

Ethics Considerations in Partnerships

Part E: ETHICS ISSUES IN PARTNERSHIPS

Federal employees must remember that while they may be working alongside partnering individuals and organizations, their first and only loyalty must be to the public's interest. While partnerships may enhance federal programs, employees are still subject to the federal ethics statutes and regulations pertaining to fund-raising, accepting gifts, endorsements, and other considerations. Therefore, as employees expand the use of partnerships, they must be mindful of these restrictions, because partnership authority is not an exception to these criminal and regulatory restrictions.

Most employees are familiar with the ethics regulations known as the Standards of Conduct. A peculiarity in the regulations provides that only employees who file financial disclosure forms are required to receive annual ethics training. The Department has an informal policy of encouraging that all other employees avail themselves of this training as well. The Department's Ethics Office (located within the Solicitor's Office) has experience in answering questions that arise from employees engaging with outside entities to partner in a variety of ways, all with an eye to furthering the Bureau's and Department's missions. It is critical for employees at all levels to understand that the Department's development of the 4 C's philosophy and management's urging that partnership activities increase in order to further our mission should not be construed to mean that partnership activities must move forward without proper consideration and resolution of ethics questions.

These discussions should include an analysis of potential organizational conflicts of interest. As Federal employees we are all bound to work in accordance with the criminal conflict of interest statutes and the Standards of Conduct regulations. These laws and regulations run to individual employees. However, we are an organization of employees bound to uphold these laws and regulations and therefore when we engage with outside entities to form partnerships, we should be mindful of the potential for tainting the process or bringing into question the agency's impartiality in line with similar analyses that would occur for an individual.

The Department and its Bureaus have many good stories to tell about partnerships that are up and running, as well as about activities that may lead to successful partnerships. However, it is conceivable that a partnership effort may one day be derailed because inadequate attention was paid to the parties' interests or because of an inadvertent (or worst case, intentional) misapplication of the ethics laws and regulations. Employees engaged in partnership activities must have a thorough understanding of the ethics laws and regulations in order to identify potential issues of concern in the development and implementation of the partnership. Everyone at all levels should be able to agree that having a partnership unravel because of ethics concerns would be an embarrassment and unacceptable.

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It is essential that employees realize that there may be gray areas in any ethics inquiry; the statutes and regulations discussed in this Primer do not always create bright-line tests. By being familiar with these restrictions, employees will be better able to ask the hard questions that must be asked, anticipate potential problems, and take steps to avoid ethics violations or the appearance of a violation. All employees engaged in these activities should be supported in identifying ethics issues, seeking resolution to them and thereby creating a stronger partnership. Nothing in the Department's message about the development of partnerships should be construed as a directive to ignore the application of the ethics rules, or to view resolution of ethics questions to be a hindrance to our doing our business.

STATUTORY PROHIBITIONS

18 U.S.C. ▪ 201 BRIBERY OF PUBLIC OFFICIALS

Generally, this statute prohibits a Government employee from receiving or soliciting anything of value in exchange for being influenced in the performance or non-performance of any official act, including giving testimony, or in exchange for committing any fraud.

18 U.S.C. ▪ 203 COMPENSATION FOR REPRESENTATIONAL ACTIVITIES

Generally, this statute prohibits a Government employee from receiving or soliciting compensation, for any representational services rendered before a Government agency in connection with a particular matter in which the United States is a party or has an interest.

18 U.S.C. ▪ 205 REPRESENTATIONAL ACTIVITIES

Generally, this statute prohibits a Government employee from representing anyone else before a court or Government agency in a particular matter in which the United States is a party or has an interest. There is an exception for representing other federal employees in personnel matters. Limited exceptions are allowed only for representation of oneself or one=s immediate family (defined as spouse, parents, and children) or of a person or estate for which the employee acts as a fiduciary, but not where the employee has participated officially or has official responsibility. There is also a limited exception for representing non-profit organizations made up primarily of employees or their immediate families.

18 U.S.C. ▪ 208 CONFLICT OF INTEREST

Generally, this statute prohibits a Government employee from participating personally and substantially in his or her official Government capacity in any "particular matter" in which any of the following has a financial interest:

- § The employee
- § The employee=s spouse
- § The employee=s minor child
- § The employee=s general business partner
- § Any organization in which the employee is serving as an officer, trustee, partner or employee; or

Any person or organization with whom the employee is negotiating for non-federal employment.

The statute recognizes limited exceptions to the prohibition for:

- § **Written waivers issued by agency after full disclosure of the financial interest (such as when serving in official capacity as an officer in an outside organization)**
 - § Financial interests exempted by OGE regulation
 - § Financial interests resulting solely from the interests of the employee or his/her spouse or minor children in birthrights in
 - § an Indian allotment held in trust
 - § an Indian tribe or band (or other recognized group or community)
 - § an Indian claims fund held in trust or administered by the U.S.
- AS LONG AS the particular matter on which the employee works does not specifically involve the allotment, tribe or claims fund. 18 U.S.C. ' 208(b)(4).

The assistance of your ethics counselors is necessary in considering any exemption from 18 U.S.C. ' 208.

18 U.S.C. ' 209 DUAL COMPENSATION

Generally, this statute prohibits a Government employee from receiving any salary, or any contribution to or supplementation of salary, as compensation for services he or she is expected to perform as an officer in the Executive Branch of the U.S. Government.

WAIVERS

In some cases a waiver may be provided to an employee which allows the employee to retain an interest that would otherwise be prohibited to the employee in a particular position because of a conflict on interest restriction. A waiver may also be issued to allow an interior employee to work on certain matters that would otherwise be prohibited because of conflict of interest laws. A waiver is a form of remedial action and an employee seeking a waiver should contact their servicing ethics counselor to determine whether their situation is one in which a waiver may be considered. After this, the servicing ethics counselor will provide guidance to the employee on how to prepare and where to send the waiver request.

18 U.S.C. ' 208(b) WAIVERS

This is a waiver to the statutory prohibition under 18 U.S.C. ' 208(a). This law generally prohibits a Government employee from becoming involved in a particular matter when the employee, his/her spouse, minor child or other entities specified in the law has a financial interest in that matter. It also applies in cases where the organization, in which the employee serves as an employee or officer or is negotiating for future employment, has a financial interest in the particular matter. A ' 208(b) waiver allows the employee to become involved in such particular matter. A waiver must be in writing and will be granted only when the Bureau head or the Designated Agency Ethics Official determines that the disqualifying financial interest is not

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so substantial that it would likely affect the integrity of the employee=s services to the Government.

The Appearance of a Conflict of Interest

PERSONAL AND BUSINESS RELATIONSHIPS - 5 C.F.R. ' 2635.502

Basic Principle: Unless specifically authorized by appropriate officials, an employee should not participate in a particular matter involving specific parties when:

- § The employee knows the matter is likely to have a direct and predictable effect on the financial interests of a member of his/her household; or
- § The employee knows that someone with whom the employee has a Covered relationship[@] is a party or represents a party in the particular matter; and
- § The employee believes that a reasonable person with knowledge of all the relevant facts would question his/her impartiality in the matter.

With whom does an employee have a Covered relationship?[@]

- § Anyone with whom the employee has or seeks a business, contractual or other financial relationship other than routine consumer transactions (but not prospective future employers);
- § Members of the employee=s household or relatives with close personal relationship;
- § Anyone with whom the employee=s spouse, parent or dependent child is serving or seeking to serve as officer, director, trustee, general partner, agent attorney, consultant, contractor or employee;
- § Anyone for whom the employee has served in above capacity within the last year;
- § An organization in which the employee is an active participant

Employees who are concerned about this prohibition may seek assistance of their supervisor, an ethics official or other authorized official. Authorization may be granted by an appropriate ethics official upon written determination that, in light of all relevant circumstances, the Government=s interest in the employee=s participation in the matter outweighs the concern that a reasonable person may question the integrity of the agency. After receiving an authorization, the employee cannot thereafter disqualify himself from participation in the matter on the same grounds that were the basis for the authorization.

LOBBYING ACTIVITIES

There are a number of statutes that prohibit DOI employees from using appropriated funds to lobby a Member of Congress or other entities other than what is required by the employee=s job duties. The general provisions to remember are these:

An employee may not use appropriate funds to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence a Member of Congress in any manner, on a matter of personal interest.

- § An employee is required to refrain from using their official position to further personal views by promoting or opposing legislation relating to programs of the Department.
- § Employees acting entirely as private citizens have the right to petition Congress, either individually or collectively, on any subject. An employee=s right to petition Congress, a Member of Congress, or to furnish information to either House of Congress, shall not be interfered with or denied as long as the employee does it as a private citizen, on their own time, and with their own supplies or equipment.

Specific statutory lobbying prohibitions affecting official duties are as follows:

- § **18 U.S.C. • 219.** Section 219 prohibits employees from acting as an "agent of a foreign principal" as defined under the Foreign Agents Registration Act (FARA) or a "lobbyist" on behalf of a foreign entity that is required to register under the Lobbying Disclosure Act of 1995 (LDA). The LDA ban prohibits certain lobbying of covered legislative and executive branch officials on behalf of foreign corporations, associations, or other organizations. There are certain FARA exceptions related to trade or commerce, legal representation, humanitarian fundraising, and religious, scholastic, or scientific pursuits.
- § **18 U.S.C. • 1913.** Section 1913 prohibits employees from using any part of the money appropriated by Congress to influence, in any manner, certain governmental individuals and entities to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation. The specific individuals and entities who may not be influenced using appropriated funds are:
 - § a Member of Congress
 - § a jurisdiction
 - § an official of any state, local, or territorial government, or
 - § an Indian tribe.

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This prohibition prevents employees from engaging in grass-roots lobbying campaigns directed at the public, using e-mails, letters or other forms of communication that expressly encourage the public to contact the specified individuals or entities on pending matters of the types identified above. The prohibition does not prevent, however,

§ good-faith responses to requests for information;

§ public statements that are strictly factual and devoid of positive or negative sentiment about pending matters; or communications which, if prohibited, would in the opinion of the Attorney General violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence or national security activities.

§ **Other Anti-lobbying Restrictions:** An annual provision of a government-wide appropriation statute prohibits the use of appropriated funds for publicity or propaganda purposes (such as expenditures for grass-roots lobbying of the public) designed to support or defeat legislation pending before Congress. Also, DOI=s annual appropriation statute contains a provision prohibiting employees from engaging in lobbying campaigns or participating in events designed to support or oppose pending legislative goals even where the employee=s activities stop short of directly encouraging grass-roots lobbying. These legislative goals may be expressed in pending bills or proposed presidential budgets. As with Section 1913, both of these additional restrictions do not prohibit good-faith responses to requests for information or public statements that are strictly factual and devoid of positive or negative sentiment about pending matters.

Regulatory Limitations

ACCEPTING GIFTS

As stated in Executive Order 12674, as a rule Federal employees may not, directly or indirectly, solicit, or accept a gift from: a) a prohibited source; or b) if it is given because of your official position. This rule applies whether the Federal employee is on duty or off duty. A gift may include but is not limited to a gratuity, favor, discount, cash, gift certificate, entertainment, hospitality, loan, forbearance, or other item of monetary value. It also applies to services as well as gifts of training, transportation, local travel, lodging and meals.

A prohibited source includes any person, company, or organization that:

- ! Has business with your agency,
- ! Is seeking to do business with your agency,
- ! Conducts operations that are regulated by your agency, or
- ! Has any interests that may be affected by the performance or non-performance of your official duties.

A Prohibited Source may also include:

- ! Any professional, technical or trade association, the majority of whose members represent prohibited sources; or
- ! An outside organizations which seeks to influence the Department.

Some things are excluded from the definition of a gift, however. The following have been deemed **not** to be gifts:

- ! Coffee, donuts, or other modest food items not offered as part of a meal;
- ! Greeting cards, presentational plaques, certificates, or trophies;
- ! Prizes in contests open to the general public;
- ! Commercial discounts available to the general public or to all Government employees;
- ! Commercial loans, pensions, and similar benefits;
- ! Anything for which you paid market price; or
- ! Anything paid for by the Government.

Exceptions to the Prohibition:

- ! Unsolicited Gifts values at \$20 or less (market value), per occasion, from a single prohibited source. However, gifts from any single prohibited source may not exceed \$50 in any given calendar year. **You may not accept cash or other monetary instruments under and circumstances.**
- ! Waiver of conference fees or acceptance of meals when you are speaking at widely-attended gatherings in your official capacity
- ! Widely attended gatherings. When there has been a determination that your attendance is in the interest of the agency, you may accept an unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering. In such cases, employees must fill out the DI-1958 **prior** to acceptance of attendance. This form must be approved by the appropriate ethics official.
- ! Discounts and similar benefits that are offered to the public, other groups that you belong to, or to all Government employees
- ! Gifts based on outside business or employment relationships
- ! Awards and honorary degrees
- ! Gifts from a political organization
- ! Gifts based on a personal relationship

Travel Regulations

ACCEPTANCE OF TRAVEL FROM A NON-FEDERAL SOURCE

As a rule, whenever you are on official travel for the Department, your travel expenses should be paid by the Department or another Federal agency. Occasionally, however, a private sector organization may express its generosity by offering to pay for all or part of the official travel expenses incurred by an employee. When this occurs, the statutory provisions of 13 U.S.C. ' 1353 may be used to authorize the Department to accept the employee=s travel related expenses. Regulations implementing this statute are contained in 41 CFR ' 304-1. In order to use the travel acceptance authority under 31 U.S.C. ' 1353, certain conditions and procedures must be satisfied.

Conditions and Procedures

Federal regulations require that the travel authority under 31 U.S.C. ' 1353 must be used, where appropriate, before any other travel acceptance authority is considered. An agency may accept payment for an employee and/or the employee=s spouse=s travel from a non-Federal source when proper consideration is given to the conflict of interest criteria and a written authorization to accept payment is issued **in advance** of the travel event. Written authorizations is accomplished by completing Form DI-2000. This form may be obtained from your servicing ethics counselor or downloaded from the Departmental Ethics Office=s website at www.doi.gov/ethics and clicking on the Aforms center@ link. The authorized Approving Official documents on this form his or her determination that the non-Federal travel payment is:

- I. For travel relating to an employee=s official duties (including attendance because the employee=s presence at the meeting is necessary to permit participation in the meeting by another employee or because a spouse=s presence at the meeting or similar function is in the interest of the agency) under an official travel authorization issued to the employee, and to an accompanying spouse when applicable;
- II. For attendance at a meeting or similar function relating to the official duties of the employee; and
- III. From a non-Federal source that is not disqualified on conflict of interest grounds.

Please Note B Payment may not be accepted under this authority for a meeting or other event required to carry out an agency=s statutory or regulatory functions. For example, a statutory or regulatory function essential to an agency=s mission, such as investigation, inspection, audit, site visit, or program evaluation.

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In making this determination, the Authorized Approving Official shall be guided by all relevant considerations including, but not limited to:

1. The identity of the non-Federal source;
2. The purpose of the meeting or similar function;
3. The identity of other expected participants;
4. The nature and sensitivity of any matter pending at the agency affecting the interests of the non-Federal source;
5. The significance of the employee=s role in any such matter; and
6. The monetary value and character of the travel benefits offered by the non-Federal source.

Authorized Approving Official

For purposes of this policy, the term, "Authorized Approving Official" means that Department official who has been delegated the authority to approve the usual travel authorizations of the employee who will benefit from the non-Federal travel payment.

The following procedures must be satisfied before the employee begins his or her travel:

1. Each employee (and/or the accompanying spouse) must have an approved travel authorization. Each travel authorization must contain a statement indicating that: (a) all or part of the employee=s travel expenses will be paid for by (name of non-Federal source); (b) The authority to accept the travel related payment is 31 U.S.C. ' 1353; and (c) and the planned travel situation complies with the ethics considerations for acceptance under 41 CFR ' 304-1.
2. A form DI-2000 must also be completed and signed by the employee and approved by the Authorized Approving Official after receiving concurrence by a servicing ethics official.
3. Payments from a non-Federal source to cover the travel related expenses of an employee may be made in the form of a check or similar instrument made payable to the agency. Employees may also accept payments-in-kind (i.e., an airline ticket) on behalf of the Department and other payments when authorized to do so. Employees may not accept cash.

A copy of each completed Form DI-2000 must be filed with the Bureau or Office Deputy Ethics Counselor. These forms are collected by the Departmental Ethics Office and used as part of the required reports to the U.S. Office of Government Ethics.

CHARITABLE FUNDRAISING - 5 C.F.R. ' 2635.808

Federal employees are prohibited from fundraising on government time or on government property. Department employees are therefore restricted from any charitable fundraising in an official capacity unless the charitable organization is approved by the Office of Personnel Management (OPM). At this time, the only charitable organization sanctioned by OPM is the Combined Federal Campaign. The rules governing acceptable fundraising activities by Federal employees are contained in 5 CFR Part 950. Raffles, lotteries, bake sales, carnivals, athletic events, or other fundraising activities not specifically provided for by regulation are prohibited. The prohibition extends to activities such as Girl Scout cookie drives and sports tournament ladders where participants contribute money. *Non-federal partner entities are not similarly restricted from fundraising. These partners may fundraise on behalf of the partnership, and such funds may in turn be accepted by the FWS under authority at 16 U.S.C. ' 742f(b).*

An employee may engage in fundraising activities as a private citizen, on their own time and away from the workplace, provided that the employee does not use their official title or position to further the fundraising event. Even when acting as a private citizen, however, an employee may not solicit funds or other support from subordinates or from prohibited sources.

A limited exception exists for recognized employee organizations (such as the IDRA) to conduct fundraising activities to benefit their members and their families.

Finally, the fundraising restrictions pertain to the raising of funds, but not to campaigns for A-in-kind@ donations such as food, clothing and toys. Such charitable drives are permissible but employees and management should make every effort to limit the amount of official time, space and equipment that are used to avoid negative impact on the work of the office.

ENDORSEMENTS - 5 CFR ' 2635.702(c)

Employees shall not use or permit the use of their Government positions, titles, or any associated authorities to endorse any product, service, or enterprise except:

1. In furtherance of statutory authority to promote products, services, or enterprises; or
2. As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency=s mission.

Employees may endorse any outside program in their private capacities; however, the endorsement may not make reference to their official titles or positions within the Department.

Things to do when Establishing Private Sector Partnerships

Prepare a written partnership agreement which should contain the objectives of the partnership. It should state the policy on endorsements and advertising, and the responsibilities of each partner. The agreement should state the benefits the Department can expect from the partnership activities.

Have employees who are officers in partner organizations recuse (disqualify) themselves from any involvement as a Federal employee in particular matters in which the partner organization has a financial interest.

Authorize official time for employees to work on the joint effort for which the partnership was established.

Things to avoid when Establishing Private Sector Partnerships

Endorsing the product or services of the partner organization in your official capacity.

Soliciting funds or donations for your programs from partner organizations without specific statutory authority.

Create an organization to do what your own agency cannot do and then enter into a partnership with it.

Accept any compensations other than your Federal salary for official duty services you provide to partner organizations unless that compensation is from a Federal agency.

Use appropriated money to pay for lobbying activities to be performed by a partner.

Control or assume any measure of practical responsibility for the fund raising activities of private individuals or organizations who are partners.

Service by an Employee in his/her Official Capacity as a Board Member or Officer of a non-Federal or Partner Organization

Sometimes an employee is asked by an outside group to serve in his/her official capacity as an officer or a board member. Serving in either of these capacities creates a conflict of interest for the employee because the financial interests of the outside group are imputed to an employee when he/she serves in a fiduciary capacity (i.e., officer or director). The employee is precluded from participating in an official capacity in matters that would directly and predictably affect the financial interests of the outside group. Therefore, the employee and his/her management must decide that it is in the best interest of the agency to serve in this capacity and that such service will not compromise or call into question the integrity of the agency in the management of its programs.

If it is decided that serving as an officer or director is in the best interest of the agency, the employee must work with a bureau ethics official to prepare and sign several documents memorializing this arrangement. First, a waiver of the conflict of interest must be issued by either the Designated Agency Ethics Official or the director of the bureau for which the employee works. Second, a memorandum of understanding between the outside group and the agency must be executed detailing the nature of the duties to be performed and the projected time spent on matters involving the outside group. Lastly, a statement of disqualification or recusal may have to be issued to protect the employee from improperly participating in a matter that creates a further conflict of interest between his/her official duties and those of the organization on which he/she is serving. Samples of these documents follow below for informational purposes. These documents should be filled out and reviewed by an ethics official in consultation with the employee seeking to serve on the outside group and the employee's supervisor, and the bureau director, who is delegated the authority to issue waivers of the financial conflict of interest.

NOTE: Many of the benefits of serving on an outside organization may be accomplished by an employee's participating as a Federal liaison instead of a board member or officer. The Department's Ethics Office recommends this as the better alternative in most cases. An ethics official should also be consulted about appearances of conflict and how to address them.

Sample Waiver of Financial Conflict of Interest when Employee is Serving as Officer or Board Member of Outside Organization

To: Bureau Director/Bureau Ethics Counselor

From: Deputy Ethics Counselor

Subject: Conflict of Interest Waiver for [Name of Employee]

The purpose of this memorandum is to request that you grant [name of employee and title of position], a waiver of the criminal conflict of interest provisions that may apply to his service in an official capacity as a member of the board of directors (board member) of the [name of organization], a nonprofit organization. [Employee=s] official [name of Bureau] duties are to serve as [describe by title and additional information]. He/She is responsible for [detail the level of responsibility and type of responsibility the employee has].

The criminal conflict of interest statute, 18 U.S.C. 208(a), requires that an employee refrain from participating personally and substantially in an official capacity in any particular matter that will have a direct and predictable effect on the financial interests of any organization in which the individual serves as an officer, director, trustee, or employee.

In the absence of: (1) specific statutory authority placing a federal employee in an officer or director position in an ex officio capacity; (2) a release of fiduciary obligations by the organization (if permitted by state law); or (3) a waiver of the requirements of 18 U.S.C. 208(a), the statute effectively would preclude [employee=s name] service, as an official duty activity, as a board member of the [name of organization].

[Employee=s name] will serve as a board member of the [name of organization] with full voting privileges. The [name of organization followed by description of its work and its relationship with the DOI]. A memorandum of understanding between the [bureau name] and the [name of the organization] concerning the service of [employee=s name] as an officer in the [name of the organization] is attached.

Inasmuch as [employee=s name] appointment as a board member of the [name of organization] is not pursuant to a statute or release of fiduciary obligations, he/she has requested that you, as the official to whom waiver authority is delegated, authorize his participation in certain particular matters that may affect the financial interests of the [name of the organization]. Under 18 U.S.C.

208(b)(1), a waiver may be granted if the official to whom waiver authority is delegated determines that the disclosed financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services to the Government.

In the course of his assigned duties as a board member, the following types of particular matters potentially could come before [employee's name] for his personal and substantial participation: (1) particular matters of general applicability, such as legislation, regulation, or policy, that may affect the financial interests of the [name of the organization] as a member of a class of similarly situated entities; (2) particular matters involving specific parties, such as grants, contracts, application approvals, that specifically involve the [name of the organization] or otherwise affect its financial interest; or (3) other miscellaneous matters involving the conduct of [name of the organization] affairs and [name of bureau] support. [The items listed in this paragraph are examples only; this language should be tailored to fit the particular situation.] While performing, as an official duty activity, the usual and customary duties of the position of a member of the board of directors of an outside organization, any actions taken, either in the federal workplace or at the organization, that affect the financial interests of the outside organization are deemed official matters to which 18 U.S.C. 208(a) may apply. For example, such actions may include: (1) requesting that official travel funds be spent or other government resources be utilized for the employee to conduct the affairs of the organization; (2) signing a training authorization to use [name of bureau] funds to pay for an employee to attend a conference or other meeting of the organization; (3) speaking as an official duty activity, or directing a subordinate to speak, at any conference or other meeting of the organization where attendance fees are charged; or (4) providing advice and consultation with respect to, or otherwise conducting, the business affairs of the organization including voting on matters to come before the [name of the organization] Board of Directors. While the financial impact may be insignificant, under well-settled precedent, 18 U.S.C. 208(a) has no de minimis aspect.

I believe that a waiver is justified because [name of employee] would serve in the [name of organization] as an official duty activity, and there is a greatly diminished risk that the integrity of the services that the government expects from [name of employee] would be affected. [name of employee's] position in the outside organization is fully known to [name of bureau]. Moreover, [name of bureau] already has determined that, to a significant degree, the interests of [name of bureau] and the interests of the [name of organization] are consonant. [name of bureau] expects that the interests of the [name of bureau] and the interests of the [name of organization] both can be furthered through the performance of [name of employee's] official duties as a board member.

Accordingly, if approved, the requested waiver will apply fully to [name of employee's] participation in his/her capacity as a board member in any particular matter that will directly and predictably affect the financial interests of the [name of organization], EXCEPT the following particular matters, that might have a direct and predictable effect on the financial interests of the [name of organization] as to which [name of employee] has committed to recuse himself:

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Preparation of requests to the [name of bureau] from the [name of organization] to obtain federal funds to support [name of organization] activities and approval of travel authorizations pertaining to himself to attend meetings or to otherwise provide support to [name of organization]. A copy of the recusal memorandum is attached. In this manner, [name of employee]=s service as a [position to be held] in the [name of organization] is severed from his service as [name of bureau and title of employee=s position], thereby avoiding any potential that he could act contrary to the interests of [name of bureau] for the benefit of the [name of the organization].

[name of employee] understands and agrees that, as an official duty activity, no separate compensation or reimbursements may be received from the [name of organization] in connection with his service as a board member [or officer]. Travel, lodging per diem or other incidental expenses incurred by [name of employee] on behalf of the [name of organization] may be accepted by [name of bureau] under 31 US Code ' 1353. Acceptance of [name of employee]=s travel expenses from [name of organization] shall be accomplished via a Form DI-2000 which must be approved by the [name of bureau] Ethics Office prior to the travel, or when circumstances do not permit prior approval, within seven days of conclusion of the travel.

This waiver letter has been coordinated with the DOI Office of Ethics, within the Office of the Solicitor.

Attachments: Recusal Letter dated _____
Blank Form DI-2000.

DECISION:

_____ Waiver granted, subject to the terms and conditions stated above, based on my determination, made in accordance with 18 U.S.C. 208(b)(1), that the disclosed financial interests are not so substantial as to be deemed likely to affect the integrity of the service which the government may expect from the employee.

_____ Waiver denied.

Bureau Director
Name of Bureau

Date

Confirmed and Acknowledged:

MOU for Official Participation as Officer or Board Member of Partnership Organization

Memorandum of Understanding
between the
U.S. Department of the Interior
and the
(Name of Outside Organization)
(*Sample*)

1. This document sets forth an agreement between the U.S. Department of the Interior (DOI) and the (organization name) concerning the service of (employee name) as an officer in the (organization name) as a part of his official government duties.

2. The primary beneficiary of (employee name)'s service as an (organization name) officer is intended to be the DOI. It is expected that the benefits to the DOI will include, but not be limited to the following:

(suggested benefits:)

- a. acquisition of state-of-the-art technical information about (name subjects).
- b. knowledge about organizational arrangements and relationships of organizations with which the DOI interacts, in order to enhance the working relationships between the DOI and such other organizations;
- c. improved understanding of current issues in the (name the field of endeavor) that concern DOI missions and operations;
- d. utilization of professional networks and channels to disseminate information relevant to the accomplishment of DOI missions; and
- e. utilization of other mechanisms to facilitate accomplishment of DOI missions, functions and processes, such as meetings, conferences, symposia, and publications.

3. In order to avoid the possibility of an actual or apparent use of public office for private gain, when official time is used for service as an officer in the (name of organization), the following principles will apply:

- a. Federal employees may not represent anyone other than the United States before an agency or court in connection with a particular matter in which the U.S. is a party or has a direct and substantial interest (18 U.S.C. ' 205).
- b. Federal employees are required to refrain from working on particular matters as a Government employee when the employee is serving as an officer in a private organization and the organization in which he is serving has a financial interest in those Government matters (18 U.S.C. ' 208).
- c. If a Federal employee's participation in a project undertaken in conjunction with a private organization was done as a part of his official duties, the employee is prohibited from sharing in any compensation by the dual compensation provisions of law (18 U.S.C. ' 209).
- d. Federal employees are prohibited from using official time and Government equipment to instigate and generate lobbying activity on any issue pending before or of interest to the Congress (18 U.S.C. ' 1913).
- e. Federal employees are prohibited from controlling or assuming any measure of practical responsibility for the fund raising activities of private individuals or organizations (E.O. 12731).

4. The relationship between the (organization name) and the DOI addressed in this document is intended to enhance service to the American public through more efficient applications of DOI programs. All actions should be directed toward attainment of that mutually beneficial goal.

5. The foregoing is not intended to impose on the (organization name) any obligations or restrictions, other than an obligation to respect the above described limitations on the activities and function of, and benefits which may be received by, nor does it constitute a representation or warranty by the (organization name) as to the benefits which the DOI will receive in fact from (employee name)'s service as an officer in the (organization name). Neither does the (organization name) assume any obligation to enquire into or enforce (employee name)'s compliance with paragraph 3c. above.

(Name of DOI Official)

Date:_____

(Name of Society Representative
and title)

Date:_____

SERVING AS A DOI REPRESENTATIVE TO AN OUTSIDE ORGANIZATION

Office of Government Ethics and Department of Justice opinions conclude that, in the absence of a waiver under 18 U.S.C. § 208(b), assigning an employee to serve as officer or director of an outside organization requires explicit statutory authority. While the Department does issue waivers from time to time permitting an employee to serve as officer or director of an outside board if it is in the interest of the Department to do so, it is far preferable for the employee to attend meetings of outside groups in an *advisory/liaison/consultative* role (e.g., in the capacity of DOI liaison, technical representative, advisory board member, or in other non-managerial roles that relate to his official duties). A representative to an outside organization is not subject to 18 U.S.C. § 208 but:

- (1) may not participate in any internal management of such organizations through, for example, the selection of salaried officers and employees, the establishment of staff salaries, or the setting of administrative policies.
- (2) may not represent the interests of the non-federal organization back to any officer of the Executive or Judicial Branches of the Federal Government. 18 U.S.C. §§ 203 and 205. This does not prohibit presenting the positions taken by the non-Federal organization over which the representative has an official responsibility to assess and report back to Interior as part of the representative's official duties.
- 3) may not participate in any fundraising activities for the outside organization.
- 4) may not receive any form of compensation or gratuities from the outside organization provided in connection to official participation in the non-Federal organization. If the outside organization is paying for official travel and per diem to a meeting, the employee must fill out the DI-2000 form and receive ethics clearance before accepting said expenses.
- 5) must remember that a reasonable person may question the employees' lack of impartiality if they participate in specific party matters (grants, contracts, licenses, agreements, litigation, etc.) that affect the outside group's financial interests. Since participation with outside organizations even in an official capacity means that employees will have a "covered relationship" with the outside group (See, 5 C.F.R. § 2635.502.), the employee must seek ethics clearance before participating as a DOI official in specific party matters (such as grants or contracts) involving those outside organizations for a period up to one year after the participation with the outside group ends.
- 6) must have a written Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA) between the employee's Bureau and the organization in which the employee desires to serve as DOI's representative. (See Draft Model MOU on page xx).

Model MOU for Official Participation as (Advisor/Liaison/Consultant) To Partnership Organization

Memorandum of Understanding
between the
U.S. Department of the Interior
and the
(Name of Outside Organization)
(*Sample*)

1. This document sets forth an agreement between the U.S. Department of the Interior (DOI) and the (organization name) concerning the service of (employee name) as an (Advisor/Liaison/Consultant) in the (organization name) as a part of (name of employee)'s official government duties.

2. The primary beneficiary of (employee name)'s service as an (organization name) (Advisor/Liaison/Consultant) is intended to be the DOI. It is expected that the benefits to the DOI will include, but not be limited to the following:

(suggested benefits:)

- a. acquisition of state-of-the-art technical information about (name subjects).
- b. knowledge about organizational arrangements and relationships of organizations with which the DOI interacts, in order to enhance the working relationships between the DOI and such other organizations;
- c. improved understanding of current issues in the (name the field of endeavor) that concern DOI missions and operations;
- d. utilization of professional networks and channels to disseminate information relevant to the accomplishment of DOI missions; and
- e. utilization of other mechanisms to facilitate accomplishment of DOI missions, functions and processes, such as meetings, conferences, symposia, and publications.

3. In order to avoid the possibility of an appearance of lack of impartiality, or the apparent use of public office for private gain, when official time is used for service in the (name of organization), the following principles will apply:

- a. (name of employee) will not participate in any management activities for (name of organization) including voting on organizational administration matters or on organizational policy decisions; or rendering advice or making decisions regarding (name of organization) contracts or finances.
 - b. (name of employee) will not represent the interests of the non-Federal organization back to any officer of the Executive or Judicial Branches of the Federal Government. 18 U.S. §§ 203 and 205. This does not prohibit (name of employee) from presenting the positions taken by (name of organization) over which he has an official responsibility to assess and report back to the Department as part of his official duties.
 - c. (name of employee) will not participate in any fundraising or lobbying activities for (name of organization).
 - d. Unless a gift rule exception found at 5 C.F.R. 2635.201 applies, (name of employee) will not receive any form of compensation or gratuities from (name of organization) provided in connection to (name of employee)' official participation in the non-Federal organization. If (name of organization) is paying for (name of employee)'s travel and per diem while at meetings, (name of employee) must fill out the form DI-2000 and receive ethics clearance prior to their travel.
 - e. A reasonable person may question (name of employee)'s lack of impartiality if (name of employee) participates in specific party matters (grants, contracts, licenses, agreements, litigation, etc) that affect (name of organization)'s financial interests. 5 C.F.R. 2635.502. Therefore, (name of employee) must seek ethics clearance before participating as a DOI official in specific party matters involving (name of organization). This requirement will extend for one year after (name of employee) has terminated his relationship with (name of organization).
4. The relationship between the (organization name) and the DOI addressed in this document is intended to enhance service to the American public through more efficient applications of DOI programs. All actions should be directed toward attainment of that mutually beneficial goal.
5. The foregoing is not intended to impose on the (organization name) any obligations or restrictions, other than an obligation to respect the above described limitations on the activities and function of, and benefits which may be received by, nor does it constitute a representation or warranty by the (organization name) as to the benefits which the DOI will receive in fact from (employee name)'s service as an officer in the (organization name). Neither does the (organization name) assume any obligation to enquire into or enforce (employee name)'s compliance with above.

(Name of DOI Official)

Date: _____

(Name of Organization Representative
and title)

Date: _____

Office of Government Ethics

95 x 8

Letter to a Designated Agency Ethics Official dated July 10, 1995

This is in response to your letter of April 10, 1995, regarding a proposed arrangement between [your agency] and the independent, nonprofit organization "Friends of [your agency]" (Friends). Friends was created by a former [agency employee] and seeks to provide various services for the [agency]. Your letter requests advice on the ethics implications of the proposed relationship.

Based on your April 10 letter, an attachment to that letter entitled "A Brief Proposal on the History of the [agency]" by [the former agency employee], and several phone conversations between you and an attorney in this Office, we understand the facts as follows: In 1992, [the former employee] organized Friends for the purpose of collecting materials reflecting the history of the [agency], preserving those materials, and publicizing the history of the [agency]. To date, Friends has made considerable progress in achieving these objectives; however, much work remains to be done. As an example, apparently 128 taped interviews have been completed, including interviews of all former [agency] directors, but fewer than one-third of the 128 interviews have been transcribed.

In anticipation of the [agency's] upcoming anniversary, [the former employee] approached the [agency] and proposed that Friends head up the anniversary celebrations and serve formally as [agency] historian. Anxious to celebrate the anniversary with special activities, but limited in its resources, the [agency] is interested in taking advantage of the Friends' offer.

More specifically, [the former employee's] proposal, as we understand it, contemplates that Friends and the [agency] enter into an agreement pursuant to which Friends would head up the anniversary celebrations; serve as [agency] historian (continuing with the development of historical materials); and prepare, for the [agency], an archive to be located within the agency's offices. The [agency] would not pay Friends for any of these services but would designate an [agency] employee to serve on a Friends' advisory committee; designate one or two [agency] employees to coordinate with Friends; provide clerical support for transcribing taped interviews and organizing the archive; provide a secure space for the archive within the [agency's] offices; officially recognize the role of [the former employee]/Friends in the history project; encourage [agency] employees and former employees to join Friends and to provide materials for the archive; help raise foundation and other funds to support the project; co-sponsor, with Friends, an event "kicking off the project"; and use some portion of the [agency's] September conference to highlight the projects being undertaken by Friends and the [agency].(1)

Your question, as we understand it, is whether there are any restrictions that would preclude [the agency] from entering into these arrangements. If so, you ask that we suggest alternatives.

Non-ethics issues

As a preliminary matter, we feel constrained to point out that the initial and, in many ways, most critical, issues raised by the proposed arrangement with Friends are not within the subject matter areas for which the Office of Government Ethics (OGE) has responsibility. First and foremost is the issue of whether the [agency] has the authority to enter into an agreement for these purposes. In addition, in light of the benefits to be conferred on the [agency] by Friends, the proposed arrangement may raise issues of improper augmentation of appropriations by the agency and improper acceptance of volunteer services by agency employees.⁽²⁾ The agency's acquisition of services from the organization may also raise an issue of compliance with applicable procurement law.

In resolving these issues, you may need to consider not only your agency's organic statute(s) and regulations, but also law applying to Federal agencies generally. On the augmentation issue, you may wish to seek advice from the Comptroller General. See also OGE Informal Advisory Letters 84 x 5, 85 x 16, 86 x 10.

Our discussion below of how the conflict of interest statutes and the Standards of Ethical Conduct (Standards) apply to the proposed arrangement assumes that these preliminary issues do not preclude the proposed arrangement, but this assumption is only for purposes of allowing us to address ethics considerations under the statutes and the Standards. Other than to note that these preliminary issues, like the related non-ethics issues noted below, are serious and, indeed, possibly determinative, we offer no opinion on these issues, which, as indicated, are outside OGE's purview.

Assignment of [agency] employees to serve on a Friends' advisory committee, to provide support in other ways, and to act in matters affecting Friends

Assuming the [agency] has the authority to assign [agency] employees to coordinate with Friends, to serve on an advisory committee, or to provide clerical or organizational help in support of authorized projects, the agency and affected employees will need to be aware of and take care to avoid conduct prohibited by the criminal conflict of interest statutes and the Standards. As a general matter, avoidance of such difficulties will be easier if one keeps in mind that, even though the objectives of the [agency] and Friends may sometimes overlap, they remain separate entities with distinct interests.

One concern that arises whenever Federal employees serve outside organizations is the basic conflict of interest prohibition set forth in 18 U.S.C. § 208. In the absence of a waiver issued pursuant to section 208(b), section 208(a) prohibits Federal employees from participating "personally and substantially as . . . Government employee[s] [in particular matters in which organizations they serve as] officer, director, . . . or employee . . . [have] a financial interest." The rationale for the disqualification is that the fiduciary duty owed to any organization served in one of the enumerated capacities may conflict with the duty an employee owes the Government.

In this context, the concern is that if [agency] employees were assigned to serve Friends in their official capacities as officers, directors or employees, they would be disqualified from participating "personally and substantially" in "particular matters" with a "direct and predictable" effect on the financial interests of Friends, unless the conditions of section 208(b) were satisfied. While it seems highly unlikely that any [agency] employee

assigned to provide occasional clerical or organizational support to Friends, in furtherance of an agreement between Friends and the [agency], would ever be considered an "employee" of Friends, much less an "officer" or "director," the situation presented by an [agency] employee serving on a Friends advisory committee or board may be more problematic. While there are precedents indicating that section 208 is inapplicable where an employee serves as director of an outside organization in his official governmental capacity, those precedents have been construed narrowly, as applying only (1) where the employee's service as an "ex officio" director of the outside organization is "expressly authorized by statute" or (2) where "the rules of the private entity designate that official as a member of the board and neither the rules or State law appear to impose a fiduciary duty to the private entity on the director." Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury (June 22, 1994) at 3.

As we understand your situation, what is needed is to have an employee or employees of the [agency] represent the views of the [agency] to Friends and coordinate efforts jointly undertaken by the two organizations. These objectives may be achieved and difficulties under section 208 avoided if the employees assume the position of "coordinators," "liaisons to Friends," or "liaisons to the Friends advisory committee or board" and do not assume "employee," "director" or "officer" positions within Friends. Of course, great care should be taken to ensure that all parties understand that the duty of such employees is to represent the interests of the United States and the [agency] and that they have no fiduciary obligations to Friends.

In addition, we suggest that, in order to avoid any conflicts under section 208 or under the impartiality provisions in the Standards, the [agency] should exercise care not to assign to work officially with Friends -- or on Friends-related matters -- [agency] employees who have significant involvement with Friends in their personal capacities. Section 208 clearly would restrict the official activities of any current [agency] employees serving Friends as employees, officers, or directors in their personal capacities. In the absence of a waiver under section 208(b), such employees would be prohibited from participating "personally and substantially," in their official [agency] capacities, in particular matters that could have a direct and predictable effect on the financial interests of Friends. Subpart E of the Standards of Ethical Conduct, Impartiality in Performing Official Duties, 5 C.F.R. § 2635.501 et seq., reaches further than section 208. Under section 2635.502(b)(1)(v) of the Standards, employees are said to have a "covered relationship" with organizations in which the employees are "active participants."⁽³⁾ Because of this relationship, unless specifically authorized by their agencies, such employees may not participate in "particular matters involving specific parties" to which they know such organizations are parties if the employees "determine . . . that the circumstances would cause a reasonable person with knowledge of the relevant facts to question . . . [their] impartiality in the matter." Thus, in some circumstances, subpart E would restrict the official activities of employees who are simply "active" in Friends, even if they do not serve the organization as employees, officers, or directors.⁽⁴⁾

Fundraising

The proposal by [the former employee] attached to your April 10 letter suggests that, pursuant to the proposed agreement with Friends, the [agency] would "encourage staff and retirees to join" Friends and, further, that it would "help raise foundation and other funds to support the project." The proposal thus seems to contemplate that the [agency] will participate actively in fundraising to benefit Friends and projects to be undertaken jointly by Friends and the [agency].

Any fundraising for Friends by [agency] employees would be covered by the Standards, which define "fundraising" as "the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. § 527(e), through [inter alia] . . . [s]olicitation of funds or sale of items." 5 C.F.R. § 2635.808(a)(1). Section 2635.808(b) describes the circumstances under which an employee may engage in fundraising in an official capacity. It provides that "[a]n employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties." Our understanding is that fundraising for Friends by the [agency] is not authorized by a statute, Executive order, regulation, or any other authority. The phrase "or otherwise as determined by the agency," moreover, does not provide an agency with authority to engage in fundraising simply because the fundraising is consistent with the agency's mission or in furtherance of its programs. See OGE Informal Advisory Memorandum 93 x 19.

Fundraising for Friends by [agency] employees acting in their personal capacities stands on a different footing but is also regulated by the Standards. Under section 2635.808(c), employees may not personally solicit funds or other support from subordinates or from persons known to be "prohibited sources" within the meaning of section 2635.203(d) of the Standards,(5) except that generally solicitations addressed to large groups are permissible unless the employee knows that the solicitation is targeted at subordinates or persons known to be prohibited sources. See 5 C.F.R. §§ 2635.808(a)(4) and 2635.808(c). Thus, any [agency] employee who, in a one-on-one setting or by means of a targeted solicitation, encouraged his subordinates to pay a membership fee and join Friends, or otherwise donate funds to Friends, would violate this restriction; and the same result would obtain if like encouragement were directed at people or organizations that do business with the [agency] or are, for other reasons, "prohibited sources." In addition, section 2635.808(c)(2) prohibits employees engaged in personal fundraising from using or permitting use of "official title, position or any authority associated with . . . public office to further the fundraising effort." This provision would impact the manner of fundraising efforts directed at other likely donor candidates -- former [agency] employees and organizations with former ties to the agency -- along with persons and organizations or foundations that have no present or past relationship with the agency. Current [agency] officials may participate in such fundraising efforts but are prohibited from using their official titles, positions, or authority to further the fundraising.(6)

Finally, it is also noteworthy that, while not entirely clear, [the former employee's] proposal seems to contemplate the raising of funds earmarked for projects undertaken jointly by the [agency] and Friends -- perhaps the archive, or the anniversary celebration. To the extent that such funding is provided for agency programs or activities, as distinct from the Friends organization, it may not be covered by section 2635.808, which, as

noted, applies to the raising of funds for nonprofit organizations. However, such fundraising would have to be based on an agency gift acceptance authority that includes the authority to solicit gifts as well as accept them. Without such gift acceptance authority, the activity could be an improper augmentation of agency appropriations. Again, however, we express no view on this issue, which, as previously noted, is not within our purview.

Promoting the Friends' organization or staff, or projects jointly undertaken by the [agency] and Friends

The proposal submitted by [the former employee] indicates that, pursuant to the proposed agreement between the [agency] and Friends, the [agency] would be expected to promote certain activities undertaken jointly by the [agency] and Friends. These promotional efforts would include encouraging [agency] employees and former employees to provide materials for the archive to be located within the [agency] offices, using some portion of the September [agency] staff conference to highlight the affiliation between Friends and the agency and the history project/archive; recognizing [the former employee's] role in the history project; and co-sponsoring, with Friends, an "event kicking off the project." The issue is whether such official activities promoting Friends and Friends' projects would be considered use of public office for private gain, in violation of section 2635.702 of the Standards.

Subject to the qualification noted below, and again assuming the existence of agency authority to enter into the proposed agreement with Friends for the specified purposes, our view is that such promotional activities are appropriate and permissible under the Standards. The primary purpose of section 2635.702 is to prohibit use of public office to promote activities for private, i.e., nonpublic purposes. It has no application to promotion of an authorized Government project, notwithstanding that a separate, private entity involved in the project may reap some benefit from the promotion, provided that the official involved in the promotion is not affiliated with the private entity in a non-governmental capacity.

In this context, we again emphasize that, in order to avoid even the appearance of use of public office for private gain, the [agency] should exercise care when assigning agency employees to work on Friends-related matters. We strongly advise that the agency not involve in such matters [agency] employees who are privately affiliated with Friends.(7) With this caveat, however, we do not believe that an [agency] official who is participating in the history project/archive as part of his official responsibilities would be precluded by the Standards from either directing current employees or requesting former employees to search for and provide relevant materials for use in the history project/archive. We also see no ethics issue if an [agency] official takes the opportunity presented by the September conference to advise agency staff regarding the affiliation between Friends and the [agency], to explain the development of the history project to date, and to describe future plans for its completion and incorporation in an archive. In this connection, recognition of [the former employee's] role in the project would seem appropriate. On the other hand, endorsement of the Friends' organization generally, as distinct from jointly undertaken and properly authorized projects, should be avoided. In our view, it would be improper for an agency official to use his office to encourage

agency employees to join Friends, even if payment of a membership fee were not required.

Regarding the proposed co-sponsorship of an "event kicking off the project," we hesitate to comment without more information about the scope of the event and its purpose. If the envisioned event is, for example, a fundraiser, it would raise ethics issues under section 2635.808 of the Standards, as discussed above. If the purpose of the event is informational, however, it may be entirely proper, provided that it is an appropriate means of disseminating word of properly authorized projects undertaken jointly with Friends and if it is accomplished consistent with applicable appropriations law.

Using Government time and property

Although your letter does not specifically raise these issues, questions regarding proper use of Government time and property are likely, we think, to arise if the [agency] enters into the proposed arrangement with Friends. Section 2635.704 of the Standards prohibits use of Government property for other than authorized purposes.(8) Section 2635.705 prohibits use of official time for activities not required in the performance of official duties or otherwise authorized in accordance with law or regulations.

As we understand the proposed arrangement with Friends, there would likely be a number of [agency] employees involved in Friends- related matters in an official capacity. These matters would include the history project/archive and the anniversary celebration. There may also be other [agency] employees active in Friends in their private capacities who are involved in Friends-related matters to which the [agency] is not a party and which are not authorized by the agency. Such matters might include membership and fundraising. Under these circumstances, the concern is that the line separating authorized from unauthorized projects and activities may become blurred and the misimpression created that it is appropriate to use Government time and equipment to support all Friends' activities. In order to avoid this situation, we would advise the agency to take the time to advise employees about the rules on use of Government time and property and how those rules apply to Friends- related projects.(9)

Status of [the former employee] or others similarly situated

Our discussion above assumes that, in working on the archive or the anniversary celebration, [the former employee], founder of the Friends' organization, or others similarly involved, would not be acting as "special Government employees." As you know, "special Government employees" or "SGEs" are part-time or intermittent employees who serve the Government on 130 or fewer days during any consecutive 365-day period. 18 U.S.C. § 202. Generally, SGEs are appointed as such; in rare situations, however, individuals have been deemed de facto SGEs. The classification is a critical one for, while nonemployees are not subject to the Standards, 18 U.S.C. §§ 205 and 208, or most of the applications of 18 U.S.C. § 203, SGEs are subject to most of these restrictions, albeit in some instances to lesser restrictions than those that apply to regular employees.

Our understanding is that [the former employee], pursuant to the proposed arrangement, would be working on the archive or the anniversary celebration as a representative of Friends, not the United States, and that he would not be authorized to speak, or purport to

speak, on behalf of the agency. In addition, our assumption is that his activities would not be subject to routine supervision by agency staff. To our knowledge, moreover, the [agency] does not intend to compensate [the former employee], either directly or through the Friends' organization, and it has no plans to formally appoint [the former employee] to a Government position. Under these circumstances, our assumption is that [the former employee] would not be considered an SGE. See OGE Informal Advisory Memorandum 82 x 22; 4B Op. O.L.C. 441 (1980); 1 Op. O.L.C. 20 (1977).

On the other hand, if our assumptions are incorrect, or if you are aware of other factors suggesting that [the former employee] would be an SGE, we would defer to the personnel classification adopted by your agency. If [the former employee] is deemed to be an SGE, his ability to undertake a number of contemplated activities will be impaired and the agency will need to reassess the viability of the proposed arrangement with Friends.

* * *

We hope that the foregoing advice regarding the conflict of interest statutes and the Standards of Ethical Conduct assists you in deciding whether to accept [the former employee's] proposal. Again, however, we caution that the concerns raised by the proposal are not exclusively ethics issues. Questions regarding the scope of the [agency's] authority and augmentation of agency appropriations, as well as [the former employee's] official status, are critical.

If the [agency] decides to proceed with the proposed arrangement, additional ethics issues are sure to arise in the future. For example, the anniversary celebration and the "event kicking off . . . [the] project" may raise issues regarding employee acceptance of gifts from prohibited sources to the extent food or other entertainment is provided for [agency] employees at these events. Retirement of [agency] employees who play an official role in Friends-related projects may raise issues under the post-employment statute, 18 U.S.C. § 207. As these or other ethics issues arise, please feel free to contact us.

We have not consulted the Department of Justice concerning your inquiry or this response.

Sincerely,

Stephen D. Potts Director

Endnotes:

(1) Your letter of April 10 also requested advice on whether the agency could provide office space within the agency for [the former employee]. However, you have since advised this Office that [the former employee] has accepted an offer of office space elsewhere. This issue is therefore moot.

(2) In this connection, we understand that the [agency] does not now have agency gift acceptance authority but is in the process of seeking such authority. Without gift acceptance authority, agencies may accept certain types of benefits pursuant to 5 U.S.C. § 4111 and 31 U.S.C. § 1353. The circumstances under which benefits may be accepted pursuant to these statutes are, however, narrowly defined. See 5 C.F.R. §§ 410.701-410.706 (implementing 5 U.S.C. § 4111) and 41 C.F.R. part 304-1 (implementing 31 U.S.C. § 1353). See also OGE Informal Advisory Letter 84 x 5.

(3) 5 C.F.R. § 2635.502(b)(1)(v) sets forth examples of activities that constitute "active participation." They include serving "as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, . . . [participating] in directing the activities of the organization . . . [devoting significant time to] promoting specific programs of the organization, including coordination of fundraising efforts." On the other hand, the rule makes clear that "[p]ayment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation."

(4) All [agency] employees involved with Friends in their private capacities should be cautioned that, depending on the circumstances, taking official actions affecting Friends could result in a violation of 18 U.S.C. § 208 or the impartiality section of the Standards. Such employees should also be made aware of the restrictions on private conduct imposed by 18 U.S.C. § 205. Section 205 generally prohibits Federal employees from acting as "agent or attorney" for anyone other than the United States before departments or agencies in connection with certain covered matters "in which the United States is a party or has a direct and substantial interest." Thus the statute precludes certain representational activities taken by employees acting in their personal capacities. In view of these restrictions, employees of the [agency] who are involved with Friends in their private capacities should be very cautious about any communications with the [agency] and [agency] officials, or other agencies and agency officials, regarding matters in which Friends has an interest. All communications are not necessarily precluded. See OGE Informal Advisory Letter 94 x 15; Memorandum for Janet Reno, Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (November 7, 1994) at 7-10. However, in order to avoid the risk of a prohibited communication, we advise that Friends use people who are not currently Federal employees to serve as conduits of communications between Friends and the [agency]. Permissible candidates include [the former employee], or other former [agency] employees, whose representational activities are not covered by section 205. See *id.* at 1, 2- 3; OGE Informal Advisory Letter 95 x 15.

(5) The term "prohibited source" is defined in section 2635.203(d) to mean-- any person who: (1) Is seeking official action by the employee's agency; (2) Does business or seeks to do business with the employee's agency; (3) Conducts activities regulated by the employee's agency; (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) Is an organization a majority of whose members are described in paragraphs . . . (1) through (4) of this section.

(6) Note, however, that nothing in the Standards restricts the ability of nonemployees to engage in fundraising. Accordingly, notwithstanding his status as a former [agency employee], [the former employee] and the Friends' organization generally are not precluded by the Standards from engaging in fundraising for Friends or [agency]/Friends' projects whether the fundraising efforts are directed at [agency] employees or others.

(7) Under section 2635.802 of the Standards, [agency] employees who are assigned official responsibilities involving Friends may in fact be precluded from engaging in Friends' matters as an outside activity if the Standards set forth in section 2635.402 (conflicts of interest) or section 2635.502 (impartiality) "would require the employee's

disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired." 5 C.F.R. § 2635.802(b). Under section 2635.702, even a lesser involvement than that contemplated by these two provisions -- e.g. mere membership in the outside organization -- could, in appropriate circumstances, raise the issue of use of public office for private gain. See 5 C.F.R. § 2635.702. Accordingly, the interests of all may best be served if no one person is involved in Friends-related matters in both a private and an official capacity.

(8) "Authorized purposes" are "those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation." 5 C.F.R. § 2635.704(b)(2).

(9) Under the proposed arrangement, the [agency] would agree to provide "a secure space [within the national [agency] offices] for an archive." Our understanding is that this archive would be part of the history project/archive to be jointly undertaken by Friends and the [agency] and that it would become a part of the [agency]. Under these circumstances, using Government resources for the archive would not raise Standards of Ethical Conduct issues provided that the decision to develop and maintain the archive is within the agency's authority and does not otherwise contravene applicable non-ethics law.

(10) We defer discussion of these issues until the circumstances underlying an offer of food or entertainment are known.

Case Study – Working with Friends Groups – Ethics Considerations

The following is a hypothetical fact situation. Please read this scenario from the point of view of a refuge or unit manager. In reviewing and analyzing these facts, identify as many issues as you can. There may be non-ethics as well as ethics issues within this scenario.

A former FWS employee founded an independent, nonprofit organization called “Friends of the Refuge” (Friends). Friends seeks to provide various services for the agency and the refuge. The group was originally formed with the idea that it would collect materials reflecting the history of the refuge, preserve those materials, and publicize the history of the refuge. Friends has made progress in all of these areas; however, they tell you, the refuge manager, that there is still a lot of work to be done. The refuge will be celebrating a milestone anniversary in two years. The former employee/founder of Friends approached you and proposed that Friends head up the anniversary celebrations and serve formally as the refuge historian. Anxious to celebrate the anniversary with special activities, but limited in your resources, you are interested in taking advantage of the Friends’ offer.

The former employee drafted “A Proposal on the History of the Refuge.” In this proposal, Friends suggests that the group and the refuge enter into an agreement whereby Friends would head up the anniversary celebrations; serve as refuge historian; and prepare, for the refuge, an archive to be located within the refuge’s offices. The refuge would not pay Friends for any of these services but would designate a refuge employee to serve on a Friends’ advisory committee; designate one or two refuge employees to coordinate with Friends; provide clerical support for transcribing taped historical interviews and organizing the archive; provide a secure space for the archive within the refuge’s offices; officially recognize the role of the former employee/Friends in the history project; encourage refuge employees and former employees to join Friends and to provide materials for the archive; help raise foundation and other funds to support the project, co-sponsor with Friends, an event “kicking off the project;” and use some portion of the refuge’s winter meeting to highlight the projects being undertaken by Friends and the refuge.

Are there any restrictions that would preclude the refuge from entering into these arrangements?

Try and spot as many issues as you can to form the basis for discussion in class.

For more information, contact
Dawn Lagrotteria
USFWS/National Conservation Training Center
dawn_lagrotteria@fws.gov