

Official Duty Advisory Committee and Editorial Board Service

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Historical Perspective

- 18 USC 208 is the federal conflict of interest law that prohibits a federal employee from participating in any official matter that would affect the financial interest of an organization in which the individual serves as officer, director, trustee, or employee.
- Prior to 1996, HHS did not view official duty assignments of employees to outside organizations such as professional associations, scientific organizations, health information and advocacy groups, and other nonprofit entities as creating a conflict of interest with the employee's official duties under 18 USC 208.
- Such official duty assignments were approved, under applicable statutory authority, where the Department shared certain mutual interests with the non-federal, nonprofit organization or entity with the view that the employee was still working for the Government and implementing agency policy even while technically serving in an outside organization.

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New Interpretation of 18 USC 208

- In 1996, the Department of Justice holds that employees are prohibited from serving in an official capacity as an officer, director or trustee of an outside organization absent a waiver under 18 USC 208(b)(1) or other limited exceptions.
- Such positions entail fiduciary duties to the outside organization in the conduct of the organization's affairs, and these fiduciary duties conflict with principal duty of loyalty that every federal employee owes to the United States in the conduct of official activities.

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Official Participation as Officer, Director or Trustee

Official capacity service as an officer, director or trustee of an outside organization requires a waiver of the conflict of interest prohibition under 18 USC 208(b) where there is a fiduciary obligation to the organization.

- HHS DAEO and DEC review required for all such waivers.

Other options for outside organization service include

- Ex-officio service expressly authorized by statute
- Release of all fiduciary obligations by the organization under applicable state law
- Service as a federal liaison
- Outside activity personal capacity service.

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Official Participation in Outside Advisory Committees

Advisory members typically:

- do not serve on a board or directors or trustees governing the business and property affairs of the organization
- do not receive delegated powers to execute binding decisions
- make recommendations or render advice concerning policy matters and the goals and direction of the organization and do not have the fiduciary obligations that accompany broad powers over an organization's proprietary affairs
- do not have an employment relationship with the organization while serving in a purely advisory role as part of their governmental duties.

Thus, 18 USC 208 ordinarily does not apply to employees who serve as advisory committee members in their official capacity.

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Official Participation on Editorial Boards

- Official assignments on editorial boards of outside journals where HHS has an interest in scientific exchange, professional development and other matters of mutual concern.
- Nature of the functions and authority of editorial board members vary considerably.
- 18 USC 208 applies to an employee serving in an official capacity as an officer of a journal organization or otherwise exercising fiduciary obligations normally associated with officers and directors such as making and executing policy and management decisions.
- Such fiduciary duties to the outside editorial board would conflict with duty of loyalty to the Government and a HHS employee may not serve in such a position on official duty absent a waiver or other exception.

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Official Participation on Editorial Boards

Editorial board positions will not generally raise concerns under 18 USC 208 if the position is not granted managerial power regarding the property, personnel or legal obligations of the organization.

Such positions might involve:

- peer review based on scientific or intellectual merit
- editorial corrections or revisions to manuscripts
- intellectual affairs of the journal such as final article decisions, determining appropriate peer reviewers, or broader policy making such as focus of the journal as long as no delegated power with respect to the proprietary and legal affairs of the organization.

18 USC 208 would not apply to HHS employees performing such limited editorial functions as part of official duties as they would not be deemed officers, directors, trustees or employees of the organization that publishes the journal.

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Other Ethics Concerns

- Even where 18 USC 208 does not apply to the official duty activity with outside organizations, impartiality or favoritism concerns may still be raised and should be addressed under the relevant Standards of Ethical Conduct.
- Serving in these roles with an outside organization in a private capacity would require prior approval and may raise other ethics issues that would need to be reviewed and resolved under the Standards.

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Current OGE Proposal

- The Office of Government Ethics is currently considering a new regulatory exemption to permit Government employees to participate in particular matters affecting the financial interests of nonprofit organizations in which they participate, in their official capacity, as officers, directors or trustees.
- The proposed exemption would NOT provide agency authority for such official duty service, it would ONLY remove the conflict bar under 18 U.S.C. 208.
- An agency would still have the discretion to approve, deny, or limit any such official duty service.