

## NATIONAL INSTITUTES OF HEALTH ETHICS PROGRAM

### Procedure for Processing and Reviewing Requests to Participate in a Leadership Position of an Outside Organization as an Official Duty Activity

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#### BACKGROUND

In 2014, the NIH implemented the NIH Ethics Policy: Official Participation in a Leadership Position of a 501(c) Nonprofit Professional Organization. Such participation requires concurrence/approval by the employee's supervisor, the NIH Ethics Office, and the employee's Deputy Ethics Counselor (DEC). Participation is subject to certain restrictions, limitations, and managerial considerations, which are outlined in the policy and the Employee Guidance Notice.

#### **Roles and Responsibilities:**

The following responsibilities are only general descriptions of duties and are only to be used as guidelines for purposes of processing official duty requests.

**NIH Employee:** Notify his or her supervisor and ethics office of proposed participation in an activity with an outside professional organization and provide information about the activity.

**NIH Supervisor:** Carefully consider requests received from employees that report to him or her. Seek guidance or clarification from ethics and other officials, as necessary.

**IC Ethics Official:** As assigned or as required, provide ethics advice and guidance to IC employees within his or her purview; review and evaluate ethics inquiries and requests; prepare an analysis and/or recommendations; support the administration of the ethics program in the IC.

**IC Deputy Ethics Counselor:** As assigned or as required, provide ethics advice and guidance to employees within his or her purview; review and evaluate ethics inquiries and requests; make recommendations and determinations on ethics requests submitted for approval; provide leadership and support for the ethics program in the IC.

**NEO Action Coordinator:** Receive, assign and update database systems regarding requests and inquiries submitted to the NIH Ethics Office (NEO) for processing. Support the administration of the NIH ethics program.

**NEO Ethics Specialist:** Provide ethics support and guidance to assigned IC ethics offices; review and process requests that require NEO concurrence and/or approval by the NIH DEC; support the administration of the NIH ethics program.

**NEO Management:** Provide support and guidance to employees within NEO purview as well as ethics staff; review and provide a recommendation or concurrence on requests submitted to NEO for review; provide leadership and support for the NIH ethics program.

**NIH DEC:** Provide leadership and support for the NIH ethics program. Provide the final determination on requests for senior employees submitted to NEO for review.

**Resources:**

- NIH Ethics Policy: [Official Participation in a Leadership Position of a 501\(c\) Nonprofit Professional Organization](#)
- Employee Guidance Notice: [Official Participation in a Leadership Position of a 501\(c\) Nonprofit Professional Organization](#)
- Comparison Chart: [NIH Employees' Participation with 501\(c\) Nonprofit Professional Organizations](#)
- ODA memo: [http://ethics.od.nih.gov/ProfessionalOrganizations/ODA\\_501c-Professional-Nonprofit-Leadership.pdf](http://ethics.od.nih.gov/ProfessionalOrganizations/ODA_501c-Professional-Nonprofit-Leadership.pdf)
- OGE Legal Advisory: [LA 13-05: 18 U.S.C. 208 \(b\)\(2\) Exemption for Official Participation in Nonprofit Organizations](#)
- September 8, 2014 DEC/EC Presentation: Official Duty Participation in a Leadership Position of a Professional 501(c) Non-profit Organization
- [Federal Register Vol. 78, No. 44, March 6, 2013: Government Employees Serving in Official Capacity in Nonprofit Organizations \(preamble to final rule\)](#)
- OGC Ethics Division: DAEO Memorandum to Deputy Ethics Counselors and Ethics Contacts, "Implementation of 18 U.S.C. § 208(b)(2) Exemption for Official Participation as an Officer, Director, or Trustee in Nonprofit Organizations" (November 21, 2014)
- OGE Presentation: Exemption for Official Participation in Nonprofit Organizations 5 C.F.R. 2640.203(m)
- Official Participation in a Leadership Position of a 501(c) Nonprofit Organization Analysis Worksheet

## **Employee and Supervisor Steps: Preparing to Request Ethics Clearance**

1. Employee and supervisor will consider the different methods in which the employee may participate in the activity. Refer to the side-by-side comparison [chart](#).
  - a. If considering official duty participation in a leadership position (e.g. officer) in his or her **official capacity**, the employee will carefully review the [Official Participation in a Leadership Position of a 501\(c\) Nonprofit Policy](#) and [Employee Guidance Notice](#). Carefully consider the restrictions, limitations, and other considerations, including travel.
    - i. If no issues or concerns are identified, the employee will complete the ODA Memo 'Request for Approval of Participation in a Leadership Position of a 501(c) Nonprofit Professional Organization' ([fillable PDF](#) or [Word](#)). Proceed to Step 2.
    - ii. If issues or concerns are identified, consider alternative options and consult the ethics office for guidance.
  - b. If considering official duty participation as a Federal Liaison to a professional organization in his or her **official capacity**, the employee will complete an Official Duty Memo ([non-senior](#) or [senior](#)). Proceed to Step 2.

- c. If considering official participation other than as Federal Liaison or in a leadership position, the employee will complete an Official Duty Memo if required ([non-senior](#) or [senior](#)). Refer to the Official Duty Activity [table](#). Proceed to Step 2.
  - d. If considering participation in a leadership position (e.g. officer) in his or her **personal capacity**, the employee will submit an HHS 520 Request for Approval of Outside Activity through NEES <http://nees.nih.gov>. Stop here and see the [Procedure for Submitting the HHS-520 Request for Approval of Outside Activity](#).
2. The employee will obtain signature on the ODA memo from his or her supervisor.
  3. The employee will submit the signed ODA memo with supporting documents to his or her [ethics office](#).

## **Ethics Processing, Review, and Analysis**

### **Ethics Office**

1. Upon receipt of an official duty request, ensure data is entered into the official duty section of the employee's EMIS record.
2. If the employee has been nominated and not yet selected for a leadership position and they wish to engage officially pursuant to the NIH policy, '[Official Participation in a Leadership Position of a 501\(c\) Nonprofit Professional Organization](#)', advise that he or she must recuse from any other official matters with the same organization for the duration of the activity.
3. Review the invite or nomination letter for the employee, the ODA request and any supporting documentation such as the organization's bylaws or other documents that address the organization's governance and structure.
4. Use the Official Participation in a Leadership Position of a 501(c) Nonprofit Organization Analysis Worksheet to document details about the activity which include but are not limited to the following:
  - a. Is the organization a 501(c) nonprofit? The organization must receive tax-exempt status under any subsection of section 501 of the Internal Revenue Code (title 26) to satisfy these criteria. For example, if the organization is for-profit, it is not eligible for approval under the NIH official duty policy.
  - b. Does the organization meet the definition of "professional" pursuant to 5 CFR 2636.305(b)(1)? The policy includes relevant language from the definition. Possible support or indication as to whether (or not) the organization is considered "professional" may include the following:
    - i. Membership requirements (e.g. credentials or other specific requirements)
    - ii. Annual Conferences (if so, what are some agenda topics, who are the presenters, and what credentials do they have)
    - iii. Scientific Meetings (e.g. attendees & agendas)
    - iv. Peer review process
    - v. Publications
    - vi. Award program

- vii. IRS classification in the National Taxonomy of Exempt Entities (NTEE)?  
(e.g. “V03” – professional societies and associations)
- c. What is the title of the position? Is it the position of officer, director, trustee, or an equivalent position having the same legal responsibilities and characteristics?

NOTE: Per the preamble (rulemaking history) dated March 6, 2013, OGE recognized that, “some nonprofit organizations do not use the actual terms of section 208(a) in the titles of their officials, but this has never been the end of the inquiry into whether section 208 applies. In such cases, ethics officials must determine whether the position has the same legal responsibilities and characteristics as the positions described in 18 U.S.C. 208(a). In some cases, the position does not correspond to an officer, director or trustee position because the position is solely advisory or honorary or otherwise does not carry the powers and fiduciary duties associated with officers, directors and trustees; in other cases, the position in question truly does entail the powers and duties of an officer, director or trustee within the meaning of the law. Agency ethics officials will need to engage in the same inquiry with respect to the coverage of the regulatory exemption, although of course no exemption would be needed if the agency determines that the employee does not hold any section 208 position in the first place. In OGE’s experience, such questions typically can be resolved by consulting with counsel for the nonprofit organization and/or by examining the organization’s governing documents.”

- d. Are there any conflicts with the stipulations in the [Employee Guidance Notice](#) and the duties and responsibilities of the position?
    - i. Complete an analysis of the ODA request and supporting information including bylaws or other governance documentation to the [Employee Guidance Notice](#) stipulations.
    - ii. Identify specific items in the bylaws or other governance documents issues that may conflict with the policy.
    - iii. Communicate the issues to the employee.
    - iv. Remind employee to provide a copy of the [Employee Guidance Notice](#) to the organization.
  - e. If there are any concerns over duties or responsibilities of the leadership position, encourage a conversation with the organization to gain clarification. If anything is impermissible, consider possible alternative options. See the NIH Ethics Program website page designed for nonprofit organizations:  
<http://ethics.od.nih.gov/ProfOrg.htm>.
  - f. Ask employee to confirm that he or she has provided the [Employee Guidance Notice](#) to the organization and that the organization agrees to the parameters concerning his or her participation.
- 5. Verify whether employee has a personal financial interest in or covered relationship with the organization. Check most recent financial disclosure report if a filer; check HHS 520 history; check recusal records; award records

- a. If any financial interest or covered relationship exists, determine if the real or potential conflict may be resolved. For example, if the employee has an approved HHS 520, he or she may be able to receive authorization for the official duty activity. Any real or potential conflicts must be resolved before an employee may be assigned to participate through the approval of the official duty activity.
  - b. If there are no real or potential conflicts to resolve, proceed with the review.
6. Provide analysis and recommendation on the ODA.
  - a. Any real or apparent conflicts of interest or conflicts or issues with the policy should be identified and described.
  - b. If a real or apparent conflict was identified, its resolution should be documented in the analysis.
  - c. Authorization language may be incorporated into the ODA for efficiency. Please note: the actions are counted as two separate ethics actions – official duty activity and authorization. If authorization is incorporated into the ODA, then under the employee’s EMIS record, create two separate entries: i) an ODA record, and ii) an authorization record, and cross-reference the two records within the notes fields.
7. Obtain concurrence from the NIH Ethics Office for all employees seeking to be assigned to a leadership position of a nonprofit professional organization until further notice is given.
  - a. As far in advance of the preferred start date as possible, the ethics office will email the complete package to the NEO Action Coordinator, with a cc to the IC’s assigned NEO Ethics Specialist with the request to review the activity.
  - a. Use of the analysis worksheet is optional, but encouraged.
  - b. Within the body of the email, include the link to the organization’s website if one exists.
8. Update the ODA and if applicable, the authorization section of the employee’s EMIS record with the ‘To NEO’ date.

**NIH Ethics Office (NEO)**

All ODA requests for employees who request approval to participate in a leadership position of an outside organization require NEO review and concurrence/approval.

- Requests from senior/”top 5” require review by NEO and approval by the NIH DEC.
- Requests from non-senior/ “non-top 5” require review by NEO and are returned to the IC for final action by the employee’s IC DEC consistent with NEO’s response.

If additional information is needed to complete the review, the NEO Specialist will contact the IC ethics office and/or the employee to request the information.

The request will be routed to the appropriate DEC for final action.

**Final Ethics Processing Steps**

1. Once the final determination is made by the employee's DEC, the employee will be notified of his or her determination. If approved, the notification should include:
  - a. A copy of the Employee Guidance Notice.
  - b. A reminder not to solicit travel funds (if appropriate).
  - c. A reminder to notify the ethics office if he or she has a change in his or her official duties or assignments, or if the scope of his or her activity is expected to change.
2. Close-out the employee's official duty and if applicable, authorization entry in his or her EMIS record. Add a note to the EMIS record(s) that the authority for the ODA is 5 CFR 2640.203(m).

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File Name: NIH-SOP-Professional-Organization-Official-Participation

Developed by C. Galvin-Combet and L. Wood with input from NEO, OGC, and the ethics community