

OFFICE OF GOVERNMENT ETHICS

01 x 11

Letter to an Individual dated November 29, 2001

This is in response to your letter dated November 7, 2001, in which you inquire whether certain members of the board of directors of a Federal Prison Industries (FPI) are subject to Federal conflict of interest requirements. We have considered the information provided in your letter and in subsequent telephone conversations with a member of your staff. In addition, we have obtained the views of ethics officials at the Department of Justice (DOJ) concerning the status of FPI as part of an executive agency and the status of its directors as Federal officers or employees. We also have reviewed the statutory and regulatory scheme in which FPI operates. For the reasons discussed below, we are of the opinion that all directors of FPI are Federal officers or employees and are subject to applicable Federal conflict of interest laws.

FPI is a wholly-owned Government corporation that was created by Congress in 1934 to govern the industrial operations that use prison labor in Federal penal and correctional institutions. See 18 U.S.C. § 4122(a); 31 U.S.C. § 9101(3)(E). In 1939, a reorganization plan approved by Congress transferred FPI, "together with its board of directors," to DOJ. 5 U.S.C. app., Reorganization Plan No. II of 1939, § 3(a).¹ See also *United States v. Demko*, 385 U.S. 149, 150 n.1 (1966) (FPI is "a Government body"). FPI operates in conjunction with DOJ's Bureau of Prisons (BOP). This fact is reflected in certain ethics regulations that expressly include FPI with BOP. See 5 C.F.R. part 2641, App. B ("Bureau of Prisons (including Federal Prison Industries, Inc.)"); 5 C.F.R. § 3801.103(a) (same); see also 28 C.F.R. § 0.98 (Director of BOP is "ex officio Commissioner of Federal Prisons Industries"). From the foregoing, it is apparent to us that FPI is part of the executive branch, see 18 U.S.C. § 202(e)(1), and that its officers and employees are subject to the conflict of interest laws that govern executive branch employees. See 18 U.S.C. §§ 202-209.

¹ The President's message to Congress in connection with the proposed plan states: "I further propose to transfer to the Department of Justice the Federal Prison Industries, Inc., and the National Training School for Boys Responsibility for the Federal penal and correctional institutions is in the Department of Justice and these two independent establishments should be consolidated therein." Message of the President, transmitting proposed Reorganization Plan II of 1939.

Ethics officials at DOJ confirmed that they long have held the same view.²

Your letter suggests that the statutory structure of the board of directors of FPI might make certain conflict of interest requirements inapplicable to at least some of the directors. Specifically, you note that "[o]ne of the slots on the Board is allocated to a person representing industry." You ask us to consider, in particular, the following hypothetical scenario: "The President appoints an executive from an industry where FPI is a significant competitor. For example, if a representative from the furniture industry were chosen by the President, recognizing that FPI also makes furniture, would that industry appointee be permitted to vote on issues where it could be argued that the outcome benefits their private sector corporation?" You state that it is your belief that "because of the structure of the Board, there should be no conflict of interest test applied to the industry representative."

Given the scenario you pose, the conflict of interest statute most relevant is 18 U.S.C. § 208. Section 208 prohibits executive branch employees from participating in particular matters that have a direct and predictable effect on their financial interests or the financial interests of certain others with whom they are associated, including any non-Federal employers. If the FPI board member in your hypothetical is properly deemed an executive branch employee, then it follows that section 208 would prohibit that member from participating personally and substantially in any particular matter in which the member's non-Federal employer has a financial interest. The question then is whether there is anything about the statutory structure of the FPI board that indicates Congressional intent that any of the members should not be considered officers or employees of the executive branch.

FPI is "administered by a board of directors, appointed by the President to serve at the will of the President without compensation." 18 U.S.C. § 4121. The statute creating the board states that the directors "shall be representatives of (1) industry, (2) labor, (3) agriculture, (4) retailers and consumers, (5) the Secretary of Defense, and (6) the Attorney General, respectively." *Id.*

² DOJ has determined that FPI has both regular and special Government employees, for purposes of the conflict of interest laws. In particular, DOJ views FPI board members as "special government employees," in view of their limited number of service days per year. See 18 U.S.C. § 202(a). Note that individuals may be deemed special Government employees, under section 202(a), even if they serve without compensation.

The reference to certain members as being "representatives" of outside interests might raise a question as to whether such members are really intended to act as officers or employees of the United States, or merely as representatives or spokespersons of identified interest groups. In other contexts, in fact, we have recognized the distinction between Federal employees and "representative" members of certain public bodies, such as Federal advisory committees and similar entities. See OGE Informal Advisory Letter 82 x 22. We have found that an industry representative who serves on a Federal advisory committee solely for the purpose of conveying the views of outside interest groups cannot rightly be characterized as "a Federal functionary." *Id.* at pp. 333-34.

We do not, however, find the functions of FPI board members to be analogous to those of industry representatives on advisory committees.³ Indeed, it appears to us that all FPI directors, including the industry representative, satisfy the most commonly used test for determining whether an individual is a Federal employee for purposes of the conflict of interest laws.

Although the conflict of interest laws do not themselves define "officer" or "employee," we have long looked to the definitions in title 5, United States Code, for guidance in this area. See, e.g., "Conflict of Interest and the Special Government Employee," at 2 (Attachment to OGE DAEOgram D0-00-003, February 15, 2000 [OGE Informal Advisory Memorandum 00 x 1]). Under 5 U.S.C. §§ 2104 and 2105, there are three basic criteria for officer or employee status: (1) a Federal appointment; (2) performance of a Federal function; and (3) supervision by a Federal official. FPI board members clearly satisfy the first criterion, as they have an appointment from the President, under the express terms of 18 U.S.C. § 4121. They satisfy the second criterion--supervision by a Federal official--because, among other things, they are removable at will by the President, a key indicator of supervision. See 17 O.L.C. 150 (1993).⁴ Finally,

³ According to materials found on the official FPI website, the board of directors is not an advisory committee: "The Federal Advisory Committee Act also does not apply to the Board's decisions because the Board's statutory role is to administer the FPI corporation, not merely to serve in an advisory capacity." www.unicor.gov/about/bodadd.

⁴ We note also that the 1939 reorganization plan, discussed above, would seem to contemplate supervision by the Attorney General: "The Federal Prison Industries, Inc. (*together with it Board of Directors*), and its functions are hereby transferred to the Department of Justice and shall be administered under the *general direction and supervision of the Attorney General*." Reorganization Plan No. II of 1939, § 3(a), 5 U.S.C. app. (emphasis (continued...))

unlike industry representatives on advisory committees and similar bodies, FPI board members do perform Federal functions: to cite just one example, the "Board of Directors of Federal Prison Industries, or such officer of the corporation as the Board may designate, may exercise the authority vested in the Attorney General by section 4126 of title 18 of the U.S. Code, as amended, to prescribe rules and regulations governing the payment of compensation to inmates of Federal penal and correctional institutions employed in any industry" 28 C.F.R. § 0.99.⁵

To be sure, the statutory scheme under which FPI and its board operate reflects a particular Congressional concern to minimize the competitive impact of prison labor on private sector industry and free labor. See, e.g., 18 U.S.C. § 4122(b)(1) (directors to minimize competition with private industry and free labor). For that reason, one can see why Congress would require that the board include persons coming from industry and labor, who might be thought to be sensitive to such concerns. The composition of the board was originally intended to garner support from labor and other private sector groups for Federal decisions to expand prison labor operations at a time when widespread unemployment made such decisions particularly controversial. See 80 Cong. Rec. 10161-62 (1934) (statements of Reps. Sumners, Reed and Tarver). Nevertheless, the board members still were to operate as "an impartial board," *id.* at 10164 (statement of Rep. Tarver), and they were expected to serve "as a matter of public and patriotic duty without compensation," *id.* at 10162. See OGE Informal Advisory Letter 93 x 14 (non-employee representatives expected to "represent a particular bias," not to use independent judgment).

Under these circumstances, the FPI board members cannot be equated with mere spokespersons for outside interest groups but must be viewed as executive branch officers or employees. Our conclusion is further supported by the fact that DOJ long has treated FPI board members as Federal officials for purposes of the conflict of interest laws. DOJ ethics officials informed us that board members file financial disclosure statements, pursuant to the Ethics in Government Act, and that any conflict of interest questions are resolved according to the usual procedures for handling such matters in the executive branch.

⁴ (...continued)
added).

⁵ Indeed, the legislative history of the act creating FPI makes clear that the authority conferred on the board to determine the manner and the extent to which industrial operations would be carried out in Federal prisons was originally exercised by the Attorney General. See S. Rep. No. 1377, 73d Cong., 2d Sess. 1-3 (1934); 80 Cong. Rec. 10162 (1934) (statement of Rep. Tarver).

In this connection, we note that there are several alternative ways of resolving potential conflicts under 18 U.S.C. § 208. Of course, board members may recuse themselves from matters in which they or their non-Federal employers have a financial interest. However, if such recusals would be inefficient or disruptive of the work of the board, other options certainly can be considered. In some cases, a waiver of the conflict of interest prohibition, pursuant to section 208(b)(1), might be appropriate, depending on the circumstances. The criteria for granting such waivers are found at 5 C.F.R. § 2640.301. In some instances, agencies may grant "limited" waivers, according to which an employee is permitted to participate in certain matters or certain aspects of those matters, while continuing to recuse from other matters or other aspects of the same matter. Where board members hold stock in companies likely to be affected by board decisions, they could also resolve potential conflicts by divesting such interests.⁶ In any event, we were advised that individual cases involving potential conflicts of interest among board members are resolved by the General Counsel of FPI, in coordination with ethics officials at BOP and main Justice, as necessary.

I hope this has been helpful.

Sincerely,

Marilyn L. Glynn
General Counsel

⁶ Moreover, certain holdings of securities and mutual funds are exempt by regulation from the conflict of interest prohibition. See 5 C.F.R. §§ 2640.201, 2640.202.