



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Reference to Official Title and Position by Employees Affiliated with Outside Organizations in Their Personal Capacity

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to emphasize that executive branch employees who are affiliated with outside organizations in their personal capacity must ensure that any references made to their official title, position, or agency are done in a manner that does not create the appearance that their agency or the government sanctions their personal activities or the activities of the outside organization. *See* 5 C.F.R. 2635.101(b)(9); 2635.701, *et seq.*¹

The Principles of Ethical Conduct, set forth in Executive Order 12674, as amended, provide that, “[e]mployees shall not use public office for private gain.” *See* E.O. 12674, § 101(g), as amended by E.O. 12731; 55 Fed. Reg. 42547, 3 C.F.R., 1990 Comp., p. 306. (1989); 5 C.F.R. § 2635.101(b)(7).² The Standards of Ethical Conduct for Executive Branch Employees

¹ This Legal Advisory does not address the use of official title, position or authority associated with public office by an employee assigned to serve with an entity in his or her official capacity, either as liaison, employee, officer, director, trustee, general partner or otherwise. *See* OGE Informal Advisory Opinion 01 x 6 (explaining that an employee is not barred from referencing his or her official title or position while engaged in authorized activities undertaken in the course of the employee’s official duties).

² References to title or position when an employee is engaged in outside activities that qualify as teaching, speaking or writing are covered by another regulation, 5 C.F.R. § 2635.807. *See also* OGE Informal Advisory Opinion 10 x 1 (explaining when an employee may reference his or her official title or position while engaged in teaching, speaking and writing activities). References to title or position in connection with fundraising in a personal capacity are covered by 5 C.F.R. § 2635.808(c).

(Standards of Conduct), which implement the Principles of Ethical Conduct, explain that “private gain” includes both personal gain by the employee and gain by any other person, including an organization with which the employee is affiliated. *See* 5 C.F.R. § 2635.701, *et seq*; OGE Informal Advisory Opinion 99 x 15.

Additionally, under 5 C.F.R. § 2635.702(b), an employee who is serving or affiliated with an outside organization in a personal capacity may not permit the organization to reference the employee’s official title, position, agency, or government affiliation, if the context is such that the reference “could reasonably be construed to imply that his agency or the government . . . sanctions or endorses his personal activities or those of another.” 5 C.F.R. § 2535.702(b). In determining whether a reference “could reasonably be construed” to imply agency sanction or endorsement, employees and agency ethics officials must consider the totality of the circumstances to determine whether a reasonable person could construe the reference to imply sanction or endorsement of the organization or the employee’s personal activities. *See id.*; 5 C.F.R. § 2635.101(b)(14).³

The determination as to whether a particular reference to an employee’s title, position, agency, or government affiliation could reasonably be construed as implying government sanction or endorsement is necessarily fact-specific. Officials making this determination need to consider the totality of the circumstances. Certain factors, however, may increase the likelihood that a reference could reasonably be construed as implying government sanction or endorsement. These factors include: whether there is a close nexus between the mission and activities of the outside organization and the employee’s Federal agency; whether the employee’s official duties relate to the activities of the outside organization; whether the employee occupies a senior-level, political or policy-determining position at his or her Federal agency; whether the employee is identified as participating in the affairs of the outside organization beyond mere membership; whether the reference to the employee’s title, position, or agency is used to promote or market the outside organization’s services, products or policy positions; whether the employee’s title, position or agency is prominently or frequently referenced; whether the employee is referred to as a “representative” of his or her agency; and whether there are other circumstances that would lead a reasonable person to conclude that the government sanctioned or endorsed the employee’s private activities or the services of the outside organization. On the other hand, certain factors weigh against a finding that a specific reference could reasonably be construed as implying governmental sanction or endorsement, such as whether the employee’s title is being used in materials that are primarily for distribution to other members of the organization; whether the outside organization has provided additional biographical facts alongside the reference to the employee’s title, position, or agency; or whether the outside organization has provided a

³ Note that individuals normally referred to by a general term of address, such as “the Honorable,” may use that address in connection with a personal activity. *See* 5 C.F.R. § 2635.702(e); OGE Informal Advisory Opinion 02 x 9.

reasonably clear and conspicuous disclaimer explaining that the employee is participating in a personal capacity.

While none of the above factors is necessarily dispositive, each is informative as to whether a reasonable person would construe the reference to the employee's government affiliation as implying government sanction or endorsement. For example, in many cases a clear and conspicuous disclaimer explaining that the employee's service is done in his or her personal capacity would be sufficient to eliminate any potential appearance that the employee's agency or the government sanctioned or endorsed the employee's service with the outside organization or the activities of the outside organization. If, however, the employee were identified as a "representative" of his or her agency, even a disclaimer would not necessarily eliminate the potential that a reasonable person could construe the reference as a sanction or endorsement by the employee's agency or the government of the employee's personal activities or the outside organization.

The following examples illustrate how an agency might apply the factors listed above to determine whether a reasonable person would construe a reference to an employee's title, position, agency, or government affiliation as implying government sanction or endorsement:

Example 1: An employee is a staff-level budget analyst at the Department of Health and Human Services. The employee is also a member of a professional licensing organization for certified public accountants. The professional organization keeps a public membership list of all 200 members on its website, along with the name of each member's current employer. The employee is identified on the membership list as "John Doe, Department of Health and Human Services." The employee's official title, position, and agency name are not listed elsewhere on the website. The following factors are relevant to the determination in this example: the activities of the outside organization and the agency are dissimilar; the employee is only identified as a member of the organization; the employee does not occupy a senior-level, political or policy-determining position at his agency; and the name of the employee's agency is only referenced once, and it is not referenced in connection with the organization's services or products. In light of these factors, this reference would not lead a reasonable person to construe that the government sanctions or endorses the employee's personal activities or the outside organization.

Example 2: An employee with the Equal Employment Opportunity Commission serves as an advisory board member of an outside organization in her personal capacity. The outside organization provides various fee-based training courses on Federal employment law to the Federal and private sector. On the same website where the organization advertises its courses, the organization has prominently posted the names of the five members of the advisory board, as well as each member's employer and official title. The following factors are relevant to the determination in this example: the activities of

the outside organization and the agency are similar; the employee is identified as more than a mere member of the outside organization; the reference includes the employee's title; and the reference is made in connection with the marketing of the outside organization's services. On that basis, a reasonable person might construe the references to the employee's title and agency as implying that the government sanctions or endorses the employee's personal activities or the outside organization.

The application of these factors is fact-specific and agency ethics officials are normally in the best position to determine whether there is an appearance of government sanction or endorsement and, if so, what steps need to be taken to eliminate that appearance. OGE can help agencies in their analysis of these factors and give guidance on how other agencies have handled similar situations. For their part, agency ethics officials are encouraged to be proactive in ensuring that employees comply with 5 C.F.R. § 2635.702(b) and applicable agency supplemental ethics regulations by training on the regulatory requirements, supporting employees with counseling in individual cases, and following-up to prevent or resolve potential violations. *See* 5 C.F.R. § 2638.203(b)(6), (7) and (9).

Upon determining that a particular reference "could reasonably be construed" to imply government sanction or endorsement, agency ethics officials should identify affirmative steps that employees can take to eliminate the appearance of government sanction or endorsement. Ethics officials may also wish to remind employees that it is never inappropriate, and is sometimes advisable, for an employee to request that an outside organization refrain from making any reference to the employee's agency, title, position, or government affiliation. In addition, when agency ethics officials provide guidance to employees who are serving, or are seeking to serve, with outside organizations in their personal capacity, they should be sure to counsel the employees as to other related provisions of the Standards of Conduct and the criminal conflict of interest statutes that may be implicated by their outside activities. *See, e.g.*, OGE Informal Advisory Opinion 06 x 13 (2006) (providing a brief survey of the ethics laws that may be implicated by an employee's outside activities). Agencies with supplemental ethics regulations requiring employees to seek prior approval before engaging in outside activities may want to remind employees of these related provisions during the prior approval process.