

30 June 2011

Richard M. Thomas
Associate General Counsel
Office of Government Ethics
1201 New York Avenue, N.W.
Suite 500
Washington, DC 20005-3917

RE: RIN 3209-AA09
[Proposed Rule Exemption and Amendment Under 18 U.S.C. 208(b)(2)]

Dear Mr. Thomas,

We are writing in strong support of your proposed rule that would ease the way for Federal employees to serve on the boards of directors of professional and scientific societies and organizations by declaring, in essence, that such service is not, in general or *per se*, a conflict of interest with their duties to their Federal agency employers.

The undersigned organizations comprise a wide range of scientific and professional societies whose members include many scientists employed by federal agencies. Over the years, our societies have found that some agencies have refused to allow those employees to serve as officers or directors of our organizations. Frequently, the agency would cite a provision in the criminal code (18 U.S.C. 208) and statements by General Counsel of the department that fiduciary duty (of board members to their scientific organizations that might conflict with their duties to their agency employers) was imputed to all board members. Some agencies refused to issue the waivers allowed by statute, at all, or would discourage employees from applying for waivers, thus effectively precluding the scientists from taking part in activities that are inherent to and an important part of the career of a scientist. Other agencies were more lenient, but this application or interpretation of the statute deterred some scientists from even applying for a waiver.

We would like to state emphatically that we are fully supportive of the proposed regulatory changes; we are grateful to the Office of Government Ethics for addressing this problem. These changes will benefit federal agencies that employ scientists by removing a serious impediment to the full participation by those scientists in their scientific and professional societies – an activity that is integral to the life of a scientist. The removal of this deterrent to federal service will make it easier for agencies to attract the best and the brightest scientists to their scientific staffs.

Scientists devote their time and energies to leadership roles because the well-being of a scientific society is vital to the dissemination of scientific research, which is, after all, the ultimate goal of every scientist. Scientific societies promote scientific research and the exchange of scientific ideas and knowledge. Scientific societies nurture students, encourage research through grants,

and, most importantly, publish research in peer-reviewed journals. They also provide scientists with the opportunity to develop their ideas through intellectual dialogue with colleagues. For these reasons, scientists take leadership roles in their societies to assure the health of those societies and, in turn, the continuance of these vital functions.

For scientists whose primary role entails natural resource management and policy, as is the case with many federally employed scientists, the scientific society serves another vital function – it helps them keep current with the research findings that they need to assure the scientific integrity of their management and policy decisions.

The legal barrier that the OGE policy would, in part, remove, also affects the retention and promotion prospects of scientists employed by federal agencies. The Office of Personnel Management in 2006 developed Research Grade Evaluation standards that base retention and promotion decisions, in part, on the stature of the scientist as measured *inter alia* by recognition by professional societies. Stature is reflected in two ways – by the conferring of rewards and by election to leadership roles. Most scientific societies confer only one or two awards per year so most scientists will never receive an award, despite stellar research careers. For most scientists, election to leadership roles is the sole recognition of stature in the society. Therefore, this component of the retention and promotion standards would require the scientist to do something that might be prohibited by the agency or that could even trigger criminal charges.

It is as representatives of these federal scientists that we submit these comments on the proposed rule that would permit Government employees to participate in particular matters affecting the financial interests of nonprofit organizations in which they serve in an official capacity, notwithstanding the employees' imputed financial interest.

In reality, service on the board of professional societies rarely entails actual fiduciary duty that conflicts with the interests of their agency-employers, though a general fiduciary duty may be implied by law. The 1996 DOJ memo did just that – it made official and apparently irrefutable that implication. In doing so, it extended the statute beyond its original intent, which was to avert actual conflicts of interest based on fiduciary duty. Instead, it said that any service on the board of an outside organization necessarily entailed the conflict that was prohibited by the statute.

It is possible, of course, that decisions made by the board would involve, in some way, including fiduciary obligations, a federal agency that employs a board member. The solution to these problems is ethics training, recusal from discussion and voting on matters that actually or are likely to conflict, and disclosure of the potential conflict of interest. The sanctions should be for actual, not potential, violation of the law. The law as it currently stands is analogous to a prohibition on driving because the driver might someday break a traffic law. It is possible to drive without breaking a traffic law and it is possible to serve on a board of directors without violating ethical, let alone criminal, standards of conduct.

We are therefore grateful to the Office of Government Ethics for its clear statement that it is exercising its authority to exempt the imputed financial interests of nonprofit organizations in which employees serve as officers, directors or trustees in their official capacity. We believe it is appropriate to sanction actual misconduct, rather than prohibit all activity that might entail

unethical conduct. The regulatory change proposed by OGE serves as a strong foundation for the further rectification of the problems encountered by scientists employed by federal agencies.

We urge you to work closely and actively with other officers from the Attorney General to the Office of Personnel Management and the White House Office of Science and Technology Policy to ensure that each will in turn lead agency and department heads across the executive branch to take the actions they need to take to ensure that their policies and practices follow your enlightened lead.

We thank OGE for its thoughtful consideration and leadership in helping to achieve this important goal.

Sincerely,

Ornithological Council
The Wildlife Society
American Fisheries Society
Council of Engineering and Scientific Society Executives
American Statistical Association
American Sociological Association
USA National Phenology Network
American Institute for Medical and Biological Engineering
Association of American Geographers
Association of Environmental and Engineering Geologists
Society for Conservation Biology
American Meteorological Society
American Astronomical Society
American Educational Research Association
American Society of Agronomy
Crop Science Society of America
Soil Science Society of America
SPIE, the International Society for Optics and Photonics
American Mathematical Society
Council on Undergraduate Research
National Society of Professional Engineers
The River Management Society
Society for Ecological Restoration
Materials Research Society
Association for the Sciences of Limnology and Oceanography
American Institute of Aeronautics and Astronautics
American Association for the Advancement of Science
American Chemical Society
Council on Food, Agricultural, and Resource Economics (C-FARE)
American Institute of Biological Sciences
Society of American Foresters