



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

|  |                         |  |
|--|-------------------------|--|
| <b>COMMISSION DIRECTIVE</b>  | <b>PREVIOUS NO.</b> N/A | <b>NO.</b> 73                          |
|  | <b>RESCINDS:</b> N/A    | <b>EFFECTIVE DATE:</b><br>May 20, 2014 |
| <b>Procedures For Requesting Prior Approval For Outside Employment Pursuant to 5 CFR Part 4701</b> |                         |  |

**I. Prior Approval Requirement for Employees of the Commission**

*As required by 5 CFR part 4701, Commission employees<sup>1</sup> shall obtain written approval from the Designated Agency Ethics Official (DAEO) before engaging in outside employment, as defined below, where the services provided:*

- A. Are related to the employee's official duties;<sup>2</sup> or
- B. Involve the application of the same specialized skills or the same educational background as used in the performance of the employee's official duties.

**II. Procedure to Request Prior Approval**

- A. To seek prior approval to engage in outside employment, an employee shall send a written request to the Alternate Designated Agency Ethics Official (ADAEO) and the Deputy Ethics Officer (DEO). Employees who report directly to the Commission shall send a written request through the Commission<sup>3</sup> to the ADAEO and the Deputy Ethics Officer.
- B. This written request shall state:
  - 1 the name of the person, group, or organization for which the outside employment is to be performed;
  - 2 the type of outside employment to be performed;

<sup>1</sup> Includes members of a Commissioner's staff, but not a Special Government Employee or a Commissioner. The outside employment of a Commissioner is governed by 11 CFR § 7.6.

<sup>2</sup> See 5 CFR § 4701.102(a)(4)

<sup>3</sup> A copy of the request should be sent to the Commission Secretary for informational circulation to each Commissioner.

3. the proposed hours of, and approximate dates of, the outside employment; and
  4. whether the proposed outside employment will be compensated.
- C. The DEO shall receive and review all requests for prior approval for outside employment. The DEO shall seek additional information from the requesting employee and other sources as necessary, and provide a draft written determination to the ADAEO. The draft written determination shall explain whether or not the outside employment is expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635.
- D. The ADAEO shall, with the advice of the DEO, provide a written determination to the requesting employee, with copies provided to all of his or her supervisors. The written determination shall include an explanation of the basis on which it was made, including reasoning regarding conduct prohibited by statute or regulation, including 5 CFR part 2635. Approval of the proposed outside employment shall be granted upon a determination that the outside employment is not expected to involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635. No request for approval of outside activities shall be unreasonably denied.

### **III. Reconsideration of Determinations of the ADAEO**

- A. When an employee has received a written determination from the ADAEO disapproving his or her request to engage in outside employment, that employee may seek reconsideration of such a determination from the DAEO.<sup>4</sup> Reconsideration shall be sought within 20 business days of receiving the written decision from the ADAEO by submitting a written request for reconsideration to the DAEO. The employee's written request must explain why he or she believes the ADAEO's determination is incorrect and why the employee believes the proposed outside employment will not involve conduct prohibited by statute or Federal regulation, including 5 CFR part 2635. The DAEO shall provide a final written response to the employee within five business days of receipt of the request, with copies provided to all of the requesting employee's supervisors. The DAEO's final written response shall include an explanation of the basis on which it was made.

---

<sup>4</sup> In the event that the DAEO himself or herself has sought approval for outside employment, the ADAEO's written determination disapproves the request, and the DAEO insists on his or her position, the DAEO and ADAEO shall jointly seek the advice of the Office of Government Ethics.

- B. The DAEO's participation in the initial written determination from the ADAEO does not disqualify the DAEO from reconsidering the initial written determination or issuing a final written response.
- C. With respect to a request by a non-bargaining unit employee, the DAEO's determination shall be final unless it is a denial through nonresponse pursuant to IV.C. below, in which case the decision shall be subject to IV.D. below. With respect to a request by a bargaining unit employee, the DAEO's determination shall be subject to section 4.d of the Memorandum of Understanding between the Commission and the National Treasury Employees Union dated September 10, 2013.

**IV. Timeliness of Determinations**

- A. The ADAEO shall issue a written determination approving or disapproving any written request of an employee to engage in outside employment within ten business days of receiving an employee's written request.
- B. If additional information is needed to make a determination whether to approve or disapprove a request to engage in outside employment, the ADAEO must contact the requesting employee to explain the cause of the delay, and notify the employee of the additional information that is being sought in connection with the review and determination process. The running of the time in which to issue a decision shall be tolled from the time of the ADAEO's request until the employee provides the requested information to the ADAEO.
- C. If a response from the ADAEO is not received within the ten business days (or the period established in the individual case subject to IV.B, above), the request will be forwarded by the ADAEO to the DAEO for final decision. Upon receipt of any forwarded request, the DAEO shall immediately notify the Commission via memorandum of the failure of the ADAEO to adhere to the timeliness provisions of this Directive, along with an explanation of the failure.
- D. If a response from the DAEO is not received by the requesting employee within five business days from the request having been forwarded to the DAEO, then the request will be considered denied. However, in such an event, the DAEO shall immediately notify the Commission via memorandum of the DAEO's failure to adhere to the timeliness provisions of this Directive, along with an explanation of the failure.

- E. For any failure to adhere to the timeliness provisions of this Directive:
1. With respect to a request by a non-bargaining unit employee, a failure by the ADAEO or DAEO to adhere to the timeliness provisions of this Directive (including a denial of the request pursuant to IV.D, above) may be raised in an administrative appeal brought pursuant to Personnel Instruction 771.1, except that 1) in any such appeal the matter shall begin at Step 3, and 2) for this purpose only, Commissioners' executive staffs may file an administrative grievance under Personnel Instruction 771.1 notwithstanding Section III.A of that instruction; or
  2. With respect to a request by a bargaining unit employee a failure by the ADAEO or DAEO to adhere to the timeliness provisions of this Directive (including a denial of the request pursuant to IV.D, above), shall be subject to section 4.d of the Memorandum of Understanding between the Commission and the National Treasury Employees Union dated September 10, 2013.
- F. As stated above, the DAEO shall immediately notify the Commission via memorandum of any failure of the ADAEO or DAEO to adhere to the timeliness provisions of this Directive (including a denial of the request pursuant to IV.D, above) and an explanation of the failure. Upon receipt of a notification pursuant to IV.C or IV.D, above, any Commissioner may, within 10 business days of receipt of such notification, request that the matter be added to agenda of the next scheduled Executive Session. The purpose of consideration in Executive Session will be to consider whether any management, administrative, training, process, or other similar actions – including amendments to this Directive – are warranted in light of the delay. The DAEO shall not further delay providing an answer to the employee pending the Commission discussion, and the Commission shall not on its own purport to provide a substantive answer to the request.

**V. Changes to Approved Outside Employment**

Upon a significant change in the nature or scope of previously approved outside employment or in the employee's official position, the employee shall immediately submit a revised request for approval.

**VI. Records**

The DEO shall ensure that copies of all written requests for prior approval, determinations by the ADAEO, requests for reconsideration, and responses from the DAEO are kept in the ethics records in accordance with requirements of the U.S. Office of Government Ethics and the National Archives and Records Administration.

**VII. Applicability to Prior Activity**

- A. Employees already approved for outside employment prior to October 11, 2013, will not have to re-submit a request for approval under this Directive. Rather, employees who were performing approved outside employment as of that date will only need to submit a revised request under the process described in this Directive if there is a significant change in the nature or scope of the outside employment or in the employee's official position.
- B. Employees who, prior to October 11, 2013, engaged in outside employment activities without approval and who reasonably believed such activity did not relate to their official duties may seek retroactive approval pursuant to this Directive without disciplinary or adverse action based solely on the failure to request prior approval. Where the outside employment *per se* violates a federal law, statute or regulation, this hold-harmless provision shall not apply. A reasonable belief does not exist in circumstances including, but not limited to:
1. Any circumstances involving the provision of any services for a candidate, political party, or political committee within the jurisdiction of the Commission, or any entity described in 26 U.S.C. § 527.
  2. Any circumstances involving activities that may ripen into issues within the Commission's jurisdiction, including but not limited to services relating to ballot access, candidate debates, electioneering communications, election-related polling, federal lobbying disclosure, federal election activity, nominating conventions, separate segregated funds of connected organizations, or any other activities that might cause a reasonable person to question whether the organization had made a contribution or expenditure, or was required to register as a political committee.

3. Any representation, legal or non-legal, of an individual or entity before any agency of the Federal Government (other than representation provided in connection with service as an officer or steward of a labor organization recognized as the exclusive bargaining representative of a bargaining unit under the Federal Labor-Management Relations Statute).
4. Any activity on behalf of, or employment by, any Commission contractor or sub-contractor, if the employee knew or should have known that the outside employer was a contractor or sub-contractor of the Commission.

## VIII. Definitions

All terms used in this Directive use the definitions provided in 5 CFR part 4701. The following definitions are reproduced here for convenience.

- A. Outside employment means any form of non-Federal employment, business relationship or activity involving the provision of personal services, whether or not for compensation. It includes, but is not limited to, services as an officer, director, agent, advisor, attorney, consultant, contractor, general partner, trustee, teacher, speaker, writer, or any other services provided by an individual. It includes writing when done under an arrangement with another person for production or publication of the written product. The definition does not include participation in the activities of a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service or civic organization, unless:
  1. The activity provides compensation other than reimbursement of expenses;
  2. The activities of the non-Federal organization are devoted substantially to matters relating to the employee's official duties as defined in 5 CFR § 2635.807(a)(2)(i)(B)-(E) and the employee will serve as officer or director of the non-Federal organization; or
  3. The activities will involve the provision of consultative or professional services.
    - a. Consultative services means the provision of personal services, including the rendering of advice or consultation, which requires advanced knowledge in a field of science or learning customarily acquired by a course of specialized

instruction and study in an institution of higher education, hospital, or similar facility.

b.. Professional services means the provision of personal services, including the rendering of advice or consultation, which involves application of the skills of a profession as defined in 5 CFR § 2636.305(b)(1) or involves a fiduciary relationship as defined in 5 CFR § 2636.305(b)(2).

B. Related to the employee's official duties means that the outside employment meets one or more of the tests described in 5 CFR § 2635.807(a)(2)(i)(B)-(E). Outside employment related to the employee's official duties includes:

1. Outside employment that an employee has been invited to participate in because of his or her official position rather than his or her expertise in the subject matter;
2. Outside employment in which an employee has been asked to participate by a person that has interests that may be substantially affected by the performance or nonperformance of the employee's official duties;
3. Outside employment that conveys information derived from nonpublic information gained during the course of government employment; and
4. Outside employment that deals in significant part with any matter to which the employee is or has been officially assigned in the last year, or any ongoing or announced Commission policy, program, or operation.

This Directive was adopted on May 20, 2014.



---

Alec Palmer  
Staff Director