National Aeronautics and
Space Administration
**Headquarters**
Washington, DC 20546-0001

Reply to Attn of: GC Memo 98-02

JAN 28 1998

TO: Officials-in-Charge of Headquarters Offices
Directors, NASA Field Installations
Director, NMO, Jet Propulsion Laboratory

FROM: G/General Counsel

SUBJECT: Participation in the Affairs of Outside Organizations in an Official Capacity

On October 28, 1994, I distributed a policy memorandum stating, in part, that Federal ethics rules usually made it inappropriate for Federal employees to serve, in their official capacities, on boards of directors of private organizations. This rule was not absolute, however, so the 1994 memorandum established a procedure to be followed in cases where official service on an outside board was seen as in NASA's interest. Based on recent opinions of the Department of Justice (DOJ) and discussions with the Office of Government Ethics (OGE), the policy and procedure established in 1994 have become inadequate to protect NASA employees from possible prosecution for felony violations of 18 U.S.C. § 208. Therefore the 1994 policy and procedure must be revised.

The Office of Government Ethics recently circulated an opinion issued by the DOJ Office of Legal Counsel (OLC) on November 19, 1996, concerning the participation of civil servants on the boards of directors of non-Federal entities in an official capacity. In that opinion, which is binding on all executive branch agencies, OLC was responding to a request by the Federal Bureau of Investigation (FBI) for guidance on the application of Section 208 to the participation of FBI employees on the boards of non-profit organizations. The opinion states:

> Section 208 prohibits any officer or employee of the executive branch from participating as a government official in any "particular matter" in which an "organization in which he is serving as an officer, director, trustee, general partner or employee . . . has a financial interest." 18 U.S.C. § 208(a). <u>We conclude that this broad prohibition against conflicts of interest within the federal government would prevent a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of § 208(a),</u> pursuant to 18 U.S.C. § 208(b). [emphasis added]

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There are two primary bases, one explicit and one implicit, for the OLC finding that a conflict exists in board membership. The first is based on a straight-forward application of the statute to the situation. Because service is in an official capacity, it follows that any act in furtherance of the employee's responsibilities as a board member is also an official act of the Government. Since 18 U.S.C. § 208 expressly prohibits taking official action with respect to an organization of which the employee is a director, the prohibited conflict is automatic and unavoidable whenever the employee acts as a director. The second basis is implicit, but based on similar logic. Service on a board of directors or similar body imposes fiduciary responsibilities on the participant on behalf of the organization. Since a Government employee owes full allegiance to the Government, acceptance of such fiduciary responsibilities in an official capacity is inconsistent with the basic duty of a Government employee. In either case, an impermissible conflict of interest is created.

The opinion specifies two avenues which could be followed to permit official membership on an outside board. It is not clear how useful either of these exceptions might be, however. The first exception contemplates a waiver of fiduciary responsibilities by the outside organization to resolve the conflict. These obligations of directors, however, are normally established by state law, which may not permit such a waiver by the organization. Since the availability of such a waiver will vary from state to state, this option will require an individualized application of state law to the situation at hand. The second exception requires a formal waiver of the conflict under 18 U.S.C. § 208(b). While such waivers are possible, they are labor intensive, require consultation with the OGE and need a formal, written determination that the waiver meets six specific requirements specified in 5 CFR § 2640.301.

Thus, it has become extremely difficult to justify official membership on outside boards. Each such instance must be individually examined and many will be subject to OGE consultations. To avoid a statutory violation in the great majority of cases where official participation in non-Federal entities is deemed beneficial to NASA, participation will need to be accomplished by an individual designated as NASA liaison, not as a member of the outside board. This approach avoids the conflict of interest and fiduciary responsibilities issues, while permitting NASA to observe and be represented. It also minimizes the potential for personal liability on the part of the individual NASA employee. As always, NASA employees may serve on outside boards as an outside activity, subject to their being disqualified from official participation in any matter that may affect the interests of the outside organization and the requirements of the NASA regulations found at 5 CFR § 6901.103.

I fully realize that this change in policy might cause difficulties to certain individuals. I also realize that membership on certain outside bodies may have professional or career implications. Nevertheless, under the recent DOJ interpretations, employees not in compliance with this policy risk prosecution under the felony statute involved here. In appropriate cases this office will be able to work with the employees involved to mitigate the impact of this new ruling. In certain cases, it may also be possible for the organizations involved to assist in resolution of any resulting problems by altering the structure of their boards, but that, of course, is a private decision that must be left to the organization. In fairness to the employees involved, and in

light of the risk of severe criminal penalties, prudence indicates that strict compliance with the opinion is in the best interest of all.

In conclusion, to the extent that employees may have received approval to participate on boards of directors, trustees, regents, or any similar fiduciary body as part of their official duties, those positions should promptly be converted to liaison roles, to approved outside activities, or justified on an individual basis, as described above. For Headquarters employees, specific questions may be directed to Robert M. Stephens at (202) 358-2053 or R. Andrew Falcon at (202) 358-2465. NASA Center employees should contact their local Chief Counsel's office.

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