

MEMORANDUM

TO: Supervisors

FROM: NIH Deputy Director and
NIH Deputy Ethics Counselor

SUBJECT: Supervisory Review of Outside Activity Requests

DATE: February 16, 2004

As you know, questions have been raised regarding the propriety of some of the outside activities in which NIH employees engage. Many of these activities have great value to the NIH, and should be continued. We recognize, also, that the employees who are involved in them are dedicated and valued members of the NIH Community. Nevertheless, we must be sure that none of these activities are detrimental to the accomplishment of the NIH mission and are in compliance with current government-wide ethics regulations and NIH policies. To that end, employees are required to submit outside activity approval packets for any outside activity they wish to pursue that involves consultative or professional services, or which involves teaching, speaking or writing that relates to the employee's official duties, or which involves service as a board member to a non-federal entity. This includes those outside activity requests that were previously approved. These packets must contain information regarding the amount and type of compensation already received from the outside activity and the amount and type of compensation they expect to receive in the future.

As supervisor, you will be required to review, and approve or deny these requests. This is not an easy task. We encourage you to discuss the request with the employee who is seeking approval, so that you have as much information as possible when considering the request. Also, seek advice from your IC Deputy Ethics Counsel. Each outside activity approval request will require you to perform two different types of review: 1) a supervisory management review; and 2) a supervisory ethics review. I write to give you guidance on what to consider when reviewing these requests.

Supervisory Management Review

The supervisory management review encompasses two separate considerations: 1) is the activity more appropriately performed as an official duty activity; and 2) will the time required by the activity exceed that which is available to the employee under the government leave system. The first question -- is the activity more appropriately performed as an official duty activity -- requires you to consider 1) whether the subject matter of the activity is significantly related to, or an extension of, the employee's current work, and 2) the situation where the employee will be asked to discuss that information.

Special rules apply to outside activities consisting of teaching, speaking or writing. Current NIH policy allows an employee to receive compensation for discussing, as an outside activity, the results of government research that have been publicly available for more than a year provided that:

- the research does not relate to any matter to which the employee is assigned, or has been assigned within the last year, or to any ongoing or announced policy, program, or operation of the agency; and
- the invitation was not extended to the employee by someone who has interests that may be substantially impacted by the employee's official duties; and
- the circumstances do not indicate that the invitation was extended to the employee primarily because of his official position rather than his expertise on the subject.

It might be appropriate, for example, to give a speech for compensation in a public forum and discuss NIH work that was completed more than a year ago, provided all the other criteria discussed above are satisfied. The speech may focus on the scientist's own past research or incorporate it into a broad survey of all the research conducted in that particular area of science, but it may not discuss in significant part the scientist's current research or research he has done within the past year. In other words, an employee may speak on a discipline or inherent area of expertise based on his educational background or experience even though the speaking deals generally with a subject within the agency's area of responsibility. Where all of the above criteria have been satisfied, this one-way flow of information is typically not problematic. If the above criteria cannot be satisfied, then the speech may still be given in a personal capacity, but the compensation received by the employee is limited to gifts that can be accepted under the gift rules (e.g., gifts that are less than \$20, or widely attended gatherings), meals or other incidents of attendance such as waiver of attendance fees as part of the event at which the speaking takes place, or travel expenses. Also, if approved by her supervisor, the speech can be given in an official capacity.

If, however, the outside activity is for a consultancy arrangement where the employee will be asked to apply the previously published work to specific scenarios posed by the private company, the activity may not be appropriate. In this circumstance, it's important to consider whether the employee is continuing to conduct research in the same area as his already published findings. Because of his current NIH research, an appearance that the employee used his official position to obtain the compensated outside business opportunity may be created and/or that he used his public office for the private gain of the company with which he would be consulting. The fact that discussions between a consultant and a company are typically held behind closed doors adds to the appearance issues.

If you determine that the subject matter of the activity is too closely related to the employee's current NIH work, and thus, the activity is not appropriate as an outside activity, a separate analysis must be done before the employee can engage in the activity as part of her official duties. You must conclude that the employee seeking approval to engage in the activity in her official capacity is the appropriate person to represent the NIH with respect to that subject matter. Also, you must determine that the forum where the information will be presented is an appropriate one. Perhaps, for instance, a society's annual meeting where attendance is open to the public is an excellent venue to discuss NIH research, whereas a private meeting attended only by the employees of one organization is not. Because it is part of the NIH's mission to disseminate information, we must be careful not to give preferential treatment to one entity, allowing that entity to have an advantage over another because of the exclusive receipt of government information. Of course, employees should

be reminded that they cannot accept compensation from an outside source for activities undertaken as part of their official duties.

The second question focuses on the amount of time the proposed activity is expected to take. All NIH employees are covered by the government leave system, and as a supervisor, you are required to manage your employees' use of their annual leave. When requesting approval of an outside activity, the employee is required to give an accurate estimate of the annual leave that he or she expects to use with respect to the proposed activity. This should not exceed the amount of time available to the employee under the leave system. Furthermore, you should also consider other instances of leave usage, i.e., other approved outside activities and past or scheduled vacations, when reviewing the amount of leave the employee expects to use for the activity under review. While not a basis upon which you can deny approval of the activity, the exact dates when the employee plans to engage in the activity should be considered as well. Time off for outside activities must fit the needs of the lab or branch. Employees cannot engage in a particular activity if that activity will require the employee to be away from the NIH at a critical time.

Supervisory Ethics Review

The second review of a request for approval of an outside activity involves the ethics rules. You must consider: 1) whether a conflict will arise between the relationship the employee has with the outside organization and his duty to the NIH; and 2) whether the conflict will require a disqualification that will effectively prevent the employee from performing critical duties, thereby harming the efficiency of the NIH.

The government-wide regulations state that:

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties if:

[The outside activity creates a covered relationship under section 2635.502 or a personal or imputed financial interest under section 208 that] would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

As you know, a covered relationship between an employee and an outside organization is established when, for example, an employee becomes a consultant for or enters into a business relationship with that organization. In the context of an outside activity, a financial interest is created when the employee serves as officer, director, trustee, general partner or employee of the outside organization, or when the employee acquires an equity interest in the outside entity.

Once the covered relationship or financial interest is established, an employee must disqualify himself from participating in his official capacity in a specific party matter where a person with whom he has a covered relationship is or represents a party to the matter, or from participating in his official capacity in any particular matter if that matter will have a direct and predictable effect on his direct or imputed financial interests. In the case of a direct or imputed financial interest, such recusal would extend not only to particular matters in which an outside employer, for example, would be affected specifically, but also to particular matters that would affect the employer as part

of a class (e.g., a matter that might affect all manufacturers of a certain class of drugs). As supervisor, you must determine if this required disqualification (sometimes referred to as a recusal) will cause an employee not to participate in a matter that is “central or critical” to the performance of his official duties so that the employee’s ability to perform his or her duties would be “materially impaired.”

For example, an employee is participating in a CRADA with an outside organization, or it is reasonably anticipated that he will be participating in such a CRADA in the near future. The employee now seeks approval to engage in an outside activity with this same company. As explained above, if the outside activity is approved, the employee must disqualify himself from the CRADA. If, however, the CRADA is central or critical to the performance of the employee’s duties, the outside activity would have to be denied. If another similarly qualified employee could be assigned to the CRADA after considering this employee’s workload, and the disqualified employee could be assigned to other matters not involving the CRADA partner, then the outside activity could be approved. In this circumstance, a determination would have to be made that the CRADA was not central or critical the performance of the employee’s duties in order for it to be reassigned.

Each outside activity analysis will be different based on how you expect to staff the project that involves an outside organization from which one or several of your employees is recused. For example, if all of your employees are substantively involved in all projects within the lab, i.e., you require a free flow of information among colleagues and want all of your employees available to consult, then allowing a disqualification may be too disruptive, and the activity should be denied. However, if it can be determined that the requesting employee will not participate in the matter, perhaps because it is well outside her expertise, or your lab is too large to have all employees involved in all projects, then the disqualification will have no effect, and the activity most likely will not conflict and may be approved.

Keep in mind, though, the NIH is not obligated to rearrange work assignments to accommodate outside activity requests. Your duty, and the duty of the employee seeking the outside arrangement, is first and foremost to the NIH and the successful accomplishment of its mission. If an outside activity conflicts with that duty based on the above criteria, the outside activity should not be approved. On the other hand, if the outside activity is approved, it is part of your supervisory responsibilities to monitor your employee’s compliance with any ensuing disqualification. That means, both you and the employee are responsible for maintaining the employee’s compliance with the disqualification. Lastly, a change in circumstance, such as the work demands of the office, may require that the activity be revised or cancelled. Employees should be reminded that they are required to report such changes.

If you have any questions, please call me or Holli Beckerman Jaffe, NIH Ethics Officer.

cc: IC DECs