



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

**Federal Hatch Act Advisory:
Federal Reserve Bank Board of Directors Not Covered**

April 30, 2004

Re: OSC File No. AD-01-xxxx

Dear Mr. _____:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. The Office of Special Counsel is authorized pursuant to 5 U.S.C. § 1212(f) to issue binding opinions under the Act. We apologize for the delay in responding to your request. OSC has received a large number of advisory requests, and we are responding to them as quickly as possible.

Specifically, you asked whether an individual who serves on the board of directors for one of the Federal Reserve Banks is subject to the restrictions of the Hatch Act. As previously explained during telephone conversations with our office, we have concluded that an individual who serves on the board of directors for a Federal Reserve Bank is not covered by the restrictions of the Act.

The Hatch Act, 5 U.S.C. §§ 7321-7326, governs the political activities of individuals employed or holding office within the federal executive branch. Specifically, section 7322 provides that the Act applies to “any individual, other than the President and the Vice President, employed or holding office in – (A) an Executive agency other than the General Accounting Office.”¹

In 1913, the Federal Reserve Act created the Federal Reserve System to serve as the Nation’s central bank. See 12 U.S.C. § 221 et seq. As such, its major responsibility is the execution of monetary policy that contributes to the strength and vitality of the U.S. economy. Within the Federal Reserve System, the Federal Reserve Act created 12 Federal Reserve Banks.

¹ Prior to the 1993 Amendments, the Act’s restrictions applied to “an employee in an Executive agency or an individual employed by the government of the District of Columbia.” 5 U.S.C. § 7324(a)(1) (1992). In 1993, Congress amended the Act and added the language “holding office” to the definition of those individuals who are subject to the restrictions of the Act. 5 U.S.C. § 7322 (2003).

The Federal Reserve Act requires each of the 12 Federal Reserve Banks to be “conducted under the supervision and control of a board of directors.” 12 U.S.C. § 301. Each Reserve Bank has nine directors, who represent the interests of their Reserve District for a term of three years. 12 U.S.C. § 308. The nine directors of each Reserve Bank are divided equally into three designated classes: class A, class B, and class C. 12 U.S.C. § 302. The six directors of class A and class B are elected by the stockholding member banks; while the three class C directors are appointed by the Federal Reserve Board of Governors. 12 U.S.C. §§ 304, 305. The board of director positions are part-time positions.

Pursuant to the Federal Reserve Act, the board of directors shall administer the affairs of the Federal Reserve bank. Their responsibilities include: contributing to the formulation of monetary policy, commenting on major organizational changes, appraising management performance, and reviewing officers’ salaries. 12 U.S.C. § 301. The directors also approve all Federal Bank officers and select their District’s representative each year to the Federal Advisory Council. In addition, the Reserve Bank directors establish their District’s discount rate at least once every 14 days, subject to the Board of Governors’ approval. *Id.*

As explained above, the Hatch Act restricts the political activities of any individual employed or holding office in a federal executive agency. The Act does not further define the terms “employed” or “holding office.” In addition, the legislative history of the Act is void of any reason or explanation of what Congress meant by the terms “employed” or “holding office.” Lastly, there is no case law interpreting the terms in section 7322(1), nor are the Act’s regulations, 5 C.F.R. Part 734, instructive.

Therefore, OSC examined other sources for guidance as to what Congress intended by the terms “employed” or “holding office.” Title 5 of the United States Code defines the terms “employee” and “officer.” Specifically, section 2104 provides that an “officer” is an individual who meets three criteria. First, the individual is “required by law to be appointed in the civil service” by one of the following acting in an official capacity: the President; a court of the United States; the head of an Executive agency; or the Secretary of a military department. 5 U.S.C. § 2104(a)(1). Next, the individual must be “engaged in the performance of a Federal function under authority of law or an Executive act.”

5 U.S.C. § 2104(a)(2). Third, the individual must be “subject to the supervision of [an individual named in section 2104(a)(1)] while engaged in the performance of the duties of this office.” 5 U.S.C. § 2104(a)(3).

Similarly, section 2105 provides that an “employee” is an individual who meets three criteria. First, the individual must have been “appointed in the civil service” by a person with appropriate appointing authority.² 5 U.S.C. 2105(a)(1). Second, the individual must be “engaged in the performance of a Federal function under authority of law or an Executive act.” 5 U.S.C. § 2105(a)(2). Third, the individual must be “subject to the supervision of an individual

² Persons with appropriate appointing authority include the President, a Member of Congress, and other individuals who are employees under § 2105. 5 U.S.C. § 2105(a)(1).

[with appropriate appointing authority] while engaged in the performance of the duties of this position.” 5 U.S.C. § 2105(a)(3).

Using the above definitions as guidance, we have concluded that any individual “employed” or “holding office” within the executive branch of the federal government must, in addition to other requirements, be “appointed in the civil service.” The General Counsel’s Office of the Federal Reserve System explained that none of the individuals who serve on the board of directors for a Federal Reserve Bank is appointed to the federal civil service system by a person with appropriate appointing authority as described above. On the contrary, the General Counsel’s Office stated that the board of directors consists of private sector individuals; they are not considered federal employees or officers.

Based on the above, we have concluded that an individual who serves on the board of directors for a Federal Reserve Bank is not an individual who is “employed” or “holding office” in an executive branch agency.³ Consequently, the individual is not subject to the restrictions of the Hatch Act.

Please be advised, however, that since 1915 the Federal Reserve Board of Governors has imposed restrictions on the political activities of the Federal Reserve Bank board of directors. Therefore, you may wish to consult the appropriate agency officials at the Federal Reserve System for more information concerning the political limitations imposed on an individual who serves as a Federal Reserve Bank board director.

Please contact me at (202) 254-3667 if you have any further questions.

Sincerely,

/s/

Amber A. Bell
Attorney, Hatch Act Unit

³ This conclusion appears to be consistent with the language found in 18 U.S.C. § 208. In section 208, Congress defines which individuals are subject to the penalties in 18 U.S.C. § 216. Section 208 provides, in relevant part: “whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, . . .” If Federal Reserve bank directors were considered officers or employees of the executive branch, there would have been no reason for Congress to specifically name them in section 208.