

OFFICE OF GOVERNMENT ETHICS

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**Letter to a Deputy Ethics Official
dated July 20, 2004**

This is in response to your letter of May 28, 2004, in which you requested our opinion as to whether the Executive Director of [your agency] is a "covered noncareer employee" as defined in 5 C.F.R. § 2636.303(a).

In your letter, in which you provided background on the roles and responsibilities of [your agency's Board] and the Executive Director, you indicated that [your agency's Board] consists of five part-time Presidentially appointed members who oversee the agency. This Board appoints an Executive Director to serve as the full-time chief executive of the agency. The Executive Director is responsible for carrying out the policies established by your agency's Board, [administering specific agency programs], and issuing regulations. While the Executive Director is charged with the day-to-day operations of the agency, your agency's Board can order the Executive Director to take a specific action. The Executive Director can serve in the position indefinitely, unless removed from office by your agency's Board for good cause.

The definition of covered noncareer employee in section 2636 focuses on both the employee's pay rate and type of appointment. For purposes of pay, a covered noncareer employee is an employee for whom the rate of basic pay is equal to or greater than 120 percent of the minimum rate of pay payable for GS-15 of the General Schedule, which is currently \$104,927. The Executive Director is paid at the rate of level III of the Executive Schedule, which is currently \$145,600, and thus meets the pay criteria under section 2636.303(a).

For purposes of type of appointment, the regulations at sections 2636.303(a)(1) - 2636.303(a)(4) specify under which appointment authorities employees will be considered covered noncareer employees. You have asked if the Executive Director would be a "covered noncareer employee" under either of two provisions in that regulation, specifically section 2636.303(a)(3), if he were appointed to his position "under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in

section 213.3301 of this title for Schedule C positions;" or section 2636.303(a)(4) if he were appointed to his position under appointment criteria "essentially the same as those for noncareer executive assignment positions."

With regard to section 2636.303(a)(3) you have indicated that the Executive Director position is not a Schedule C position, but question whether he may have been appointed "under criteria essentially the same as that set forth in section 213.3301 of this title for Schedule C positions." The criteria at section 213.3301 focus on positions that are policy-determining or involve a close and confidential working relationship with key appointed officials. After consulting with the Office of Personnel Management, we conclude that the Executive Director is not appointed under criteria similar to a Schedule C position. Since the Executive Director's duties, as stated at 5 U.S.C. § 8474(b)(1), include carrying out the policies that are established by the Board, he does not appear to occupy a policy-determining position. The criteria for determining whether a position involves a close and confidential working relationship with key appointed officials, focuses on whether the individual is appointed by the President, or someone else who is appointed by the President, and whether the individual may be removed from office at the will of the appointing official. As you state in your letter, the agency's Presidentially-appointed Board appoints the Executive Director, who may be removed from office for good cause, 5 U.S.C. § 8472(g)(1)(C). Therefore, while the Executive Director is appointed in a manner consistent with a Schedule C appointment, the conditions for his removal are not the same as the "at will" conditions for removal of a Schedule C appointee.

With regard to section 2636.303(a)(4), we note first that the executive assignment system was abolished by the Federal Employees Pay Comparability Act of 1990 and replaced by the Senior Level system. However, we can still examine the appointment criteria to determine whether the Executive Director position would fall under section 2636.303(a)(4). Former regulations at 5 C.F.R. § 305.601(b) set forth three criteria to consider when determining whether a noncareer executive assignment could be made. These criteria, which include being deeply involved in the advocacy of Administration programs and support of their controversial aspects; participating significantly in the determination of major political policies of the Administration; or serving principally as personal assistant to or advisor of a Presidential appointee or other key figure, do not appear applicable to the Executive Director

position. Moreover, former section 305.601(c) indicated that a position does not qualify to be filled by noncareer executive assignment if its principal responsibility is the internal management of an agency, or if it involves long-standing recognized professional duties and responsibilities resting on a body of knowledge essentially politically neutral in nature. The Executive Director position appears to meet both these factors since he is responsible for the day-to-day operations of the agency and management of [a specific agency program] in accordance with the policies established by the Board.

In addition, when we identify a position as "noncareer," we are typically referring to a political appointment. In this case, while your Executive Director is appointed by the Presidentially-appointed Board, the position is for an indefinite period, not subject to political changes in Administrations. Also, you have indicated through telephone discussions that the Executive Director position demonstrates some characteristics similar to a career employee, such as the accrual of leave and participation in the Federal Employees Retirement System.

Therefore, we conclude that the Executive Director would not be a noncareer employee covered under either of the provisions in section 2636.303(a) about which you inquired. However, we still caution that given the Executive Director's role in your agency, he should remain particularly mindful of 5 C.F.R. §§ 2635.801 - 2635.808 regarding outside activities.

We hope this has been helpful.

Sincerely,

Marilyn L. Glynn
Acting Director