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MEMORANDUM FOR PATRICK MCDONOUGH
EXECUTIVE DIRECTOR
JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

FROM: Kirsten N. Witter
Chief, Ethics and General Government Law Branch (GLS)

SUBJECT: Joint Board Regulations and Conflict of Interest Issues Relating to Advisory Committee Members

This responds to your questions regarding: (1) the authority of the Joint Board for the Enrollment of Actuaries (Joint Board) to institute fees to process initial application forms and to increase current renewal application fees; (2) the permissibility of posting a roster of enrolled actuaries on the Joint Board's website; and (3) the permissibility of IRS employees serving on the Joint Board's Advisory Committee on Actuarial Examinations (Advisory Committee). For a response to your second question, please see the attached memorandum from the Office of Disclosure and Privacy Law. As described in detail below, the Joint Board may institute or change user fees only by regulation and must state the amount of the fee, either as a specific amount or rate, in the regulation. Additionally, we are of the opinion that where Service employees observe the Office of Government Ethics' Standards of Ethical Conduct for Employees of the Executive Branch (OGE Standards), they may serve on the Advisory Committee.

Authority to Implement User Fees

At this time, the Joint Board does not charge anything to process initial applications for the enrollment of actuaries and charges $25 to process renewal forms from currently enrolled actuaries. It is our understanding that the Joint Board hopes to institute a new fee for the processing of initial applications and to increase the renewal fee to $250 in order to reflect the actual cost of processing these applications. You have asked us to address how the Joint Board can institute these user fee changes. As explained in detail below, the Joint Board must issue regulations to institute a new fee and to increase the current renewal fee. The regulation must specify the amount of the fee in the new regulation.

The authority to charge a user fee is either provided by a specific statute or derived from Title V of the Independent Offices Appropriations Act of 1952 (IOAA), 31 U.S.C. § 9701 ("General User Fee Statute"). While the General User Fee Statute does not expressly require that agencies charge a user fee, the statute does state that "[i]t is the sense of the Congress that each service or thing of value provided by an agency...to a person...is to be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). In furtherance of this statutory goal, the head of each Federal agency is authorized to issue regulations establishing charges for services or things of value provided by the agency to the public. 31 U.S.C. § 9701(b). These regulations must be consistent with policies prescribed by the President. *Id.* Such policies are set forth in OMB Circular A-25, User Charges, 58 Fed. Reg. 38142 (July 15, 1993), and the provisions of the Circular are mandatory for the assessment of all user charges under section 9701. OMB Circular A-25, § 4b; *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349-51 (1974).

In the absence of specific statutory authority, applying for enrolled actuary status is a special benefit for which a fee may be charged under the General User Fee Statute. OMB Circular A-25 requires that user charges be instituted through the promulgation of regulations. OMB Circular A-25, §§ 4b, 7a; *see also Alyeska Pipeline Service Co. v. U.S.*, 624 F.2d 1005, 1010 (Ct. Cl. 1980); *Sohio Transportation Co. v. U.S.*, 766 F.2d 499, 502 (Fed. Cir. 1985). To address the requirements of the OMB Circular A-25 and the related user fee case law described above, the Board should specify any changes to the current renewal fee and any new fees for the processing of initial applications by regulation.[1]

You have asked whether it is permissible to state "a reasonable non-refundable fee may be charged..." as opposed to stating a specific fee amount in the user fee regulations. We are of the opinion that it is not permissible.[2] In setting a user fee pursuant to the General User Fee Statute, a simple statement to the effect that fees will be charged for special services has been held too vague to support fee assessment. *Diapulse Corp. of America v. FDA*, 500 F.2d 75, 79 (2d Cir. 1974). Since rule-making under the Administrative Procedure Act, 5 U.S.C. § 553, must provide the opportunity for public comment, the agency's notice must include, or make available upon request, a reasonable explanation of the basis for the proposed fee. *See Engine Manufacturers Ass'n v. EPA*, 20 F.3d 1177 (D.C. Cir. 1994). Additionally, agencies are responsible for reviewing user charges biennially to ensure that existing charges are adjusted to reflect changes in costs. OMB Circular A-25, § 8(e). In order to comport with these requirements, we are of the opinion that the Joint Board should publish regulations which specify the amount of the fee

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[1] The Board should also ensure that the fee proposed is consistent with the General User Fee Statute requirement that fees are "(1) fair; and (2) based on: (A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U.S.C. § 9701 (b). Generally, if the fee is cost-based, the fee must be sufficient to recover the full cost to the Government of providing the service. OMB Circular A-25, § 6a(2)(a). A provision charging less than full cost may only be made with OMB approval. *Id.*, § 6c(2) and (4).

[2] We recognize § 901.11(d) of the current Joint Board regulations, 20 C.F.R. Part 901, contains similar non-specific language and, to our knowledge, this language has not been challenged.

either as an exact dollar amount or as a particular rate. *Id.* Therefore, in order to comply with the requirements of 31 U.S.C. § 9701 and OMB Circular A-25, the regulation implementing the enrollment and renewal fees should state the specific amount of the fee involved.

Service Employees Serving as Advisory Committee Members

You have also asked us to address whether any ethics or conflict of interest rules would prohibit current Service employees from being members of the Joint Board's Advisory Committee on Actuarial Examinations.[3] It is our understanding that the Advisory Committee is responsible for drafting, rewriting, and updating the three annual enrolled actuary examinations. Advisory Committee members are expected to devote 125 to 175 hours per year, including four annual meetings, to the Advisory Committee on Actuarial Examinations. *Invitation for Membership on Advisory Committee*, 70 Fed. Reg. 30649 (May 30, 2006). While the four annual meetings are conducted during business hours, other work can be completed during evenings and weekends.

Neither the Federal Advisory Committee Act, 5 U.S.C. App. 2, nor its implementing regulations, 41 C.F.R..Part 102-3, prohibit federal employees from serving on federal advisory committees. However, all Service employees are subject to the OGE Standards, which prohibit employees from engaging in outside employment that conflicts with their official duties. 5 C.F.R. § 2635.802. A conflict occurs if the activity is prohibited by statute or agency supplemental regulations (e.g., Treasury Supplemental Standards of Ethical Conduct), or would materially impair the employee's ability to perform her official duties by requiring her disqualification under the conflict of interest or impartiality provisions of the OGE Standards. *Id.*

Generally, employees must obtain prior approval to engage in any outside employment or business activity. 5 C.F.R. § 3101.104(a); *see also* 5 C.F.R. § 2635.803. However, certain activities do not require prior approval as the activity is not considered to be employment. We have generally advised that membership in a civic organization, where such services do not entail the management or operation of a business, is such an activity. Service on a Federal government advisory board is tantamount to participation in a civic organization, and therefore, does not require prior written approval.

The impartiality regulations prohibit an employee from working on an official matter if an organization with which he has a covered relationship is or represents a party to the matter where a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. 5 C.F.R. § 2635.502(a). An employee will have a covered relationship with any organization in which the employee is an active participant. 5 C.F.R. § 2635.502(b)(1)(v).

As active participants on the Board, the Service employees would have a covered relationship with the organization. 5 C.F.R. § 2635.502(b)(1)(v). As the Board can only

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[3] In providing this advice, we are assuming that these individuals are serving on the Advisory Committee in their personal, and not official, capacities.

act through its members, the employees would also have covered relationships with the members of the Joint Board and Advisory Committee. Consequently, absent authorization from their immediate supervisors, they should not participate in their official capacities in any particular matter involving specific parties in which the Joint Board, Advisory Committee, or a member of the Joint Board or Advisory Committee, is a party or represents a party to the matter if a reasonable person with knowledge of the relevant facts would question their impartiality. 5 C.F.R. § 2635.502(a). However, the likelihood of the Joint Board or Advisory Committee becoming a party or representative to a party in a specific matter is remote. Therefore, we do not foresee any impartiality issues arising if Service employees served on the Advisory Committee.

Although we are unaware of any specific prohibition disallowing Service employees to serve on federal advisory committees in a non-official capacity, due to the amount of time involved in being a member of the Advisory Committee, it appears that service on the Committee could conflict with an employee's ability to perform her official duties. *See* 5 C.F.R. § 2635.705(a)(stating that unless authorized by law or regulation, an employee shall use official time in an honest effort to perform official duties.) Because an employee's membership on the Advisory Committee is an outside activity and not a part of the employee's official duties, employees are required to request and receive approval from his or her supervisor to use annual leave or available credit hours when the Board meets during business hours, generally four times per year for 1 – 2 days.

Additionally, unlike other members of the Advisory Committee, any Service employees who serve on the Committee are subject to the OGE Standards which prohibit the disclosure of non-public information to further the interests of another, whether through advice or recommendation, or by knowing unauthorized disclosure. 5 C.F.R. § 2635.703(a). Non-public information is information that the employee gains by reason of Federal employment that he knows or reasonably should know has not been made available to the general public, including information that has not actually been disseminated to the general public and is not authorized to be made available to the public on request. *Id.* at § 2635.703(b). Therefore, any non-public information obtained through the employee's employment with the Service may not be used in furtherance of the Advisory Committee, and employees should use extreme caution to ensure that such non-public information is not disclosed to any other member of the Advisory Committee or Joint Board.

If you have any questions concerning this memorandum, or if we can be of further assistance, please contact Jennifer Hallman of this office at (202) 283-7900.

Attachment

CC: Eva Williams, Management and Program Analyst, Office of the CFO