



Responsible Office:

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## Service or Consulting Agreements Involving Faculty Contracted Through Harvard

### Policy Statement

This policy establishes a process for approving and managing service or consulting agreements that faculty undertake under the auspices of Harvard University, meaning Harvard would be the contracting party. These are agreements under which faculty are obligated to provide specified services or “deliverables” and that do not fall squarely within the traditional framework of research or teaching activities. While these agreements may have research or scholarly benefits, those are a secondary aspect, not the primary purpose of the activity. The terms “service agreement” or “consulting agreement” are intended to be descriptive; such agreements could have many different labels or titles.

In most cases, faculty members who may consider providing services as consultants will do this for their own account on their own time. The University’s preference is for faculty to conduct consulting activities on their own time in accordance with University policy. The University should be the contracting party only when justified by compelling reasons that meet the criteria of this policy. There are occasions, however, when a faculty member is considering providing a service through Harvard University. For example, the activity may have a strong academic component and the faculty member may want to be able to use Harvard facilities, resources, staff or students to assist in its performance. This policy allows for Harvard to act as the contracting party in those exceptional circumstances, but only if the activity in question advances a core academic mission of the faculty member’s school and either provides a significant institutional benefit or a public benefit that is consistent with the University’s mission and charitable status.

By way of illustration, but without limitation, services that faculty may seek to provide under the auspices of Harvard may include:

- Performing an evaluation or assessment of an external program, such as an educational program or public health initiative;
- Establishing rating criteria, such as standards for measuring health or safety outcomes;
- Providing technical assistance to a foreign government in areas such as social, health or economic services;
- Assisting a city government in its urban planning.

## Benefits and Risks

Often, participating in service agreements involves high-profile and challenging projects that may benefit members of the Harvard community by, for example:

- Adding significantly to faculty (and student) expertise;
- Demonstrable connections to curriculum development, new teaching cases, and executive education program development;
- Engaging faculty in domestic and international matters that are highly relevant to their teaching and scholarship;
- Initiating or reinforcing strong institutional relationships that can serve long-term University and school interests.

Though there may be much to recommend the pursuit of these arrangements, especially where there is a substantial potential to advance scholarship and education, these arrangements may also pose risks that need to be managed.

Service arrangements are more complicated for the University to manage than routine sponsored research agreements because of the expectations of the external entities, who perceive themselves as clients rather than sponsors. Such activities are particularly challenging in the natural or physical sciences due to the University's Intellectual Property Policy and Bayh-Dole obligations. Issues to be considered in evaluating service arrangements include the following potential risks:

- Harvard, as the contracting party in these arrangements, bears the risk of liability or reputational harm for non-performance or poor performance of agreed-upon tasks and for unsatisfactory contract "deliverables." Potential contract damages here may reach beyond the payments to Harvard and could include consequential damages, such as lost profits, from the downstream effects of contested performance.
- Unlike in sponsored research arrangements, in which the sponsor may be presumed to be committed to the principles of objective science or the enhancement of the public welfare, "clients" in service arrangements may be more focused on obtaining specific results and may wish to be more involved in directing performance of the services. Institutional integrity and impartiality may be called into question if expectations are not properly managed at the outset.
- The use of Harvard students, post-doctoral candidates, and staff to assist in these projects also raises unique policy issues. Harvard has a duty to students and postdoctoral fellows in particular. They should not be made to work on projects unless the work advances their educational goals.

- The interests of faculty, students, and the institution must be safeguarded in the negotiation of such arrangements to assure them that they may generate and publish works of scholarship, receive proper credit for their work, obtain appropriate intellectual property rights in the work product, and avoid confidentiality or other obligations that may compromise transparency and injure reputations.
- Special attention must be paid to assure that these arrangements comply with Harvard's obligations as a tax-exempt organization.

Because such arrangements pose unique risks in the university setting and are challenging to negotiate, instances where service agreements are made with Harvard as the contracting party are expected to be exceptional, not routine.

### **Statement of Principles and Basic Criteria**

Given the considerations discussed above, service arrangements where Harvard University will be the contracting party must meet the following basic criteria:

- a. The project must (i) advance a core academic mission of the school and (ii) either provide a significant institutional benefit or a public benefit, all as determined by the Dean's approval of the project.
- b. The project must be submitted for a Provostial Review.
- c. If students are to participate in the activity, the school must assure that the activity will provide a learning experience that advances their educational goals, and that students will be free to use and disclose details of the experience in their academic and career pursuits.
- d. The school should ensure that the activity complies with all relevant Harvard policies such as the use of Harvard's name, facilities and resources; use of human subjects; intellectual property rights, etc.
- e. The service arrangement must present manageable and limited risks, generate sufficient revenue to pay for full performance that includes both the direct charges associated with the activity and Harvard's negotiated IDC, and be properly accounted for from a tax perspective, all as determined by Provostial review with the assistance of the Office of the General Counsel (OGC).

### **Statement of Process**

1. When the Provost's Office, the Office for Sponsored Programs (OSP), OGC, or any of the various research administration offices at the schools is asked to assist faculty in negotiating an agreement, the first preference is that such agreements should be structured as consulting agreements between a faculty member, in his or her private capacity, and the external entity. This would *not* allow the faculty to use Harvard resources (other than incidentally) or, ordinarily, to involve staff and students in the work.

2. If this is not possible, but there is a possibility that publishable research may emerge from such a project, the next preferred arrangement would be to work with the outside entity *to re-fashion the project as a sponsored research agreement*. This would allow the project to meet the University's Research Policies and provide for the monitoring and reporting of the progress of the activity through the University's GMAS system. In this case, depending on the sponsor of the project, OSP (or Longwood SPA offices) and/or the Office of Technology Development (OTD) would handle the agreement in the usual manner.
3. If neither of these alternatives can be achieved, then the arrangement may be handled as a service agreement under the following procedures. The first step is for the faculty member to obtain approval of the project from his or her Dean, which will then be sent to the Provost's Office for review. The Dean's approval should be in writing and should indicate the rationale for the arrangement, i.e., the reasons that the project advances a core academic mission of the school and either provides a significant institutional benefit or public benefit. The Dean should also acknowledge and address the risks the arrangement presents to the school, as well as the extent to which the agreement will require use of school resources, including students and/or non-faculty staff. If the project will involve the use of students or post docs, the Dean should address how their interests will be protected consistent with this Policy.
4. Once decanal support is obtained, the proposed arrangement will be reviewed by the Provost's Office. This review will focus on matters such as reputational and other risks and risk mitigation strategies, feasibility, use of the Harvard name, restrictive privacy and confidentiality clauses that prohibit communications about the work product or restrict the ability of faculty or students to use and publish their own work. The Provost's Office may recommend that a school level committee or board be established to evaluate the work product and review the academic/scholarly merits/value of said (?)work product. In the event of disagreement between the Dean and faculty on the one hand, and those conducting Provostial review on the other, the Provost will be called upon for his judgment and direction. If the outcome of this review is a decision to proceed, this information will then be communicated back to the school and to OGC.
5. OGC will negotiate these agreements and assure that the appropriate tax officials at Harvard undertake the UBIT (Unrelated Business Income Tax) analysis of the project and will confer with the Treasurer's Office regarding any limitations imposed by the financing of the Harvard facilities proposed for use in the project. Schools will be responsible for implementing the necessary accounting procedures that OGC recommends. In negotiating these agreements, OGC will ensure at least the following unless the school requests, and the Provost's Office grants, an exception:
  - a. Harvard will give no indemnity or warranties as to the quality of the work product or as to the timeliness of performance;
  - b. Harvard may allow the external entity to own the copyrights or other intellectual property rights generated in the course of the services, but the client must grant Harvard and other non-profit entities, at a minimum, a royalty-free license to permit its faculty and staff to use the work product for teaching, research, and publication

- after a defined reasonable interval, most often limited to no more than 60 days. If Harvard intends to grant copyright ownership or other rights in the work product to the external entity, the project may not proceed if the faculty, students, and others whose copyrighted works or other rights are not automatically owned by the University are not willing to assign the copyrights or other rights to Harvard by means of a written assignment prepared by OGC and administered by the school;
- c. Harvard may agree to keep its work product confidential (subject to standard confidentiality exceptions), but faculty and staff will gain, after a reasonable interval, most often limited to 120 days and preferably a shorter period, the ability to use and disclose information they have generated for teaching and research purposes. (Students and post docs should not be asked to work under confidentiality obligations other than obligations that may flow from professional or legal requirements, such as those applicable to law or medical students.) Harvard may agree to maintain confidentiality for a period longer than 120 days for defined, demonstrably sensitive information, such as human resources records, identifiable employee personal health or financial information, corporate or enterprise financial information, trade secrets of the external entity, or other private commercial information that may become known to Harvard faculty, students, or staff in the course of providing services, but that has no significance to the academic or scholarly work of these individuals;
  - d. Harvard will have the right to terminate the contract without liability in the event that one or more of the project's key personnel leave the University or are otherwise unavailable to perform the work.
6. If OGC identifies important institutional interests that may be compromised by contract demands of the external entity, OGC should call upon the following parties, as appropriate, for advice and direction: faculty members, school officials, and the Provost's Office. Issues relating to projects with significant international activities should also be referred to the Vice Provost for International Affairs.
  7. Once negotiations have concluded, the contract should be signed by the appropriate school authorized official. The school will be responsible for maintaining the contract and for monitoring performance.

## Definitions

**Bayh-Dole Act or University and Small Business Patent Procedures Act** -- United States legislation dealing with intellectual property arising from federal government-funded research. The Bayh-Dole Act, was passed in 1980 in an effort to encourage the commercialization of inventions made within federally-funded research programs. It allows universities, non-profit organizations, and small businesses to elect to retain title to inventions resulting from federally-sponsored research, and it also allows these institutions to exclusively (or non-exclusively) license the technologies to the marketplace for the public good.

**Unrelated Business Income Tax (UBIT)** -- Section 513 of the Internal Revenue Code defines an "unrelated business" as an activity which is regularly conducted and not substantially related to the purpose for which the nonprofit organization was granted its exempt status. Subject to

certain statutory exclusions and modifications, any income from such unrelated business income activity that exceeds its allowable deductible expenses is subject to unrelated business income tax. Annually, the University is required to report and remit any UBIT to the IRS.

## **Contacts & Subject Matter Experts**

Grants and Contracts Officers  
Office of Sponsored Programs/Sponsored Program Administration

Office of the General Counsel

## **Related Resources**

Conflict of Interest Policy  
Statement on Outside Activities of Holders of Academic Appointments  
Publication Policy  
OTD Consulting Guidance  
Harvard University Employee Manual  
Criteria and Procedures for Provost's Review of New Projects or Grants  
Statement of Principles Governing Commercial Activities of Harvard University, with application to Partnerships between the University and Outside Organizations  
Statement on Outside Activities of Holders of Academic Appointments  
IP Policy

## **Revision History**