



Memorandum from the Office of the Inspector General

October 7, 2021

Those listed

REQUEST FOR FINAL ACTION – EVALUATION 2021-17259 – EXTERNAL ORGANIZATIONS BOARD PRACTICE

Attached is the subject final report for your review and final action. Your written comments, which addressed your management decision, have been included in the report. Please notify us when final action is complete. In accordance with the Inspector General Act of 1978, as amended, the Office of the Inspector General is required to report to Congress semiannually regarding evaluations that remain unresolved after 6 months from the date of report issuance.

If you have any questions or wish to discuss our findings, please contact Lindsay J. Denny, Evaluations Manager, at (865) 633-7349 or E. David Willis, Director, Evaluations, at (865) 633-7376. We appreciate the courtesy and cooperation received from your staff during the evaluation.

David P. Wheeler
Assistant Inspector General
(Audits and Evaluations)

William B. Killbride
Kenneth E. Allen
A.D. Frazier
Beth Harwell
Brian Noland

John L. Ryder
Jeff W. Smith
David B. Fountain
Jeffrey J. Lyash

LJD:FAJ

Attachment

cc (Attachment):

Robert M. Deacy, Sr.
Donald A. Moul
Jill M. Matthews
Ronald R. Sanders II
Michael D. Skaggs
Rebecca C. Tolene
Kay W. Whittenburg
OIG File No. 2021-17259



Office of the Inspector General

Evaluation Report

To the TVA Board of Directors;
the President and Chief
Executive Officer; and the
Executive Vice President and
General Counsel

EXTERNAL ORGANIZATIONS BOARD PRACTICE

Evaluation Team
Lindsay J. Denny
Jeffrey T. McKenzie

Evaluation 2021-17259
October 7, 2021

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
BACKGROUND.....	1
OBJECTIVE, SCOPE, AND METHODOLOGY	2
FINDINGS	3
WE FOUND NO EVIDENCE TVA WAS OUT OF COMPLIANCE WITH THE EXTERNAL ORGANIZATIONS BOARD PRACTICE.....	3
OPPORTUNITIES FOR IMPROVEMENT.....	5
RECOMMENDATIONS	6

APPENDIX

MEMORANDUM DATED OCTOBER 1, 2021, FROM DAVID B. FOUNTAIN TO
DAVID P. WHEELER



Evaluation 2021-17259 – External Organizations Board Practice

EXECUTIVE SUMMARY

Why the OIG Did This Evaluation

In November 2016, the Tennessee Valley Authority (TVA) Board of Directors approved the TVA Membership in External Organizations Board Practice to provide more definitive guidance as to limitations applicable to TVA's participation in external organizations. According to the Board Practice, TVA maintains memberships in various external organizations that typically have specialized expertise in a particular area, provide unique services, bolster TVA's ability to carry out projects or activities, or otherwise advance the TVA mission in some appropriate manner.

According to TVA, memberships in external organizations allow for the sharing of best practices, familiarization with lessons learned by other members, and the ability to pool resources for research and analysis. The Board Practice guidance allows for TVA to participate in any external organization that it determines can assist TVA in the advancement of its statutory or corporate mission. However, these organizations are not allowed to lobby on behalf of TVA or represent TVA in litigation without specific authorization.

In response to requests from stakeholders, we scheduled an evaluation to determine if TVA complied with the 2016 Board Practice regarding memberships in external organizations.

What the OIG Found

We found no evidence TVA was out of compliance with the TVA Membership in External Organizations Board Practice. We did not identify any evidence of direct lobbying or litigation on behalf of TVA; however, the external organizations do not administratively segregate TVA's funds, so we were unable to determine if the funds were used for lobbying or litigation. We also found all contracts or membership agreements contained required language limiting the use of TVA funds for prohibited activities such as litigation or lobbying; however, TVA does not have a contract or membership agreement with one external organization.

We also identified opportunities for improvement related to TVA's management of memberships in external organizations. Specifically, we determined TVA could (1) provide training of employees participating in committee or leadership roles in external organizations and (2) benefit from the coordination of all memberships in external organizations with the Office of the General Counsel to confirm all legal and ethical requirements are met.



Evaluation 2021-17259 – External Organizations Board Practice

EXECUTIVE SUMMARY

What the OIG Recommends

We made recommendations to TVA management regarding the (1) incorporation of a contract or membership agreement with one external organization, (2) implementation of a training program, and (3) coordination of all memberships in external organizations. Our detailed recommendations are listed in the body of this report.

TVA Management's Comments

In response to our draft report, TVA management agreed with the recommendations. See the Appendix for TVA's complete response.

BACKGROUND

In November 2016, the Tennessee Valley Authority (TVA) Board of Directors approved the TVA Membership in External Organizations Board Practice to provide more definitive guidance as to limitations applicable to TVA's participation in external organizations. According to the Board Practice, TVA maintains memberships in various external organizations that typically have specialized expertise in a particular area, provide unique services, bolster TVA's ability to carry out projects or activities, or otherwise advance the TVA mission in some appropriate manner. The external organizations within the scope of this evaluation provide, or have provided, TVA with services related to the development and implementation of environmental regulations, as well as regulatory advocacy, regulatory analysis, and compliance assistance. According to TVA, these groups allow for the sharing of best practices, familiarization with lessons learned by other members, and the ability to pool resources for research and analysis. The Board Practice guidance allows TVA participation in any external organization that it determines can assist TVA in the advancement of its statutory or corporate mission. However, these organizations are not allowed to lobby on behalf of TVA or represent TVA in litigation without specific authorization.

The Lobbying Disclosure Act requires a lobbyist or the organization employing a lobbyist register with the Secretary of the Senate and the Clerk of the House of Representatives no later than 45 days after the first lobbying contact and each registrant must file a quarterly activity report. A lobbying contact is defined as any oral or written communication to a covered executive branch official¹ or a covered legislative branch official² made on behalf of a client regarding:

- The formulation, modification, or adoption of federal legislation.
- The formulation, modification, or adoption of a federal rule, regulation, executive order, or any other program, policy, or position of the United States Government.
- The administration or execution of a federal program or policy.
- The nomination or confirmation of a person for a position subject to confirmation by the Senate.

¹ A covered executive branch official includes, but is not limited to, (1) the President, (2) the Vice President, (3) any officer or employee, or any other individual functioning in their capacity, in the Executive Office of the President, and (4) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of Title 5, United States Code.

² The term covered legislative branch official means (1) a member of Congress, (2) an elected officer of either House of Congress, (3) any other legislative branch employee serving in a position described under section 109 (13) of the Ethics in Government Act of 1978 (5 U.S.C. App.), and (4) any employee of, or any other individual functioning in the capacity of an employee of (a) a member of Congress, (b) a committee of either House of Congress, (c) the leadership staff of the House of Representatives or the leadership staff of the Senate, (d) a joint committee of Congress, and (e) a working group or caucus organized to provide legislative services or other assistance to members of Congress.

A lobbying contact does not include communication made in response to notices soliciting communications from the public.

In response to requests from stakeholders, we scheduled an evaluation to determine if TVA complied with the 2016 Board Practice regarding memberships in external organizations.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our evaluation was to determine if TVA complied with the TVA Membership in External Organizations Board Practice. Our scope included memberships from November 2016 through May 2021 for the following external organizations: Utility Air Regulatory Group, Utility Water Activities Group, Utility Solid Waste Activities Group, Climate Legal Group, Clean Air Act Monitoring Service, and the Power Generators Air Coalition.³ To achieve our objective, we:

- Interviewed TVA employees and individuals associated with external organizations to understand the benefit provided by TVA's membership in these organizations.
- Obtained contracts, by-laws, or membership agreements for external organizations to review for language required by the Board Practice.
- Reviewed TVA Board meeting minutes to identify if specific authorization was requested or granted at any time for external organization to lobby or litigate on TVA's behalf.
- Searched registration and quarterly activity reports of the Secretary of the Senate and Clerk of the House of Representative records to identify lobbying on behalf of the external organizations.
- Researched public legal electronic records to determine if external organizations have participated in litigation and if so, whether TVA was named as a litigant in these legal actions.
- Determined what, if any, steps external organizations took to ensure TVA money was not spent for lobbying or litigation.
- Reviewed documentation provided by an external organization to determine if their lobbying efforts were on behalf of TVA.

We performed this evaluation in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation*.

³ The stakeholder request specifically named the first five organizations in our scope. At the time we initiated our evaluation, TVA no longer maintained a membership in the Clean Air Act Monitoring Service and had replaced it with Power Generators Air Coalition, so we also included them in our scope.

FINDINGS

We found no evidence TVA was out of compliance with the TVA Membership in External Organizations Board Practice. We did not identify any evidence of direct lobbying or litigation on behalf of TVA; however, the external organizations do not administratively segregate TVA's funds, so we were unable to determine if the funds were used for lobbying or litigation. We found all contracts or membership agreements contained required language limiting the use of TVA funds for prohibited activities such as litigation or lobbying; however, TVA does not have a contract or membership agreement with one of the six external organizations.

We also identified opportunities for improvement related to TVA's management of memberships in external organizations. Specifically, we determined TVA could (1) provide training of employees participating in committee or leadership roles in external organizations and (2) benefit from the coordination of all memberships in external organizations with the Office of the General Counsel (OGC) to confirm all legal and ethical requirements are met.

WE FOUND NO EVIDENCE TVA WAS OUT OF COMPLIANCE WITH THE EXTERNAL ORGANIZATIONS BOARD PRACTICE

We determined all contracts or membership agreements contained required language limiting the use of TVA funds for prohibited activities such as litigation or lobbying; however, TVA does not have a contract or membership agreement with one external organization. Additionally, we did not identify any litigation⁴ activities on behalf of TVA by any of the three organizations that engaged in such representation. We did identify registered lobbying activity on behalf of one external organization; however, we did not identify any documents or materials suggesting that any organization lobbied on behalf of TVA. Therefore, we found no evidence TVA was out of compliance with the External Organizations Board Practice.

All Contracts or Membership Agreements Contained Required Language; However, TVA Does Not Have a Contract or Agreement With One Organization

The Board Practice states that "To the extent possible, TVA shall require language in any membership agreement limiting the ability of an external organization to use TVA resources for a purpose inconsistent with TVA's authorizing legislation; such prohibited activities shall include lobbying efforts and litigation without specific authorization." We found that all contracts or membership agreements included language indicating (1) TVA funds were not to be used for litigation or lobbying activities, and/or (2) the external organization

⁴ The organizations sometimes submitted written comments to Congress or federal regulatory bodies such as the Environmental Protection Agency. These comments were in response to requests for public comment as provided for in legislative frameworks such as the Administrative Procedures Act and, therefore, did not fall under the commonly accepted definitions of litigation or lobbying.

may not represent TVA before any judicial, legislative, or other body, or take any legal or policy positions on behalf of TVA.

For one external organization in our evaluation scope, TVA did not have a membership agreement or contract in place;⁵ therefore, the suggested language from the Board Practice is not expressly stated. We did not identify any lobbying or litigation activities by this specific organization; however, a contract or membership agreement including the Board Practice language would more clearly demonstrate TVA's position on those issues.

Litigation

Each organization in our evaluation scope engaged in some level of legal services provided to its members. TVA specifically solicited and received legal services related to matters such as rule interpretation, comparison of technical practices to other members, legislative and regulatory tracking, and other manner of advice from subject matter experts. These groups occasionally represented members in legal disputes, although only three of the organizations engaged in litigation during the period we evaluated. We did not identify any litigation activities on behalf of TVA by any of the three organizations that engaged in such representation. There were no court filings by any of the three organizations that identified TVA as a represented party during this period, and none of the more than 100 lawsuits where TVA was a litigant included any of the six organizations as a party in any capacity. In addition, we noted TVA's recusal from discussions involving litigation on behalf of organizational members. We found no documents indicating TVA's participation in potential litigation.

Lobbying

As mentioned previously, according to the Lobbying Disclosure Act of 1995, no later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, such lobbyist shall register with the Secretary of the Senate and the Clerk of the House of Representatives and must file a quarterly activity report. Our search of quarterly activity reports identified only one organization in our evaluation scope that participated in lobbying. This organization reported its lobbying expenses to be less than \$50,000 during the 4 1/2 years we reviewed. In the second quarter of 2021, the registration was terminated on behalf of this organization, and public filings do not indicate any subsequent lobbying during the time frame of our review.

TVA's contract with this organization included language that prohibited the organization from using TVA funds for litigation or for lobbying the federal government, and by executing this agreement, the organization certifies it uses no federal funds for lobbying or litigation. During interviews, representatives of the organization stated that although they did engage in lobbying activities, those efforts were not on behalf of TVA. Lobbying activities may be oral, but could include a written component. We did not find any documents or materials

⁵ TVA pays an annual membership fee to this organization, which has by-laws in place constraining the initiation of litigation.

suggesting the organizations advocated on behalf of TVA. Likewise, we were unable to find any materials that cast the organization's statement that it did not lobby on behalf of TVA in doubt or that it would have any reason to deviate from its contractual obligation to TVA. However, the organization indicated there were no specific controls or mechanisms to separate TVA funds from those used to support their lobbying efforts.

OPPORTUNITIES FOR IMPROVEMENT

We identified opportunities for improvement related to TVA's management of memberships in external organizations. Specifically, we determined TVA could (1) provide training of employees participating in committee or leadership roles in external organizations, and (2) benefit from the coordination of all memberships in external organizations with the OGC to confirm compliance with all legal and ethical requirements.

TVA Employees Could Benefit From Training

We identified instances where TVA employees serving in leadership roles in member committees of the organizations engaged in ministerial activities such as transmitting budgets requests and action lists. However, we did not identify any indications that TVA employees engaged in substantive activities related to directing or funding litigation or lobbying.

TVA employees could benefit from training before participating in committee or leadership roles in external organizations where it is necessary to be mindful of TVA policies and its unique role as a federal entity. In particular, it could be helpful to provide these TVA employees a meaningful framework around the federal guiding ethics principle that they shall not knowingly make unauthorized commitments or promises of any kind binding the government. This could reduce the risk that a reasonable member of the public reviewing such ministerial communications without appropriate context might infer a greater level of participation than merited.

TVA Could Benefit From Coordination of Memberships

TVA does not currently have a formalized process that includes a conflict of interest review for participation in external organizations. To avoid potential conflicts of interest and to ensure TVA's OGC, which houses the TVA ethics program, is aware of all participation in external organizations, TVA could benefit from the coordination of all memberships in external organizations with OGC to confirm compliance with all legal and ethical requirements. This step would also allow the creation and maintenance of a comprehensive list of all such employee participation.

- - - - -

While we did not identify any violations of the Board Practice, we believe these changes could help TVA be proactive in maintaining compliance with the Board Practice.

RECOMMENDATIONS

We recommend the Executive Vice President and General Counsel:

- Implement an agreement, for the external organization with no contract or membership agreement, to include specific language prohibiting the use of TVA funds for lobbying or litigation, as is included in other membership agreements or contracts.
- Implement a training program for employees involved in external organizations to educate them on the boundaries of their participation as a TVA employee.
- Implement a policy for coordination of TVA memberships in external organizations which includes a (1) review for compliance with all legal, ethical, and governance requirements and (2) centralized record of all employees participating in external organizations.

TVA Management's Comments – TVA management agreed with the recommendations. See the Appendix for TVA's complete response.

October 1, 2021

David P. Wheeler, WT 2C-K

MANAGEMENT RESPONSE - EVALUATION 2021-17259 – EXTERNAL ORGANIZATIONS BOARD
PRACTICE

Our response to your request for comments regarding the subject draft report is attached. Please let us know if your staff has any concerns with TVA's comments.

We would like to thank Lindsay Denny and Jeff McKenzie for their professionalism and cooperation during this evaluation.



David Fountain,
Executive Vice President and General Counsel and Designated Agency Ethics Official
WT 6A-K

JEB:CSH

Cc (Attachment):

William B. Kilbride
Kenneth E. Allen
A.D. Frazier
Beth Harwell
Robert M. Deacy, Sr.
Ronald R. Sanders II
Rebecca C. Tolene
OIG File No. 2021-17259

John Ryder
Jeff W. Smith
Jeffrey J. Lyash
Brian Noland
Donald A. Moul
Michael D. Skags
Kay W. Whittenburg

Evaluation 2021-17259
External Organizations Board Practice
Response to Request for Comments

ATTACHMENT A
Page 1 of 1

	Recommendation	Comments
1	Implement an agreement, for the external organization with no contract or membership agreement, to include specific language prohibiting the use of TVA funds for lobbying or litigation, as is included in other membership agreements or contracts.	Management agrees.
2	Implement a training program for employees involved in external organizations to educate them on the boundaries of their participation as a TVA employee.	Management agrees.
3	Implement a policy for coordination of TVA memberships in external organizations which includes a (1) review for compliance with all legal, ethical, and governance requirements and (2) centralized record of all employees participating in external organizations.	Management agrees.