

*Making an Impact on U.S. Manufacturing*

# Oversight Board Standards

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## TABLE OF CONTENTS

Background .....	3
Types of Boards.....	3
By-laws & Conflicts of Interest .....	5
Term Limits.....	7
Additional Requirements.....	7
Serving as Vendor or Subawardee to Center and Serving on Board .....	7
Center Staff Serving as Board Members .....	8
Structure of the Board Reporting.....	8
Number of Board Meetings.....	8

## Background

The Hollings Manufacturing Extension Partnership (MEP) program, administered by the National Institute of Standards and Technology (NIST), is a public-private partnership with Centers in all 50 states and Puerto Rico dedicated to serving small and medium-sized manufacturers.

MEP's authorizing statute, codified at 15 USC 278k, specifies the activities and operation of the program. In particular, 15 USC 278k(k) requires MEP Centers to establish boards to oversee the operations of the Center (Oversight Boards or Boards) as a condition of receiving a federal financial assistance award, and for the NIST Director to establish appropriate standards for those Boards. The MEP statute provides that the standards address:

1. Membership;
2. Board composition;
3. Term limits;
4. Conflicts of interest; and
5. Such additional requirements as the Director considers necessary.

The MEP statute also requires that Oversight Boards establish and submit to the Director by-laws to govern the operation of the Board. See 15 U.S.C. 278k(k)(4).

These Oversight Board Standards supplement and should be read in conjunction with the Oversight Board requirements contained in 15 U.S.C. 278k(k) and in Section 6, Oversight Boards, of the MEP Center General Terms and Conditions (2017). Additionally, if an MEP Center's Oversight Board does not satisfy the requirements of Section 6 of the MEP General Terms and Conditions (2017) or this document at any time during the term of an MEP Center cooperative agreement, the Center must promptly disclose the deficiencies to the NIST Federal Program Officer (FPO) and NIST Regional Manager (RM), and must ensure that its Oversight Board conforms to the requirements set forth herein within 90 calendar days from the initial date of the noncompliance, unless such time period is otherwise extended by the NIST Grants Officer based on a written request from an MEP Center.

## Types of Boards

The MEP statute and NIST recognize that the type and organizational structure of an MEP Center affects the type of Board that a Center uses. Within the MEP National Network, multiple types of organizations are recipients of MEP Center cooperative agreements, and, as set forth in this document, NIST has established varying Oversight Board standards depending on the type and characteristics of the Non-Federal Entity receiving an MEP Center cooperative agreement.

Accordingly, the following classifications apply in determining the Oversight Board requirements applicable to the recipient of an MEP Center award:

1. Non-profit organizations where the MEP program is a primary activity of the organization (Category 1);
2. Non-profit organizations where the MEP program is not a primary activity of the organization (Category 2);
3. Institutions of higher education (Category 3); and

#### 4. State, Territory, Tribal or local governments (Category 4).

For non-profit organizations and institutions of higher education, the existence of a fiduciary board is generally required as part of the process of establishing the organization. For non-profit organizations, the fiduciary board typically is the governing body for the organization. For institutions of higher education, the fiduciary board exists at the highest level of the institution and typically has responsibility for all the institution's programs and activities. These boards are generally known as a Board of Trustees, Board of Regents or have similar titles. For government agencies, the fiduciary aspects of a board are carried out at the agency's executive level and are prescribed by that entity's authorizing legislation, as well as its executive and legislative institutions and practices.

NIST requires that those organizations classified in Category 1 above have an Oversight Board with a fiduciary obligation to the non-profit organization receiving the MEP Center cooperative agreement. For organizations described in Categories 2 through 4 above, the Oversight Board may serve in an advisory capacity to the organization receiving the MEP Center cooperative agreement. In such an advisory capacity, the Oversight Board must provide regular strategic, policy, and programmatic input related to the needs of manufacturers and the local/regional manufacturing community directly to the organization's fiduciary board and/or to the designated representative of the organization via the appropriate management chain (e.g., through a university dean or provost, depending on where in the organization the Center resides). Nothing in these Oversight Board Standards preclude an organization from having both a fiduciary board and an advisory board.

In determining whether the MEP program is a primary activity of a recipient, MEP will consider unique factors and circumstances such as, but not limited to: (1) the proportion of MEP Center funding (both Federal dollars and non-Federal match) relative to the applicant's funding [or budget] for its other programs and activities; and (2) the duration of other funding sources over time. As a general rule, if the MEP program (Federal dollars and non-Federal match) is greater than or equal to 40% of the organization's overall annual budget, NIST considers the MEP program to be the primary activity of the recipient of an MEP Center award. However, an organization may submit a written justification that establishes, to the satisfaction of NIST MEP, that the MEP program is not the primary activity of the organization, notwithstanding that the federal and non-federal funding allocated to the MEP program is equal to or greater than 40% of the organization's overall annual budget. Any such justification will be reviewed by NIST MEP, which will either approve such designation or indicate why it is insufficient.

NIST also recognizes that oversight boards must be compliant with State, U.S. Territory, Tribal and/or local laws that may preclude an Oversight Board from complying with the standards promulgated by the Director. In such cases where State, Territory, Tribal and/or local laws prohibit the recipient from fully complying with the Oversight Board Standards set forth in this document, the recipient of an MEP Center award must promptly notify NIST MEP in writing, providing the reason(s) for deviation and the specific legal citation that requires the deviation.

The following sections address both requirements and best practices for by-laws and conflicts of interest, membership, board composition, term limits, and certain other requirements and best practices identified by the Director in accordance with 15 U.S.C. 278k(k)(2)(C)(v).

## By-laws & Conflicts of Interest

15 U.S.C. 278(k)(4)(A) requires each Oversight Board to adopt and submit to the Director by-laws to govern the operation of the Board. Board by-laws typically cover a wide range of topics including, but not limited to, membership selection and appointment, including term limits, selection and roles of Board officials, meeting procedures, procedures to minimize conflicts of interest, quorum and voting provisions, manner of acting, expenses and reimbursement for board activities, and changes to by-laws.

For Oversight Boards that are required to serve in a fiduciary capacity to the organization receiving an MEP cooperative agreement, the by-laws are generally prepared as part of the incorporation process and subject to periodic amendment. Oversight Boards serving in a fiduciary capacity are required to submit their current by-laws to the Director. Oversight Boards serving in an advisory capacity to the organization receiving an MEP cooperative agreement are also required to adopt and submit by-laws to the Director governing operation of the Oversight Board, although such documents may be termed Governance or Guidance documents or have other appropriate titles.

15 U.S.C. 278(k)(4)(B) requires that an Oversight Board's by-laws include policies to minimize conflicts of interest, including such policies relating to disclosure of relationships and recusal as may be necessary to minimize conflicts of interest. For this purpose, NIST will use as a benchmark the Internal Revenue Service (IRS) guidance on managing conflict of interest ([Compensation and Other Financial Arrangements with Your Officers, Directors, Trustees, Employees, and Independent Contractors](#), [Purpose of Conflict of Interest Policy](#) and [Sample Policy Statement](#)).<sup>1</sup> At a minimum, an Oversight Board will have adopted a policy, conduct regular periodic reviews of the policy and adherence to it, and have the board members sign a statement acknowledging that they have read and understand the policy.

The by-laws, including the conflicts of interest provisions, must comply with the requirements set forth in Section 6 of the MEP General Terms and Conditions (2018) and in these Oversight Board Standards, and must be acceptable in form and substance to the NIST Director and to the NIST Grants Officer. Following its review, NIST will indicate in writing that the by-laws are acceptable or identify any areas of non-compliance or deficiency for resolution by the Non-Federal Entity receiving the MEP cooperative agreement. Importantly, the Non-Federal Entity receiving the MEP Center cooperative agreement has an affirmative obligation to promptly inform and provide copies of any amendments or other changes to its Oversight Board by-laws to NIST MEP.

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<sup>1</sup> See Part V. Compensation and Other Financial Arrangements with Your Officers, Directors, Trustees, Employees, and Independent Contractors and Appendix A of the Instructions for Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (Rev. June 2006), accessible at: <https://www.irs.gov/pub/irs-pdf/i1023.pdf>.

## Board Membership & Composition

15 U.S.C. 278(k)(3) requires that:

1. The membership of each Oversight Board be representative of “stakeholders in the region” in which the Center is located. For this purpose, stakeholders in the region means broadly those manufacturing businesses, other businesses, individuals, and organizations with a vested interest in the activities of the Center in its service region. Oversight Board members should be selected from among those persons whose primary residence is in the region of service, or whose business’ or organization’s primary address is in the region of service; and
2. A majority of the members of the Oversight Board are to be selected from among individuals who own or are employed by small or medium-sized manufacturers. Small or medium-sized manufacturers includes those manufacturers that would be qualified for survey using NIST’s current definition of manufacturers within the region of service and whose facility has under 500 employees at the time the individual joins the board. Ownership or employment means current ownership or employment or ownership or employment within the last 6 months. Such an individual may serve out the remainder of their term of membership as if he/she were the owner or still employed by a small or medium-sized manufacturer. If after 6 months, the individual is not employed at a small or medium-sized manufacturer or does not have ownership in a small or medium-sized manufacturer, then they would be considered representative of non-manufacturing stakeholders. Ex-officio board members with non-voting rights are not considered a part of the calculation for determining if a majority of the members of the board are owners of or employed by small or medium-sized manufacturers.
3. An Oversight Board member may not concurrently serve on more than one MEP Center Oversight Board. See 15 U.S.C. 278k(k)(3)(B).

In addition, NIST has observed over the past 20 years, that the size of effective Oversight Boards typically range from 10 to 40 members. Oversight Boards larger than 20 members typically also have a committee structure, which includes an executive committee to deal with issues between board meetings. A review of relevant literature on board size<sup>2,3,4</sup> suggests that the strategy and purpose of the Center should drive the size of the board and the Center should have a size and committee structure that allows the board to be an active participant in helping the Center achieve its mission and vision.

NIST has further observed that it is often useful to have individuals who can assist the Center Director with strategy, outreach and general business insight. Accordingly, when looking for Oversight Board members many Centers consider representatives from any number of industries such as banking, workforce development, insurance, etc., who may be helpful in providing critical insights into the manufacturing ecosystem within the region of service. NIST also encourages

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<sup>2</sup> BoardSource, <https://boardsource.org/resources/board-responsibilities-structures-faqs/>, accessed May 18, 2017.

<sup>3</sup> BoardSource, Report on the Size, Composition, and Structure of the Board of Regents, Prepared for: Governance and Nominating Committee of the Board of Regents of the Smithsonian Institution, January 26, 2008.

<sup>4</sup> NEO Law Group, <http://www.nonprofitlawblog.com/number-of-directors-whats-the-best-practice/>, accessed May 18, 2017.

diversity and inclusion on oversight boards to broaden the perspective of the Centers into future needs and trends.

## **Term Limits**

The by-laws for the Oversight Boards must establish term limits, and Centers must be active in enforcing such term limits. NIST has observed a wide variety of practices at Centers and recommends that term limits be of sufficient length to allow board members to learn about the Center and make contributions to the Board, but not so long that the Board does not enjoy the benefits of new ideas and thoughts and broader thinking important to keeping an organization forward thinking.

Boards are encouraged to establish a Nominating Committee with an intentional approach to identifying and adding new board members.

Recognizing that it takes some time to learn about the program to be able to contribute, NIST recommends terms of no less than 3 years. Typical practices include board members who can serve two terms in a row before taking some time away from the board. This has been an effective practice in maintaining a solid core base of knowledgeable board members functioning well together over time while adding new members to the mix. Typically, NIST will look for term limits with a maximum of 6 consecutive years.

In some instances, board members can remain effective beyond 6 consecutive years of service, and if so, the Center may make the case for longer service of individuals. In extraordinary cases, the Center may make the case for a board member to extend service beyond 10 consecutive years, if the member continues to add value to the Oversight Board. Such extensions are expected to be rare and any such requests will be carefully evaluated by NIST and the Center will need to show how/why that particular board member adds such unique value to the Oversight Board.

## **Additional Requirements**

### **Serving as Vendor or Subawardee to Center and Serving on Board**

No member of an Oversight Board, nor a company owned by a member, may be a vendor to or provide contractual services to the MEP Center or to any subrecipient of the MEP Center, regardless of the Oversight Board's conflict of interest policy. This provision includes anyone serving the Center as a vendor, regardless of the nature of the work. Representatives of subrecipients may serve as members of an Oversight Board, however, Oversight Boards, particularly those serving in a fiduciary capacity, consisting of a majority of subrecipients may be viewed as having significant real or apparent conflicts of interest to the organization receiving the MEP cooperative agreement (and responsible for administering and enforcing subawards) and are generally discouraged. Such board memberships will need to be justified by the Center and will be reviewed by NIST on a case-by-case basis.

Oversight Boards should review the Department of Commerce's Conflict of Interest and Code of Conduct section of the Standard Terms and Conditions (2017)<sup>5</sup> for specific guidance on conflicts

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<sup>5</sup> Conflict of Interest and Code of Conduct, Section F.01, Department of Commerce Financial Assistance Standard Terms and Conditions, accessible at

particularly with respect to “interested parties” and recognition thereof

### **Center Staff Serving as Board Members**

In the view of NIST MEP, it is considered a best practice for Center staff and management not to be a member of a Center’s Oversight Board. Should the Center choose to have a Center staff or management member on the Oversight Board, it should be limited to only the designated Center Director. Such board member should only serve in a non-voting, ex-officio capacity, unless State, U.S. Territory, Tribal or local law does not allow for ex-officio, non-voting members. In such an instance, the Center should notify NIST of the requirement and cite the prevailing law.

### **Structure of the Board Reporting**

For Oversight Boards of MEP Centers operated by institutions of higher education or State, local or Tribal governments, NIST MEP generally expects the Oversight Board to report to the head of the agency, unit or college under which the program falls, rather than the Center Director. In limited cases the Oversight Board may report to the Center Director where the Center submits sufficient justification as to why such a reporting structure is necessary and beneficial to the Center.

### **Number of Board Meetings**

NIST typically expects that the Oversight Board will meet at least 4 times a year, or once a quarter, either by teleconference, video conference, or in-person as a best practice.

## **Resources**

Note that MEP Center cooperative agreement recipients have access to BoardSource, a recognized leader in nonprofit board leadership. See [www.boardsource.org](http://www.boardsource.org).

Centers are encouraged to review Part VI Governance, Management, and Disclosure of IRS Form 990 - Return of Organization Exempt From Income Tax<sup>6</sup> for guidance on items relevant to determining independence of members of the Oversight Board.

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[http://www.osec.doc.gov/oam/grants\\_management/policy/documents/Department%20of%20Commerce%20Standard%20Terms%20&%20Conditions%2031%20March%202017.pdf](http://www.osec.doc.gov/oam/grants_management/policy/documents/Department%20of%20Commerce%20Standard%20Terms%20&%20Conditions%2031%20March%202017.pdf)

<sup>6</sup> See <https://www.irs.gov/pub/irs-pdf/f990.pdf>.