

CHECKLIST FOR PUBLISHING AGREEMENTS

Before signing a publishing agreement, the document should be reviewed for the following issues:

1. Is this a Request for Permission to Publish or Copy, or a Publishing Agreement?

Granting permission to publish or copy does not assign any rights. However, you should still look to see if it proposes other items that would not be allowed under federal ethics rules.

2. If the document is a Publishing Agreement and not a Request for Permission, what rights does it ask for?

Some agreement will just ask for the transfer of all rights, but some may be specific as to the rights, especially when it comes to publishing in electronic formats. This can also be an area for negotiation. Most the time the publisher will ask for exclusive rights so that no one else can publish the work. What about translations? Look carefully at this section.

3. Does the document have a separate signature block for government employees only, or is the signature block for any author?

Some publishers who frequently publish works from government authors have a separate section blocked off in the agreement for government authors to sign which simplifies the situation. It basically requires the author to acknowledge that the publication is a work of the U.S. Government, without agreeing to the rest of the document.

4. Does the document request a transfer of U.S. rights, or worldwide rights?

Since the publication is a work of the U.S. Government, there are no rights in the U.S. to be assigned, and the document should either be modified to reflect this, or not signed. If worldwide rights are requested, the matter can become very complicated and you should look to your agency's policy on handling these requests, including who should sign, and whether the agreement should be

modified.

5. Does the document ask for the author to warrant the work is original, that it doesn't infringe other works, it does not contain material that is defamatory, and/or that it contains no copyrighted works unless permission was obtained?

This is typical language for most agreements; however, because these statements could expose the agency to liability, agencies may want to modify the agreement so that the employee no longer warrants, but agrees "to the best of their knowledge" or used their "best efforts". One caution: if the work contains copyrighted material, the permission provided must be as broad as the publishers requested rights.

6. Does the document ask for the Agency to indemnify the publisher, if sued?

The Anti-Deficiency Act, 31 U.S.C. § 1341 and the Adequacy of Appropriations Act, 41 U.S.C. § 11, preclude an employee from committing the government to such open-ended liability. Therefore, this language should be deleted.

7. Does the document indicate that, if litigation is required, the matter will be heard in a particular state court, or under a particular state law?

If the document request a state court, the provision should be deleted or modified to indicate a federal court, since the government is the real party at interest. As to the law that will apply, many of the issues involved in a dispute over a publishing agreement involve federal law. Thus, a modification to something like "This agreement shall be interpreted under the applicable federal or state law" is suggested.

8. Does the document refer to any royalties or honorarium being paid?

A royalty payment or an honorarium are both forms of compensation to the contributor for the work. With certain rare exceptions, an employee of the executive branch may not accept compensation for his or her government service from any source other than the U.S. Government, 18 U.S.C. § 209.

9. Does the document offer free reprints?

An Agency employee may accept from the publisher a free copy of the work for his or her own records, because it would not be considered compensation from an outside source under government ethics regulations. 5 C.F.R. § 2635.807. The Agency employee may also accept an additional archival copy for the Agency and a reasonable number of reprints if the total value of those additional reprints does not exceed a nominal amount established in the government gift rules (generally, \$20 per gift, and no more than \$50 per year) 5 C.F.R. § 2635.204(a).

10. Does the document offer discounts on purchases?

Beyond an archival copy and additional reprints that do not exceed the gift limits, an Agency employee may only accept other gifts or discounts from the publisher that are generally available to all other government employees or to the public at large.

5 C.F.R. § 2635.204(c). However, if the Agency is using government funds to purchase copies for the government's use as opposed to receiving free copies or discounts for the author, then any reasonable discount the publisher wants to offer is acceptable.

11. Does the document ask to use the employee's title or likeness to promote the publication?

The Agency employee may allow the publisher to use his or her title or likeness in connection with the work only to the extent it is intended to identify the employee or otherwise provide biographical information. The employee's title, likeness, and other information may not be used to promote the publication, because that would constitute a misuse of position. 5 C.F.R. § 2635.701, *et.seq.*