

Note: The honoraria ban was held unconstitutional by the U.S. Supreme Court in *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995).

Office of Government Ethics

95 x 9 -- 07/21/95

Letter to the President of an Organization dated July 21, 1995

This is in reply to your letter of January 25, 1995, in which you requested that the U.S. Office of Government Ethics (OGE) amend its regulations to prohibit current and former executive branch employees from profiting, in certain circumstances, from their speeches and writings. I understand that a member of my staff has spoken several times with [a member of your staff] concerning our delay in responding to your correspondence given continuing uncertainty relating to the interpretation of the U.S. Supreme Court decision in *United States v. National Treasury Employees Union* (NTEU).(1)

Your letter recommends first that OGE amend the regulation implementing the 15 percent outside earned income limitation set forth in 5 U.S.C. app., § 501(a). More specifically, you believe that employees should be authorized to accept royalties from the sale of a book only if the work necessary to produce the writing was "performed when the person was not paid by the government and not subject to the 15% limitation in § 501(a)(1)." You also believe that other OGE regulations require clarification as they pertain to the acceptance of compensation for speeches and writings in the circumstances specified in your letter. Thus, even if falling within certain existing exceptions to the honoraria ban (5 U.S.C. app., § 501(b)), you recommend that the OGE implementing regulation should explicitly state that compensation may not be accepted "if the covered person's staff provides any substantial assistance ... for the book, speech, or article." You also suggest that the regulation should clearly prohibit employees from accepting compensation from the sale of a bound collection of speeches and articles which, if published individually, would be subject to the honoraria ban. Finally, you believe that former employees "should not be entitled to package their speeches and writings made while working for the government ... and turn a profit on them."

Royalties for Book Written During Government Service

As stated in 5 C.F.R. § 2636.304, an employee subject to the 15 percent outside earned income limitation "may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive

Schedule" As defined in section 2636.303(b)(5), however, "outside earned income" does not include "[c]opyright royalties, fees, and their functional equivalent, from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights." Accordingly, and as highlighted in your letter, the Deputy Assistant Secretary in Example 4 in section 2636.303(b) may receive royalties based on actual sales of a book of fictional short stories that he wrote during the term of his appointment without regard to the 15 percent outside earned income limitation.

You suggest in your letter that the Assistant Secretary in Example 4 would be equally free to accept royalties in the case of a book written "on matters directly related to the Assistant Secretary's official duties." Pursuant to the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635), however, an employee is prohibited from accepting compensation, including royalties, for a writing that deals in significant part with an employee's current or recent Government work or with any "ongoing or announced policy, program or operation of the agency." 5 C.F.R. § 2635.807(a)(2)(i)(E)(1)-(2). Moreover, the Assistant Secretary would be subject to the broader definition in 5 C.F.R. § 2635.807(a)(2)(i)(E)(3) prohibiting a high-level noncareer employee from accepting compensation for writings dealing in significant part with "the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency." (2) For purposes of considering your suggestion relating to royalties, therefore, we have assumed that the book for which an employee would be receiving royalties would not be related to official Government duties within the meaning of 5 C.F.R. § 2635.807.

For purposes of the 15 percent outside earned income limitation formerly set forth in section 210 of the Ethics in Government Act of 1978, as amended, (3) OGE determined that a Government employee with a royalty interest in a manuscript "is deemed to retain a mere property right in the residual income stream -- not within the concept of 'earned income.'" OGE distinguished from royalties a writer's "income from the sale or other disposition of, transfer of an interest in, or licensing of the use of such property" (4) OGE subsequently drew this same distinction between advances and royalties for purposes of the outside earned income ban imposed on certain Presidential appointees by section 102 of Executive Order 12674. (5)

In section 503 of 5 U.S.C. app., Congress provided that the outside earned income limitation set forth in section 501(a) "shall be subject to the rules and regulations of and administered by the Office of Government

Ethics ... with respect to officers and employees of the executive branch." When OGE published the interim rule implementing section 501(a) in January 1991, we noted in the preamble to the rule that the term "outside earned income" was defined "using concepts similar in some respects to those that had been used to implement the outside earned income limitation earlier imposed by section 210 of the Ethics in Government Act of 1978." (6) Thus, for example, we incorporated the distinction that we had earlier drawn for purposes of section 210 between advances and royalties. While the interim final honoraria regulation inspired numerous responses during the comment period, none objected to the exclusion of royalties from the definition of outside earned income.

Even assuming, arguendo, that royalties should be considered "earned" income, OGE can in its implementing regulations exempt categories of earned income from the 15 percent limitation. When drafting the regulations, we considered the comments and recommendations of the President's Commission on Federal Ethics Law Reform. Appointed by President Bush, the Commission published a comprehensive report in March of 1989 recommending, among other things, "that senior employees in all three branches be covered by a uniform percentage cap on outside earned income...." (7) The Commission noted that employees engage in a variety of activities from which they derive income. Thus, for example, it observed that "officials may write scholarly articles or even novels...[or] may raise pedigreed horses, produce and market gourmet food, lead exercise classes, or engage in any number of other money-making activities entirely unrelated to their federal jobs." (8) The Commission considered excepting by statute particular types of employment from the limitation on outside earned income, specifically noting that it considered royalty income as one possible exception. Instead, and with knowledge of the distinction drawn between advances and royalties by OGE, it recommended that the President be authorized to exempt activities by regulation. (9)

As you observe in your letter, "high-ranking officials are expected to be working substantially full time on government business." A cap on outside earned income is thought to reduce an employee's incentive to engage in outside activities that might distract him from his Government duties. However, in the absence of evidence that our position on royalties for writings unrelated to Government work has undercut the effectiveness of the earned income limitation, we are reluctant to consider the amendment of our regulation in the manner you suggest. As already noted, the exclusion of royalties from the definition of outside earned income drew no criticism during the relevant comment period. Moreover, not only would we be reversing a long-standing interpretation, we would also be restricting still further the receipt of income by employees, such as the Assistant Secretary in Example 4, who seek to

derive income from an expressive activity that is unrelated to official Government duties.(10)

Finally, we wish to point out that there are provisions other than the 15 percent outside earned income limitation which advance the Government's interest in ensuring that a high-ranking Government official does not allow his outside writing (or any other personal activity) to interfere with the full performance of his Government duties. Notably, 5 C.F.R. § 2635.705(a) provides as follows:

Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. § 6301(2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

A senior noncareer employee who fails to satisfy this standard is, at a minimum, answerable to the official responsible for his appointment.

Staff Assistance Relating to Speech or Article

The honoraria ban prohibits a covered individual from receiving an honorarium for an appearance, speech, or article. As you point out, the OGE implementing regulation at 5 C.F.R. § 2636.203(d) excludes a book from the definition of "article." Moreover, reflecting a statutory amendment to the honoraria ban, section 2636.203(a) excludes from the definition of "honorarium" any "payment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government." Accordingly, an employee covered by the honoraria ban may accept an honorarium for a book or for a series of articles in the circumstances described. We believe, however, that existing laws and regulations address your concern that executive branch employees should not be entitled to benefit from these exceptions "if the covered person's staff provides any substantial assistance, whether in the form of research, writing, or clerical."

When an executive branch official writes a book or series of articles as part of his official Government duties, he can appropriately rely on his

staff for assistance. Regardless of the extent to which his final written product may or may not be attributable to the efforts of his staff, however, 5 C.F.R. § 2635.807(a)(2)(i)(A) prohibits the employee from accepting compensation for a book or series of articles produced as part of his official duties. Moreover, 18 U.S.C. § 209 would similarly preclude acceptance. Executive branch employees are reminded of these provisions in the regulation implementing the honoraria ban.(11)

While an employee subject to the honoraria ban can accept an honorarium for a book or series of articles if written in his personal capacity and on his own time, 5 C.F.R. § 2635.705(b) specifically provides that he may not "encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation." Since the existing statutory and regulatory framework appears adequate, we are not persuaded that amendments are necessary, especially given your letter's concession that you have "no evidence that covered officials in the Executive Branch are receiving compensation for work done with substantial help from their staffs."

Bound Collections of Speeches or Articles

Your letter also recommends that the honoraria regulation be amended to prohibit employees from accepting compensation from the sale of a bound collection of speeches or articles for which honoraria could not be accepted if published individually. Since an employee may accept an honorarium for a book, you fear that employees will circumvent the ban by means of shrewd packaging.

You did not cite specific instances of abuse in this regard by executive branch employees. Your concern seems focused, however, on the high-level

Government employee who might seek to profit from a collection of speeches

or articles where "the work that was done to create the speeches or articles would generally have take [sic] place on government time and with the assistance of government personnel." In those circumstances, however, we believe it is likely that the employee would be barred by 5 C.F.R. § 2635.807, and by 18 U.S.C. § 209, from accepting an honorarium for the collection. Thus, for example, an Assistant Secretary of State who delivers numerous official speeches about relations between the United States and Russia would be precluded from accepting payment from a private

source for those speeches either at the time they were delivered or at the

time of their later compilation.

When one assumes that the speeches or articles at issue were not written as part of an employee's official duties and are not otherwise "related to duties" within the meaning of 5 C.F.R. § 2635.807, we expect that any question that arises concerning a collection of speeches or articles can be satisfactorily resolved on a case-by-case basis under the existing honoraria statute and implementing regulations. As noted above, the statute was amended by Congress to permit the acceptance of honoraria for a series of three or more articles, provided the subject matter is not directly related to the employee's official duties and the payment is not made because of the employee's official position. Beyond the possible applicability of the series exception, we would consider a number of relevant factors in determining whether a particular collection should be deemed a "book," including the number and length of the articles compiled.

Government Speeches or Writings and Former Employees

You suggest that former employees might "package their speeches and writings made while working for the government after they leave office and turn a profit on them." You recommend that OGE amend its regulations to address what you see as an abuse of public office by former Government employees. Without commenting on the merits of your recommendation, it is

our opinion that OGE lacks the authority to regulate the expressive activities of former employees in the manner you suggest.

As reflected in our enabling statute at 5 U.S.C. app., OGE has significant responsibilities in relation to the promulgation of regulations pertaining to conflicts of interest and ethics in the executive branch. OGE's authority concerning the conduct of former employees is, however, more limited. As directed by 5 U.S.C. app., § 402(b)(1), for example, OGE has established procedures for the filing and review of public financial disclosure reports by employees, including former employees, as required by title I of the Ethics in Government Act of 1978, as amended. In addition, by agreement with the Department of Justice, OGE provides guidance concerning the interpretation of 18 U.S.C. § 207, the primary post-employment statute applicable to former officers and employees of the executive branch. In other respects, however, our authority is generally focused on the conduct of current executive branch employees. We do not construe the language in section 503 of 5 U.S.C. app. as granting any authority to this Office to promulgate implementing

regulations extending to the conduct of former executive branch employees since, by its own terms, the honoraria statute applies only to any "Member, officer, or employee."

Sincerely,

Stephen D. Potts
Director

Endnotes:

(1) 115 S. Ct. 1003 (1995).

(2) We recognize that the Court of Appeals for the District of Columbia Circuit very recently invalidated 5 C.F.R. § 807(a)(2)(i)(E) insofar as it prohibits the acceptance of travel expenses for speech about an employee's Government work. *Sanjour v. Environmental Protection Agency*, No. 92-5123 (D.C. Cir. May 30, 1995). Pending the Government's decision whether to file a petition for a writ of certiorari, however, it is the position of this Office that the *Sanjour* decision applies only to the two employees who brought the case. In any event, the court explicitly reserved judgment on the constitutionality of the rule as applied to "senior executive employees," a class which would presumably encompass the Assistant Secretary in Example 4.

(3) Until its repeal by the Ethics Reform Act of 1989, section 210 of the Ethics in Government Act of 1978, as amended, provided that certain high-level employees could "not have in any calendar year outside earned income attributable to such calendar year which is in excess of 15 percent of their salary."

(4) Office of Government Ethics Informal Advisory Letter 82 x 18. See also OGE Informal Advisory Memorandum 83 x 4.

(5) See, e.g., OGE Informal Advisory Letter 89 x 17.

(6) 56 Fed. Reg. 1721, 1722 (Jan. 17, 1991)

(7) *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* (1989), at p. 33.

(8) *Id.* at 37.

(9) Id. at 37.

(10) We remain satisfied that the inclusion of royalties in the definition of "compensation" for purposes of 5 C.F.R. § 2635.807 is justified and in accordance with the standards discussed in NTEU. In order to address the threat to the integrity of the Government occasioned by employees using their public office for private gain, the section prohibits royalties where there is a nexus between the writer's official duties and either the subject matter of the writer's expression or the identity of the payor. (The section also bars acceptance of royalties for writings "undertaken as part of the employee's official duties." Acceptance in those circumstances would violate 18 U.S.C. § 209, a criminal statute that prohibits the supplementation of an employee's salary "as compensation for his services as an officer or employee....")

(11) 5 C.F.R. § 2636.202(a) indicates that an employee is prohibited by criminal statute and by regulation from accepting compensation for speeches or writings produced in his official capacity or as part of his official duties.

(12) In addition, section 201(c) of E.O. 12674 assigns OGE the responsibility of promulgating, with the concurrence of the Attorney General, regulatory guidance concerning the interpretation of 18 U.S.C. § 207.