

OFFICE OF GOVERNMENT ETHICS

98 X 14

**Letter to the Acting Deputy Director
of an Agency dated August 31, 1998**

This is in reply to your letter of July 9, 1998, in which you asked if there are any particular provisions in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) issued by this Office at 5 C.F.R. part 2635, or if this Office has any advisory letters or memoranda, addressing two questions you have about Federal employees who serve as speakers at conferences or similar events sponsored by non-Federal entities. Your questions, and our answers to them, are set forth in turn below.

1. What standards should be used in evaluating the appropriateness of Government employees participating, either in their official or unofficial capacities, in non-Federally sponsored conferences, meetings, or symposia where a fee is charged for attendance?

As discussed below, the conflict of interest statutes and the Standards of Conduct apply differently in the context of speaking engagements, depending on whether the employee is participating in an official or unofficial capacity.

OFFICIAL PARTICIPATION

Section 208 of title 18, United States Code, prohibits an employee from participating personally and substantially in an official capacity in any particular matter affecting the financial interests of an organization in which the employee serves as an officer, director, or employee, unless he obtains a waiver under 18 U.S.C. § 208(b). Accordingly, when an employee serves an organization in such a capacity, section 208 may preclude the employee from serving as an official speaker at an event sponsored by the organization. Similarly, "appearances" might require an employee's disqualification from a speaking engagement under section 2635.502 of the Standards of Conduct. Unless specifically authorized to participate, section 2635.502 provides that an employee should not participate in certain assignments involving an organization in which he is an active participant, if a reasonable person with knowledge of the relevant facts would question his impartiality.

Other authorities prohibit an employee from accepting compensation for making an official speech. Section 209 of

title 18, United States Code, prohibits an employee from receiving any salary or supplementation of salary "as compensation for his services as an officer or employee" Under section 209, therefore, an employee may not accept payment from a private organization for giving an official speech. Also, in this regard, the Standards of Conduct provide that an employee may not receive compensation (including travel expenses) from an outside source for speaking if the activity is undertaken as part of the employee's official duties. 5 C.F.R. § 2635.807(a)(2)(i)(A). However, an employee speaking at a conference or other similar event may accept "[m]eals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the . . . speaking takes place" as well as items of little monetary value, such as a commemorative plaque, a ballpoint pen, or an inexpensive meal even if not furnished as part of the event. 5 C.F.R. §§ 2635.807(a)(2)(iii)(A) and (B), 2635.203(b), and 2635.204(a). In addition, the Standards of Conduct would permit the employee to receive a tape of the speech or a similar item that provides a record of the activity. 5 C.F.R. § 2635.807(a)(2)(iii)(C).

The question of whether employees should be assigned to serve as speakers at conferences or similar events sponsored by non-Governmental entities, especially where the organizers are charging a significant fee, goes beyond the issues of individual employee conduct addressed in the Standards of Conduct and conflict of interest statutes.¹ Nevertheless, in an informal advisory opinion we issued a few years ago, we suggested that in determining whether to authorize an employee to make an official presentation at a conference, "an agency necessarily would have to determine that it is in the Government's interest for the employee to participate and that the event is an appropriate forum for the exchange of information relevant to the programs, operations, or responsibilities of the agency." In making this determination, we suggested that an agency might consider a number of factors, including the cost of attendance and the extent of Federal participation in the event. OGE Informal Advisory Letter 94 x 14; see also OGE Informal Advisory Letter 90 x 1.

UNOFFICIAL PARTICIPATION

¹ The Director of the Office of Management and Budget issued guidelines in 1977 concerning Government-sponsored attendance at conferences stating that "[s]peaking engagements should not be accepted for meetings where fees for Government employees are not in line with actual costs." It is our understanding that this guidance was revoked in the early 1980s.

An employee engaged in any outside activity must comply with any prior approval requirement his agency may have in its regulations. Many agencies have such a regulatory requirement. Although the requirement varies from agency to agency, most of the agencies that require their employees to obtain prior approval include outside speaking among the activities for which prior approval must be obtained. At some agencies, for example, an employee must obtain prior approval for any outside speaking activity, whether or not for compensation, unless the activity is to be undertaken for a nonprofit charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization and is to be done without compensation (other than reimbursement of expenses). See, e.g., the Supplemental Standards of Ethical Conduct for Employees of the Commodity Futures Trading Commission, at 5 C.F.R. § 5101.103(c). At other agencies, an employee must obtain prior approval only if the outside speaking activity is to be done for an entity in a certain category and is to be for compensation. See, e.g., the Supplemental Standards of Ethical Conduct for Employees of the Nuclear Regulatory Commission, at 5 C.F.R. § 5801.103. Moreover, some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches to determine whether the speech contains an appropriate disclaimer and complies with the Standards of Conduct.

Like an employee who speaks in his official capacity, an employee who engages in speaking as an outside activity must comply with restrictions relating to his acceptance of compensation. Although the statutory honoraria ban can no longer be enforced against any employee,² the Standards of Conduct continue to prohibit employees from receiving compensation, including travel expenses, for outside speaking that "relates to the employee's official duties." 5 C.F.R. § 2635.807. An activity can relate to an employee's official duties within the meaning of this prohibition even though it is undertaken in an employee's personal capacity. For most employees, speaking is considered related to duties if the subject of the activity deals

² In National Treasury Employees Union v. United States, 413 U.S. 454 (1995), the Supreme Court found that the honoraria ban at 5 U.S.C. app. § 501(b) violated the First Amendment rights of persons on whose behalf the case was brought. The Department of Justice's Office of Legal Counsel subsequently concluded that the honoraria prohibition cannot be enforced against any employee, including employees of the legislative and judicial branches and high-level executive branch officials.

in significant part with any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period, or any ongoing or announced policy, program or operation of the employee's agency. 5 C.F.R. § 2635.807(a)(2)(i)(E)(1) and (2).³ Speaking is also deemed related to duties if the invitation to speak was extended to the employee primarily because of his official position, rather than his expertise in the subject; if the invitation or the offer of compensation was extended by a person or entity substantially affected by the performance of the employee's official duties; or if the speech is based substantially on nonpublic information. 5 C.F.R. §§ 2635.807(a)(2)(i)(B), (C), and (D). As already noted, the term "compensation" is defined for purposes of section 2635.807 as excluding commemorative plaques and other items or benefits of de minimis value.⁴

³ Different standards apply to high-level noncareer employees and to part-time or intermittent "special Government employees" (SGEs). In the case of a high-level noncareer employee, the subject of a speech is considered related to the employee's duties if it deals in significant part with "the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency." 5 C.F.R. § 2635.807(a)(2)(i)(E)(3). An SGE's speech is considered related to duties only if it deals in significant part with certain of his Government assignments. 5 C.F.R. § 2635.807(a)(2)(i)(E)(4).

⁴ In Sanjour v. United States, 56 F. 3d 85 (D.C. Cir. 1995) (en banc), the United States Court of Appeals for the District of Columbia Circuit sustained a First Amendment challenge to a portion of 5 C.F.R. § 2635.807. Pending the district court's issuance of a final order in Sanjour, we have asked Designated Agency Ethics Officials not to enforce against employees (other than certain noncareer employees) the provision in the Standards of Conduct prohibiting the acceptance of travel expenses in connection with a speech that is related to the employee's duties solely because the subject of the speech deals in significant part with agency policies, programs, or operations.

Ed. Note: On remand in the Sanjour case, at 7 F. Supp.2d 14 (D.D.C. 1998), the district court ruled that the travel expenses prohibition in section 2635.807 of the Standards of Conduct is unconstitutional and cannot be enforced against employees "who work below the grade level of senior executive service." On November 25, 1998, OGE issued DAEOgram DO-98-034 that said there was not going to be any further appeal of the decision, and
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Some employees are subject to outside earned income limitations which may restrict the acceptance of payment for a speaking engagement, even if the speech is not related to duties within the meaning of 5 C.F.R. § 2635.807. Noncareer employees who occupy positions above GS-15 of the General Schedule are, by statute, subject to a 15-percent limitation on outside earned income. As described in 5 C.F.R. § 2636.304(a), an employee subject to the 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" "Outside earned income" is defined in 5 C.F.R. § 2636.303(b) to mean "wages, salaries, honoraria, commissions, professional fees and any other form of compensation," subject to several regulatory exceptions. Separately, section 102 of Executive Order 12674 prohibits certain Presidential appointees, including all Executive Schedule officials, from receiving any outside earned income for any outside activity performed during their appointments.

Apart from observing the restrictions relating to the acceptance of compensation, an employee who speaks in his personal capacity must comply with provisions in subpart G of the Standards of Conduct requiring that he not misuse the Government's property, nonpublic information, or time (including the time of a subordinate). And, as discussed more fully below, he may not use his official title or position in connection with his outside speaking except as permitted by section 2635.807(b).⁵

⁴(...continued)
advised agencies to continue enforcement of the ban on travel expenses only against senior executive branch officials who are "covered noncareer employees" under 5 C.F.R. § 2636.303(a), pending the issuance of an amendment to the Standards of Conduct that would reflect this guidance.

⁵ Of course, when an employee is authorized by his agency to speak in his official capacity, the provisions of the Standards of Conduct concerning an employee's use of official title and agency resources in connection with the preparation and delivery of a speech are not applicable. When an employee makes a speech in his official capacity, it is expected that he will prepare it using Government time and resources and that he will be identified by reference to his Government title. It is also expected that the sponsor of a forum may refer to an employee's Government title in connection with the promotion of the speech.

2. May employees use their Government title, agency stationery or other Government resources to advertise or advocate attendance at non-Federally sponsored conferences, meetings, or symposia where a fee is charged for attendance?

Section 2635.702(b) of the Standards of Conduct prohibits any employee from using or permitting the use of his Government title or position in a manner that would reasonably be construed to imply that the Government or his agency endorses his personal activities or those of another. Section 2635.702(c) states that an employee may not use or permit the use of his Government title or position to endorse any product, service, or enterprise.⁶ Applying these concepts in the context of unofficial speech, section 2635.807(b) prohibits an employee who engages in speaking as an outside activity from using or permitting the use of his official title or position in connection with that activity, either for purposes of identification or as a means of promoting his activity. An exception at section 2635.807(b)(1), however, provides that an employee may use or permit the use of his title or position in connection with his speaking when it is used for purposes of identification, provided it is included as one of several biographical details. His title or position may be given no more prominence than other significant biographical details. Allowing the listing of the employee's current position only as one of several biographical facts permits important information about the speaker to be revealed in a manner that does not suggest Governmental sanction of the speech or conference.

Under section 2635.704(a) of the Standards of Conduct, an employee may not use or permit the use of Government property "for other than authorized purposes." Section 2635.704(b)(2) explains that use of Federal property is "authorized" when the use is for those purposes for which Government property is made available to the public or for purposes authorized in accordance with law or regulation, such as the Federal Property Management regulations issued by the General Services Administration.⁷ Notably, as

⁶ There are circumstances where an employee, acting in an official capacity, may properly endorse a product, service, or enterprise. See 5 C.F.R. § 2635.702(c)(1) and (2). In example 2 following section 2635.702 of the Standards of Conduct, for example, a Foreign Commercial Service officer meeting with representatives from the Government of Spain could explain the advantages of procurement from a particular U.S. company.

⁷ Section 2635.704 of the Standards of Conduct implements the
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recognized in regulations promulgated by the Office of Personnel Management at 5 C.F.R. part 251, an agency may provide support services to certain organizations, including professional associations, when the agency determines that "such action would benefit the agency's programs or would be warranted as a service to employees who are members of the organization" 5 C.F.R. § 251.202. By way of example, the regulation suggests that an agency might authorize an employee to use agency equipment or administrative support to prepare a paper to be presented at a conference. This is an agency authority, however, and would require the agency to determine the extent of support to be extended to any particular organization.

Finally, your letter enclosed a brochure advertising a conference to be held in September (September conference). It appears that several current executive branch employees are scheduled to speak at that conference. We cannot determine from the brochure, however, whether these employees will be addressing the conference in their official or private capacities. When an employee's participation in an event comes to our attention by means of a brochure or other advertisement, we typically forward the advertisement to the cognizant Inspector General for investigation or other appropriate action. Consistent with this practice, we are forwarding a copy of the September conference brochure to the Inspector General's office (or equivalent investigatory office) at each agency employing one of the Federal employees advertised as a speaker. Once the facts are known, each agency will then be in a position to decide if its employee engaged in activity contrary to law or regulation.⁸ Since we understand that the September conference is merely representative of your concerns, we have not sought to clarify the role of the Federal participants at that particular conference for purposes of our discussion of applicable law.

⁷(...continued)
principle in Executive Order 12674 that "[e]mployees shall protect and conserve Federal property and shall not use it for other than authorized activities." OGE does not have authority to create exceptions permitting the use of Government property otherwise falling within the general prohibition in the Executive order.

⁸ In the case of the September conference, some of the conduct potentially violative of the Standards of Conduct or conflict of interest laws has yet to occur and might, therefore, be prevented. We will emphasize this fact in our forwarding letters.

I trust the foregoing summary of applicable laws and regulations will prove useful.

Sincerely,

Stephen D. Potts
Director