

Office of Government Ethics

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Letter to an Ethics Official dated June 11, 1982

This is in response to your request for an opinion from this Office as to whether an honorarium paid to a charitable organization on a Government employee's behalf must be counted as outside earned income for purposes of section 210 of the Ethics in Government Act of 1978 ["the Act"], 5 U.S.C. App. § 210. For the reasons stated below, it is our opinion that it must.

Section 210 provides:

Except where the employee's agency or department shall have more restrictive limitations on outside earned income, all employees covered by this title who are compensated at a pay grade in the General Schedule of grade 16 or above and who occupy nonjudicial full-time positions appointment to which is required to be made by the President, by and with the advice and consent of the Senate, may not have in any calendar year outside earned income attributable to such calendar year which is in excess of 15 percent of their salary.

The implementing regulations define outside earned income as "wages, salaries, commissions, professional fees and other compensation received for personal services actually rendered, other than for services for the United States Government" 5 C.F.R. § 734.501(b). Honoraria fall within that definition.¹

The Federal Election Campaign Act of 1971, as amended, prohibits any elected or appointed officer or employee of any branch of the Federal Government from accepting any single honorarium of more than \$2,000.² 2 U.S.C. § 441i(a). Those employees who are covered by section 210 of the Ethics in Government Act are thus subject to two separate limitations on their acceptance of honoraria: 5 U.S.C. App. § 210 and 2 U.S.C. § 441i(a).

Section 441i(b) of Title 2 of the United States Code provides:

If an honorarium payable to a person is paid instead at his request to a charitable organization selected by

payor from a list of 5 or more charitable organizations provided by that person, that person shall not be treated, for purposes of subsection (a) of this section, as accepting that honorarium. For purposes of this subsection, the term "charitable organization" means an organization described in section 170(c) of Title 26.

There is no comparable provision in the Ethics in Government Act. Your question is, in effect, whether an exception to section 210 for honoraria donated to charity can nonetheless be read into the Act. We do not believe that it can.

The exception for honoraria set forth in 2 U.S.C. § 441i(b) was not included in the Federal Election Campaign Act as it was originally enacted in 1976. Rather, the exception was added by Pub. L. No. 95-216 in 1977. When Congress passed the Ethics in Government Act the next year, surely it would have included a similar limitation on the applicability of section 210 had that been its intention.

Moreover, exclusion of honoraria donated to charity would be inconsistent with at least one of the two basic purposes underlying the outside earned income limitation of section 210, which are to prevent executive branch officials from cashing in on their positions of influence or being affected by the prospects of outside income and to insure that outside activities do not detract unduly from an official's attention to his job. See 124 Cong. Rec. 32003-08 (1978); Letter from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to Fred F. Fielding, Counsel to the President (January 28, 1982).³ See also House Comm. on Standards of Official Conduct, 97th Cong., 2nd Sess., Ethics Manual for Members and Employees of the U.S. House of Representatives 67-68 (1981); Final Report of the Select Comm. on Ethics, H.R. Rep. No. 1837, 95th Cong., 2nd Sess. 29-30 (1979) (demonstrating that similar purposes underlie the outside earned income limitation applicable to members of the House of Representatives).

Because the financial benefit of having a donation to charity made on one's behalf is minimal, an exception for honoraria donated to charity would probably not significantly undercut section 210's object of preventing executive branch officials from trading on their positions for financial gain. The second concern of the statute, however, is directly implicated by your

question, because the type of activities which generate honoraria are those which ordinarily require personal participation on the part of the Government official. To earn more honoraria, more time must be diverted from Government responsibilities, regardless of whether the honoraria are paid to the individual directly or donated to charity on his behalf. We believe, therefore, that the exclusion of honoraria from outside earned income for purposes of section 210 would be inconsistent with the statute's object of insuring that Government officials do not spend an inordinate amount of time on work other than their Government responsibilities.

As [another ethics official in your agency] mentioned in his original request for an opinion, an honorarium is income for income tax purposes even if it has been donated to charity in accordance with 2 U.S.C. § 441i(b). It is our view that honoraria donated to charity are also income for purposes of section 210 of the Ethics in Government Act.

If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

J. Jackson Walter
Director

1 Cf. 5 C.F.R. § 734.301, which provides that honoraria must be reported as income on the financial disclosure reports required by Title II of the Act. The instructions to the form expressly state that honoraria received and donated to charity must be reported.

2 As originally enacted, the Federal Election Campaign Act also prohibited acceptance of honoraria aggregating more than \$25,000 in any calendar year. In 1981, Pub. L. No. 97-51 eliminated that prohibition.

3 In his January 28, 1982, letter to White House Counsel Fred Fielding, Assistant Attorney General Olson declined to follow the "cash receipt" approach adopted by the Federal Election Commission in its administration of the limit on honoraria in 2 U.S.C. § 4li, and held that

income, for purposes of section 210, is attributable to the year in which services relating to it were performed. We concur in the reasoning of Mr. Olson's opinion.