

Office of Government Ethics

89 x 16 -- 09/26/89

Letter to Agency General Counsel dated September 26, 1989

This is in response to your letter requesting an opinion regarding the applicability of section 102 of Executive Order 12674, April 12, 1989, to members of [your agency].

Section 102 provides:

"No employee who is appointed by the President to a full-time noncareer position in the executive branch, including all full-time employees in the White House Office and the Office of Policy Development, shall receive any earned income for any outside employment or activity performed during that Presidential appointment."

Members of [a board in your agency] are appointed by the President with the advice and consent of the Senate to terms of years. They may be removed by the President only for "inefficiency, neglect of duty or malfeasance in office." You argue that because they can be terminated only for specified cause, members of [this board] hold other than "noncareer" positions. In this connection you suggest that section 102 should be interpreted as applying only to officers and employees who hold positions that can be terminated at the pleasure of the President.

The language limiting application of section 102 to Presidential appointees to "noncareer positions" did not appear in the early draft of the Executive Order distributed for comment within the executive branch. It was added in response to comments by this Office for the specific purpose of limiting its application to exclude uniformed and foreign services officers, both of whom are appointed by the President. Because of the absence of similarly limiting language in section 210 of the Ethics in Government Act of 1978, 5 U.S.C. App. 4. § 210, it had been necessary to examine the legislative history in concluding that the statutory 15% limitation on outside earned income did not apply to foreign service officers. Informal advisory letter 81 x 6, February 18, 1981. Based on our understanding that the outside earned income prohibition in the Executive Order was

intended to cover only those persons generally thought of as Presidential appointees, we urged that the White House modify the draft language that ultimately became section 102. In the absence of modification, section 210 would have applied the prohibition against receipt of outside earned income to every "Presidential appointee in the executive branch."

We know of no basis to conclude that the term "noncareer" was intended to draw a distinction between Presidential appointees based upon the President's authority to effect their removal. As you point out, Presidential appointees are not otherwise characterized as "career" or "noncareer". Compare 5 U.S.C. § 3132(a) (4) and (7) creating a distinction between career and noncareer positions within the Senior Executive Service. In the absence of any fixed meaning as applied to Presidential appointees, we believe it is appropriate to interpret the phrase "noncareer position" in light of the history of its incorporation into the language of Executive Order 12674. That history indicates an intent to exclude from application of section 102 only those Presidential appointees, such as uniformed and foreign service officers, appointed to positions within an established service having a formal personnel system designed to provide a career path from entry through retirement. A fixed-term appointment to a position at a senior level does meet this standard even when it is for an extended period and is coupled with specific retirement provisions. Thus, the phrase "full-time noncareer appointees" applies to those, including members of [the board], serving under fixed-term appointments required by statute to be made by the President. It applies regardless of the extent, if any, to which the President's power of removal may be circumscribed.

Sincerely,

Frank Q. Nebeker
Director