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Letter to the Head of an Agency
dated February 26, 2008

I am writing this to summarize the advice I gave you in our meeting on February 6, 2008, and during subsequent phone conversations.

[Subject of] Book:

During our meeting you asked whether you may write and edit a book for compensation during your current appointment. The following is a summary of the relevant facts as you described them.

You stated that you plan to co-write and co-edit a book consisting largely of quotations from a well-known poet and author. The author's writings have no relation to your agency's policies, programs, or operations, nor to the general subject matter area primarily affected by the work of your agency. The two co-authors of the book are not employees of the executive branch of the Government. Your writing and editing activities for this book will consist of writing a preface to the book as well as "compiling the quotables" and placing them in thematically divided chapters. The purpose of the book is to generate public interest in this author's writings.

You expect to sign a contract with a book publisher, during your current appointment, which will pay you copyright royalties--a percentage of the proceeds from the sale of each book. You also plan to receive an approximately \$2,000 lump-sum payment for certain activities connected to your writing. Your contract will specify that this \$2,000 payment is for "writing related activities" to be carried out in connection with this book. The payment will either be made to you directly or to a third party and distributed for these purposes.

In your current Presidential appointment as [Agency Head], you are subject to a complete ban on outside earned income applicable to full-time, noncareer Presidential appointees, under section 102 of Executive Order 12674. See also 5 C.F.R. § 2635.804(a). As a result, you are prohibited from receiving any outside earned income attributable to writing that you

perform during your appointment. See 5 C.F.R. § 2635.807(a)(2)(iv); 5 C.F.R. § 2636.303(c).

However, there are two exclusions from the definition of "outside earned income" that may be relevant to your situation.

First, the outside earned income ban does not apply to the receipt of copyright royalties for published writings. See 5 C.F.R. § 2636.303(b)(5)(excluding royalties from the definition of outside earned income). The ban does not apply even if the writing is performed, and a publishing contract is signed, during the employee's appointment. See 5 C.F.R. § 2636.303(b)(Example 4). Therefore, if you entered into a contract to receive a share of the royalties from sales of the book, you may receive such royalties without regard to the restriction on outside earned income.¹

Second, the outside earned income ban does not apply to "the actual and necessary expenses incurred by the employee in connection with the outside activity." 5 C.F.R. § 2636.303(b)(6)(excluding actual and necessary expenses from the definition of earned income); see 5 C.F.R. § 2635.804(c)(1). Reimbursement for activities such as typing, copying, and copy editing services are examples of activities that may qualify under this exception as actual and necessary expenses incurred in connection with the writing. In addition, a payment from a publishing company for the type of research services you described, performed by a third party, also would qualify under the exception.

As mentioned above, you stated that the contract will specify that the approximately \$2,000 lump-sum payment is for "writing related activities." Although your publishing company may contemplate that the payment could include reimbursement for services that fail to qualify for the exception for actual and necessary expenses, you are still prohibited from using the payment for anything but "actual and necessary" expenses as described above. See 5 C.F.R. § 2636.303(b)(6). In addition, under the rule you must return to the publisher any portion of the \$2,000 payment that exceeds the actual and necessary expenses incurred in connection with the writing. If you choose

¹ Please note, however, if the topic of your book is related to your official duties under 5 C.F.R. § 2635.807(a), then you would be prohibited from receiving the royalties because royalties are considered compensation under section 2635.807. See 5 C.F.R. § 2635.807(a)(2)(iii)("Compensation includes . . . royalties").

to accept the \$2,000 payment, OGE strongly recommends that you maintain a separate accounting of, and receipts for, all payments made from the \$2,000 payment. Such an accounting would ameliorate any potential concerns that could arise regarding the purpose for which the money is spent.

Writings Related to Official Duties:

Additionally, you asked about the rules that apply to writing a book related to your official duties. In particular, you asked whether you would be able to receive compensation for a book, written after you leave Government service, if you submit a book proposal to a publisher during your current appointment.

As mentioned above, you are subject to a complete ban on outside earned income attributable to writing that you perform during your current appointment. See 5 C.F.R. § 2635.807(a)(2)(iv); 5 C.F.R. § 2636.303(c). This ban applies to any form of compensation, including copyright royalties, for any writing related to your official duties. See 5 C.F.R. § 2635.807(a)(2)(iii). However, a book proposal written entirely on speculation absent any form of consideration for its production would not constitute "writing" for which payment is "received" under the rule.

Therefore, nothing in OGE's regulations explicitly prohibits you from submitting a book proposal to a publishing company during your appointment and subsequently receiving compensation for writing performed after Government service. However, there are the two key factors that make this type of arrangement permissible under ethics rules. First, you may not receive any form of consideration for the preparation of the book proposal, including a cash payment or entry into an agreement to receive payment for the subsequent book, prior to submitting the proposal. Second, no writing of the book may occur during your Government service.² Of course, as we discussed, although the type of arrangement described above is not specifically prohibited, such activity could be subject to criticism by the public, the press, and even senior officials in the Administration.

² The keeping of diaries or notes during Government service to be used later as a basis for a book is considered "writing," and the outside earned income ban extends to these activities. See 5 C.F.R. § 2635.804.

Finally, you should be aware that under 18 U.S.C. § 208, an employee who has a contract to write a book may not participate personally and substantially in a particular matter that would directly and predictably affect the value of the book. In addition, if an employee who has a contract with a publisher participates personally and substantially in a particular matter that would directly and predictably affect the publisher's ability or willingness to pay what it promised under the contract, the employee's participation poses a conflict of interest under 18 U.S.C. § 208.

I hope this has been helpful. Feel free to contact me, if you have any questions.

Sincerely,

Marilyn L. Glynn
General Counsel