Office of Government Ethics
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Letter to a Government Official dated May 17, 1982

This is in response to your March 3, 1982, letter requesting an informal advisory opinion from this Office as to the applicability of the outside earned income limitation set forth in section 210 of the Ethics in Government Act of 1978 ["the Act"], 5 U.S.C. app. § 210, to a co-executor's fee received by [an individual holding an advice and consent position in your Department]. In subsequent telephone conversations between you and representatives of this Office, the factual background of this matter has been developed in more detail than was originally set forth in your March 3rd letter. It has become apparent that the requested advisory opinion must address, in addition, the application of section 210 to certain co-trustee's fees which [the appointee] has received.

The pertinent facts as you have represented them to us and our analysis thereof are set forth below.

Facts

[The appointee in question] assumed his present position [in] February 1981.

Upon the death of [a private individual] [in] November 1978, [the appointee] and [a] Bank assumed duties as co-executors under the terms of [the individual's] will. At that time, [the appointee] was a partner at [a large law firm]. [The appointee] and the bank continued as co-executors until a final decree settling the estate was issued [in] January 1982.

Under [the applicable state] law, the amount of an executor's commission is determined by statute as a percentage of the value of the estate and does not depend on the actual amount of work performed. Pursuant to the statute, [the appointee] and the Bank each received an executor's fee of $218,002.14. The bank received its fee in one payment [in] February 1982. [The appointee] received two advance payments of $40,000 each in 1979 and 1980 and the $138,002.14 balance of his fee [in] February 1982. The advance payments were not intended to correspond to work done. Half of each advance payment was paid

over to [the appointee's law firm] pursuant to an agreement between [the appointee] and the firm.

[The appointee] spent approximately 50 hours working on the estate before he assumed [his] position [with your Department in] February 1981. After [assuming this position, the appointee] spent approximately one hour in 1981 and fifteen minutes in 1982 discharging a few remaining executor responsibilities.

[The appointee] is now, and has been since at least April of 1979, a co-trustee of [a] Trust. In March of 1981, [the appointee] received a co-trustee's annual commission of $4,125.07 from the trust. The payment was for service as a co-trustee from April 1979, through February 1981. In March of 1982, [the appointee] received from the trust a co-trustee's commission of $5,883.66, covering the period March 1981, through February 1982. [The appointee] does not know how many hours were spent actually working on the Trust, but estimates that about the same amount of time was spent each month. In [the State where the trust was created] the amount of a trustee's commission is fixed by statute as a percentage of the corpus.

[In early 1981, the appointee] filed a public disclosure report (SF 278) as a nominee to the position [which he presently holds]. On Schedule A of that form, it is noted that [he] received a co-executor's fee of $20,000 from the estate [in question]. (Presumably, the reference is to that portion of the 1980 advance payment which was retained by [the appointee]). On Schedule D, the estate is listed as a source of compensation in excess of $5,000. The estate is not listed under either "Positions Held" or "Relations with Other Employers." No mention is made on the form of the Trust.

The [salary for the appointee's present position] is $60,662.50 per year. [He] held the position from February to the end of 1981, thus earning $54,180.75 that year. In 1982, he will presumably receive the full $60,662.50.

Section 210 of the Ethics in Government Act of 1978 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 the term "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). The term does not include amounts received during a period in which the individual was not a Government employee covered by section 210 of the Act for personal services actually rendered during the period. 5 C.F.R. § 734.501(b)(2).

The [appointee] is covered by section 210. Fifteen percent of $54,180.75 is $8,127.11; fifteen percent of $60,662.50 is $9,099.38.

Analysis

There does not appear to be any question as to whether the executor's fee and trustee's commissions are outside earned income for purposes of section 210. The payments were clearly made for personal services actually rendered. There is, however, some question as to what portion of such income is "attributable" to time [the appointee] spent [while in his present Government position]. The regulations clearly exclude payment for services rendered while not a Government employee if the payments are received while not a Government employee. However, [the appointee] received payments after he had become a Government employee for services rendered over a period of time which included both Government employment and non-Government employment. The statute and regulations do not explicitly tell us how such payments are to be treated. Consequently, it is necessary to construe the statute, and to do so we must look at the purposes of the Act.

As you correctly note in your March 3rd letter, there are two basic purposes underlying the outside earned income limitation of section 210: 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). 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). To facilitate those purposes, and to be consistent with the plain language of the statute, the Office of the Legal Counsel has, with the approval of this Office, interpreted section 210 as attributing outside earned income to the year in which the services which "brought about" that income were performed.**1**

Because [the appointee] became co-executor of the estate long before his appointment to [his present Government position] could even have been contemplated, one of the concerns of section 210, that of an individual trading on his position, is not here involved. [The appointee] did, however, continue to perform the duties of a co-executor of the estate after assuming [his present Government position]. Consequently, the second concern of section 210 is directly implicated. The fact that in [the state whose law governs the estate] the amount of an executor's commission is fixed by statute does not change the fact that [the appointee] was performing simultaneously as co-executor and as [a Government official], and that there was, as a result, a real risk that his time would be diverted from his Government responsibilities.

Similarly, [the appointee] became co-trustee of the trust before being named [to his present position], but continued to perform as co-trustee after becoming a Government official. Applying section 210 to the facts of this case, giving due regard to the dual purposes of the statute, would require that some portion of the executor's fee and trustee's commission be attributed to calendar years 1981 and 1982 as outside earned income. Consequently, it is necessary for us to determine what portions of those fees were "brought about" by work done by [the appointee] while he was [a Government official].

While [the applicable state] law fixes executor's fees as a percentage of the estate rather than on an hourly basis, the basis for such a fee arrangement probably is that ordinarily

larger estates require more work than small estates, and the percentage arrangement thus operates fairly in the long run. Similarly, the fixing of the trustee's annual commission as a percentage of the corpus suggests that in the usual course of things managing a larger trust requires more time and effort than does handling a smaller one. Thus, the executor's fee and trustee's commission are "brought about" by hours worked or time served, albeit indirectly, and fees earned over a period encompassing Government employment and non-Government employment should be apportioned on that basis. In the present case, it appears appropriate to apportion the executor's fee on the basis of hours worked and the trustee's commission on the basis of time served.**2**

As noted above, [the appointee] spent 50 hours working on the estate before he [assumed his present Government position], approximately one hour in 1981 after [assuming this Government position] and a quarter of an hour in 1982. He thus earned $178,002.14 divided by 51.25, or $3,473.21 per hour, and $3,473.21 of the executor's fee is thus attributable to calendar 1981. One-fourth of $3,473.21, or $868.30 is attributable to 1982.

With respect to the trust, the 1981 payment of $4,125.07 covered a period of 700 days, 20 of which were after [the appointee entered the government]. So, $4,125.07 divided by 700 = $5.89/day; $5.89/day x 20 days = $117.86 attributable to 1981 for purposes of section 210. The March 1982 payment of $5,883.66 from the trust covered a period of 365 days, 275 of which were in 1981 and 90 of which were in 1982. Thus, $5,883.66 divided by 365 = $16.12/day; $16.12/day x 275 days or $4,432.89 is attributable to 1981, and $16.12 x 90 or $1,450.80 is attributable to 1982.

Conclusion

On the basis of the facts as you have represented them to us, we have been able to determine that [the appointee] had outside earned income attributable to calendar year 1981 in the amount of $3,473.21 from the estate and $4,550.75 from the trust for a total of $8,023.96, and outside earned income attributable to calendar 1982 in the amount of $868.30 from the estate and $1,450.80 from the trust for a total of $2,319.10. As noted above, [the appointee's] outside earned income limits for 1981 and 1982 are $8,127.11 and $9,099.38, respectively. Thus, there

is no apparent violation of section 210.

Of course, [the appointee] may have had other outside earned income attributable to 1981 and 1982 of which we are not aware, and we cannot, therefore, rule out the possibility that section 210 has been violated. We assume that all income required to be reported will be so reported on the disclosure forms which will be filed by [the appointee] on or before May 15, 1982, pursuant to Title II of the Act.**3**

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

Sincerely,

J. Jackson Walter
Director

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1 In January 28, 1982, letter to White House Counsel Fred Fielding (cited above), Assistant Atorney General Olson seclined 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. § 44li, and held that income, for purposes of section 210, is attributable to the year in which the services relating to it were performed. We concur in the reasoning of Mr. Olson's opinion.

2 Before we can apportion the executor's fee, we must determine how much of that fee was actuall income to [the appointee]. As noted above, [the appointee] turned over one-half of his two $40,000 advance payments to
[his then law firm] pursuant to an agreement he had with the firm. Apparently, [the appointee] only considers the portion of the fee he retains to be income to him. (As noted above, hs SF 278 shows income from
the estate in the amount of $20,000 for 1980.) We must determine whether to
take the same approach whe fixing the amount of income from the estate for purposes of section 210. Although the matter is not free from doubt, we believe that we should.

It is true that an individual cannot avoid being deemed in receipt of income for tax purposes simply be giving the money away, or by assigning

the rights to it, either before or after it is received. See, e.g., Lucas v. Earl, 281 U.S. 111(1930); Helvering v. Horst, 311 U.S. 112 (1940); Helvering v. Eubank, 311 U.S. 122 (1940). However, income earned by member of a partnership is distributed amoung the members according to the terms of the partnership agreement, and it is treated by the Internal Revenue Service as income to the individual partners on the basis of how it is distributed, rather than on the basis of how it was actually earned. Therefore, we believe it reasonable to exclude the $40,000 paid over the [the law firm] from outside earned income form section 210 purposes. While
it is possible that some percentage of the amounts paid over to the law firm may have ultimately reached [the appointee] as part of his partnership distributions, we do not believe that any funds so received would be "compensation for personal services actually rendered" within the meaning of the statute or of 5 C.F.R. § 734.501(b). Thus, the amount of the executor's fee that must be apportioned is $178,002.14.

3 As noted above, the 278 which [the appointee] filed as a nominee in 1981 did not include, as it should have, his position as trustee of the Trust; nor did it indicate that [he] was continuing to serve as co-execuktor of the estate. We have corrected the file so that it now reflects the facts as you have represented them to us. Please advise [the appointee] that he should use great care in insure that he does not inadvertently omit from his 1982 annual filing information which he is required by law to disclose.