Note: The honoraria ban was held unconstitutional by the U.S. Supreme Court in *U.S. v. National Treasury Employees Union*, 513 U.S. 454 (1995).

# Office of Government Ethics
## 90 x 24 -- 11/28/90

**Memorandum Issued November 28, 1990,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
General Counsels and Inspectors General
Regarding the Honorarium Prohibition
and Limitations on Outside Earned Income
and Employment**

The provisions added by Title VI of the Ethics Reform Act of 1989 become effective on January 1, 1991. On that date, all officers and employees in the executive branch will become subject to the prohibition against receipt of honoraria, and certain high-level noncareer employees will become subject to limitations on the amount of outside earned income and the types of outside employment they may have. All three provisions become and remain effective only if the pay increase provisions contained in Section 703 of the Reform Act are not repealed. The maximum penalty for violation is $10,000 or the amount of compensation received for the prohibited conduct, whichever is greater.

This memorandum provides initial guidance regarding the application of Title VI. The content of this memorandum has been coordinated with the Department of Justice and the Office of Personnel Management, and we expect that the implementing regulations to be issued by the Office of Government Ethics will be consistent in all significant respects with the interpretation set forth below. Therefore, pending the issuance of regulations, employees may rely on the guidance contained in this memorandum.

### THE HONORARIUM PROHIBITION

Section 501(b) states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." For these purposes, Section 505[(2)] defines the phrase "officer or employee" to mean any officer or employee of the Government except a special Government employee or an individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate. The term "honorarium" is defined in . . . section [505(3)] to mean:

> ". . . a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed."

Section 501(c) contains standards under which an honorarium paid to charity may be deemed not to have been received by the individual for whose appearance, speech or article it was given. On January 1, 1991, the $2,000 honorarium limitation imposed by 2 U.S.C. § 441i will no longer apply to executive branch personnel.

The honorarium prohibition applies even without a nexus between the appearance, speech or article and the individual's Federal employment. Executive branch employees have long been prohibited from receiving any compensation, including honoraria, for speaking and writing on subject matter that focuses specifically on the employing agency's responsibilities, policies and programs; when the employee may be perceived as conveying agency policies; or when the activity interferes with his or her official duties. Those limitations, discussed more fully in OGE informal advisory memoranda 84 x 5 and 85 x 18, will continue to apply after January 1. However, on or after that date, receipt of compensation will be prohibited for any appearance, speech or article, regardless of the subject matter or circumstances.

Whether compensation constitutes an honorarium requires a threshold determination whether it is offered for an "appearance, speech, or article." We expect that the regulatory definitions of those terms will be similar to definitions used in the Federal Election Commission's regulation implementing 2 U.S.C. § 441i at 11 CFR § 110.12(b). Those definitions provide:

> "(2) Appearance. `Appearance' means attendance at a public or private conference, convention, meeting, social event, or like gathering, and the incidental conversation or remarks made at that time.
>
> "(3) Speech. `Speech' means an address, oration, or other form of oral presentation, regardless of whether presented in person, recorded, or broadcast over the

media.

"(4) Article. `Article' means a writing other than a book, which has been or is intended to be published."

Except when the opportunity was extended to the employee wholly or in part because of his or her official position, we expect to exclude the following from the respective definitions of the terms "appearance" and "speech":

- Engagements to perform or to provide entertainment using an artistic or other such skill or talent or primarily for the purpose of demonstration or display; and

- The recitation of scripted material as for a live or recorded theatrical production.

We expect that the definition of the term "article" will exclude works of fiction, poetry, lyrics and scripts.

Although the statutory definition of the term "honorarium" excludes travel expenses for the employee and one relative, we expect that the regulations will reflect standards of conduct concerns by continuing to forbid acceptance of travel expenses from a source whose interests may be substantially affected by performance of the employee's official duties or where the subject matter of the speech or article focuses specifically on the employing agency's responsibilities, policies or programs. Travel expenses accepted under a specific statutory authority, such as 5 U.S.C. § 4111 or 31 U.S.C. § 1353, will continue to be permissible.

In addition to providing an exclusion for travel expenses, we expect that the implementing regulations will include at least the following exceptions to the statutory definition of "honorarium":

- Meals and other incidents of attendance, such as waiver of attendance fees or provision of course materials furnished as part of the event at which an appearance or speech is made;

- Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a

prohibited source;

- Copies of publications containing articles, reprints of articles, tapes of appearances or speeches, and similar items that provide a record of the appearance, speech or article;

- Compensation for goods and services other than appearing, speaking or writing, even though making a speech or appearance or writing an article may be an incidental task associated with provision of the goods or services;

- Salary, wages and other compensation pursuant to an employee compensation plan when paid by an employer for services on a continuing basis that involve appearing, speaking or writing;

- Compensation for teaching a course involving multiple presentations by the employee offered as part of a program of education or training sponsored and funded by a state or local government;

- Compensation for teaching a course involving multiple presentations by the employee offered as part of the regularly established curriculum of an accredited institution of higher education;

- An award for artistic, literary or oratorical achievement made on a competitive basis under established criteria;

- Witness fees credited under 5 U.S.C. § 5515 against compensation payable by the United States; and

- Compensation received for any appearance or speech made or article accepted for publication prior to January 1, 1991, or for any appearance or speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991.

The legislative history of the Ethics Reform Act indicates that the honorarium ban cannot be circumvented by contracting for a continuing series of talks, lectures, speeches or appearances and characterizing the income as a stipend or as salary. Thus,

employees will not be able to avoid the prohibition simply by contracting or otherwise agreeing to provide multiple appearances, speeches or articles in exchange for a fee, nor may they accept compensation from an agent, speakers bureau or similar entity that facilitates appearance, speaking or writing opportunities.

An honorarium is "received" when the employee has the right to exercise dominion and control over the honorarium and direct its subsequent use. Thus, with the exception of an honorarium paid to a charity pursuant to Section 501(c), an honorarium will be deemed to have been received if it is paid to another person on the basis of designation, recommendation or other specification by the employee or if, with the employee's knowledge and acquiescence, it is paid to his or her parent, sibling, spouse, child or dependent relative.

There are several statutory limitations on the authority created by Section 501(c) to direct an honorarium to a charitable organization to avoid receipt in violation of the prohibition. The organization to which the honorarium is paid must be a charitable organization described in 26 U.S.C. § 170(c), and the employee, the employee's parent, sibling, spouse, child or dependent relative may not derive any direct financial benefit from the charitable organization separate from and beyond any general benefit conferred by the organization's activities. The amount of any honorarium directed to such an organization may not exceed $2,000 per appearance, speech or article, and the employee must not take a tax deduction on account of the honorarium payment.

Only those honoraria that could be accepted by the employee but for the existence of the honorarium prohibition may be paid to a qualifying charity. Thus, for example, an honorarium that must be declined under 18 U.S.C. § 209 because it is offered for the performance of an employee's official duties may not be directed to a charity. Similarly, an honorarium offered for a speech regarding subject matter that focuses on agency responsibilities, policies and programs must be declined under the standards of conduct and thus may not be directed to a charity. Individuals who direct honoraria to charitable organizations will be required to file, on a confidential basis, a report identifying the charitable recipients.

**THE 15-PERCENT OUTSIDE EARNED INCOME**

**LIMITATION**

With a special proration provision for individuals who are subject to the limitation for less than a year, Section 501(a) provides that an officer or employee, other than a special Government employee:

> ". . . who is a noncareer officer or employee and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule under section 5332 of title 5, United States Code, may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5 United States Code, as of January 1 of such calendar year."

Many who will be subject to the 15-percent outside earned income limitation are full-time Presidential appointees who are already prohibited from receiving "any" outside earned income by Section 102 of Executive Order 12674, as modified by Executive Order 12731 dated October 17, 1990. Unlike the Executive order prohibition, however, the statutory 15-percent limitation carries civil penalties.

The 15-percent outside earned income limitation only applies to a noncareer employee whose rate of basic pay is equal to or greater than the annual rate for GS-16, Step 1 of the General Schedule. In the case of an employee who holds a General Schedule or other position that provides several rates of pay or steps per grade, we expect that the regulations will construe the above quoted provision as applying only if the rate of pay for the lowest step of the grade at which he or she is employed exceeds the annual rate for GS-16, Step l. Thus, a GS-15 noncareer employee paid at Step 9 would not be subject to the limitation even though his or her total annual compensation exceeds the per annum pay for GS-16, Step l.

Under the Federal Employees Pay Comparability Act of 1990, Public Law 101-509, General Schedule positions at GS-16, 17 and 18 will be replaced by a new range of rates for positions classified "above GS-15." The pay for these positions may be no less than 120 percent of the rate for GS-15, Step 1. When this provision of the Comparability Act takes effect, this minimum rate for positions classified "above GS-15" will replace GS-16,

step 1 as the rate that triggers application of the 15-percent outside earned income limitation. For purposes of determining whether an individual's rate of basic pay equals or exceeds the triggering rate, adjustments, such as those for locality pay authorized by the Comparability Act, will be disregarded.

Noncareer employees covered by the prohibition include those paid at or above the triggering rate and appointed by the President to positions under the Executive Schedule, 5 U.S.C. §§ 5312 through 5317, or to positions that, by statute or as a matter of practice, are filled by Presidential appointment, other than positions in the uniformed services and within the foreign service below the level of Assistant Secretary or Chief of Mission. All noncareer members of the Senior Executive Service or of other SES-type systems (e.g., the Senior Foreign Service) will be subject to the prohibition, as will employees serving in Schedule C or noncareer executive assignment positions who are paid at or above the triggering rate. The prohibition will also apply to individuals paid at or above the triggering rate who are appointed to positions under agency-specific statutes that establish appointment criteria essentially the same as those set forth in 5 CFR § 213.3301 for Schedule C positions or 5 CFR § 305.601 for noncareer executive assignment positions.

The term "outside earned income" includes wages, salaries, commissions, professional fees and any other form of compensation or remuneration for services. We expect that the regulatory definition will exclude the following:

- Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

- Income attributable to service with the military reserves or national guard;

- Income from pensions and other continuing benefits attributable to previous employment or services;

- Income from investment activities where the individual's services are not a material factor in the production of income;

- Payments, whether advanced, provided in kind or reimbursed, intended to compensate for out-of-pocket

expenses actually incurred;

- Copyright royalties, fees, and their functional equivalent from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights;

- Honoraria paid to charitable organizations pursuant to Section 501(c), as discussed above;

- Compensation for services rendered prior to January 1, 1991, or in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991; and

- Compensation for services which the employee first undertook to provide prior to January 1, 1991, where the standards of the applicable profession require the employee to complete the case or other undertaking.

The statutory limitation applies to income attributable to the calendar year and, thus, cannot be avoided by deferring payment. It cannot be avoided by accepting compensation in some form other than cash or by artificial efforts to characterize earned income as investment income. For example, a covered noncareer employee who has been employed on his own time as an educational consultant cannot incorporate his consulting business, limit the amount of salary he draws from the corporation and, under the guise of a dividend, recover additional compensation attributable to his consulting services.

The only authority to exclude compensation diverted to another is the authority at Section 501(c) by which an honorarium paid to a charitable organization is deemed not to have been received. Other compensation will be included in determining the amount of outside earned income attributable to the calendar year, even if it is donated by the employee or on behalf of the employee to a charitable organization.

Assuming, for purposes of illustration, that the rate of basic pay for Executive Level II is $120,000 on January 1, 1991, the maximum amount of outside earned income a covered noncareer employee may have in 1991 will be 15 percent of $120,000, or $18,000. Subsection 501(a)(2) provides a proration formula for

determining the amount of the outside earned income limitation applicable to an employee who becomes a covered noncareer employee during a calendar year. In the case, for example, of an employee appointed to a noncareer Senior Executive Service position on November 1, the outside earned income limitation applicable to him during the 61 days of the year he is in a covered position is determined in the following manner:

Step 1 The rate of basic pay for Executive Level II as in effect on January 1 of that year ($120,000) is divided by 365. That quotient is $329;

Step 2 The dollar amount determined by Step 1 ($329) is then multiplied by the 61 days the employee held the covered noncareer position. That product is $20,069;

Step 3 The dollar amount determined by Step 2 ($20,069) is multiplied by .15, or 15 percent. The product ($3,010) is the maximum outside earned income the employee may have in 1991 attributable to the period of his service in a covered noncareer position.

**LIMITATIONS ON OUTSIDE EMPLOYMENT**

Section 502 states that one who is a noncareer officer or employee whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedules shall not:

"(1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

"(2) permit that officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

"(3) receive compensation for practicing a profession which involves a fiduciary relationship;

"(4) serve for compensation as an officer or member

of the board of any association, corporation, or other entity; or

"(5) receive compensation for teaching, without the prior notification and approval of the appropriate entity referred to in section 503."

The above limitations apply to those noncareer officers and employees who are subject to the 15-percent limitation on outside earned income discussed in the preceding section of this memorandum. We expect that the term "compensation" will be given the same meaning as the term "outside earned income," which is also defined in the preceding section.

Application of the first three prohibitions listed above must begin with a definition of the phrase "profession involving a fiduciary relationship." The following excerpt is from the report of the bipartisan task force that initiated the legislation:

> The task force notes that a `fiduciary' is generally described as one `having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking' (Black's Law Dictionary, 5th Ed. 563). However, the task force intends that the term fiduciary not be applied in a narrow, technical sense and wants to ensure that honoraria not reemerge in various kinds of professional fees from outside interests. The task force intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture, or financial. The appropriate ethics office will make the determination as to which professional activities involve a 'fiduciary' relationship.

Consistent with this purpose, we expect that a "profession which involves a fiduciary relationship" will be defined in the regulations as a profession in which the nature of the services provided causes the recipient of those services to place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge of the practitioner.

We expect that the term "profession" will be given its normally understood meaning. According to Webster's Third New International Dictionary, a profession is:

> . . . a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.

The term "profession" is not used in Section 502 in the more colloquial sense to refer generally to any vocation or employment.

Section 504(b) gives the Office of Government Ethics and designated agency ethics officials authority to render advisory opinions. Accordingly, designated agency ethics officials will be responsible in the first instance for determining whether a given activity involves "practicing a profession which involves a fiduciary relationship" or employment or affiliation with a firm or entity that "provides professional services involving a fiduciary relationship."

Nothing in the law prohibits a covered noncareer employee from providing uncompensated, or "pro bono," services. Nor does it prohibit a covered noncareer employee from assuming fiduciary responsibilities or from accepting compensation for performing such responsibilities, provided that he or she is not thereby "practicing a profession which involves a fiduciary relationship. " Thus, a covered noncareer employee may receive the customary fee for serving as executor of the estate of a friend or for serving as the trustee of a family trust, as long as his or her outside earned income does not violate either the 15-percent outside earned limitation discussed above or the outside earned income prohibition applicable to certain Presidential appointees. A covered noncareer employee could not, however, hold himself or herself forth as a professional trustee and charge a fee for such services or serve for compensation as an attorney for an estate.

The prohibition on receipt of compensation for serving as an officer or member of the board of any association, corporation, or other entity is straightforward. Covered noncareer employees are prohibited from receiving compensation for serving as officers or on boards of directors of any entity. This

prohibition is not limited to commercial or for-profit entities; it also prohibits compensation for serving as an officer or board member of entities such as professional associations and charitable organizations. Uncompensated service, however, is not prohibited by Section 502. The definition of the term "compensation" that we expect to include in the regulations would allow a covered noncareer employee to receive travel and similar reimbursements that would permit participation in the activities and business affairs of an entity he or she serves without compensation.

The provision relating to teaching by covered noncareer employees is one that will require the designated agency ethics official to give advance written approval for any compensated teaching activity. The statute imposes no requirement for advance approval of uncompensated teaching. For purposes of this provision, we expect that "teaching" will be defined in the regulations as any activity that involves oral presentation or personal interaction, the primary function of which is to instruct or otherwise impart knowledge or skill. We do not expect that it will be limited to the structured type of teaching that occurs in a formal setting, as through teaching a class or course to a number of individuals, but will extend to instruction on an individual basis or in an informal setting. As a practical matter, the approval mechanism will not come into play where compensation for the particular teaching activity is prohibited because it is an honorarium for a speech.

The approval criteria that we expect to include in the regulations will require a determination that the teaching will not interfere with performance of the covered noncareer employee's official duties nor give rise to an appearance that the teaching opportunity was extended to the employee principally because of his or her official position. The designated agency ethics official will, of course, be required to determine that the employee's receipt of compensation will not violate any of the statutory limitations discussed above, and that the activity will not violate any other conflict of interest statute or any prohibition or limitation imposed by applicable standards of conduct. Thus, for example, a Presidential appointee prohibited by Section 102 of Executive Order 12674 from receiving any outside earned income could not be authorized to engage in compensated teaching activities. Similarly, an employee could not be authorized to receive compensation for teaching a course that focuses substantially on a particular agency program in

violation of the standards of conduct.