

Office of Government Ethics
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Letter to an Acting General Counsel
dated November 15, 1990

This is in reply to your letter of September 5, 1990, in which you posed several questions regarding application of the provisions of Title VI of the Ethics Reform Act of 1989, as amended (the "Act"), to the activities of a member of the Board of Directors of [your agency]. As required by [your agency's organic statute], the Board of Directors of [your agency] consists of three members, two of whom are cabinet level officials. Your questions pertain to the third member (the "Director"), who is required by the statute to be [engaged in a certain commercial pursuit and] experienced in financial matters. We understand from a member of your staff that the Director was appointed by President Reagan [in] 1988.

Title VI of the Act amended Title V of the Ethics in Government Act of 1978. Title VI enacted several new restrictions on the outside earnings and employment activities of Federal officers and employees that will take effect January 1, 1991, unless the salary provisions contained in section 703 of the Act are repealed. The Office of Government Ethics (OGE) will be publishing regulations implementing these new restrictions. One restriction will prohibit all officers and employees of the Government (other than special Government employees and individuals whose compensation is disbursed by the Senate) from receiving any honorarium. 5 U.S.C. app. § 501(b). Another restriction will apply only to certain noncareer officers and employees of the Government, prohibiting them in any calendar year from having 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. 5 U.S.C. app. § 501(a). Other of the Act's restrictions, set forth in 5 U.S.C. app. § 502, will provide that these same noncareer officers and employees may not receive compensation for affiliating with or being employed by an entity that provides professional services involving a fiduciary relationship, for practicing a profession which involves a fiduciary relationship, for serving as an officer or member of the board of any entity, or for teaching without the prior approval of the appropriate authority. Section 502 will also prohibit an officer or employee from permitting his

name to be used by any entity with whom he may not affiliate or be employed for compensation. As amended by Public Law 101-280 on May 4, 1990, and on November 5, 1990, by the Federal Employee Pay Comparability Act of 1990, sections 501(a) and 502 of the Act will apply to any noncareer officer or employee of the Government in a position for which the basic rate of pay is greater than the basic rate of pay for a position classified above GS-15 of the General Schedule (excluding special Government employees and those individuals whose compensation is disbursed by the Secretary of the Senate).¹

As a Presidentially-appointed member of the Board of Directors of the [agency], the Director is a noncareer officer or employee of the Government. Further, you indicate that the Director is compensated "at a rate of pay for Executive Level III as specified by statute, which is in excess of the basic hourly rate for GS-16." Although he would therefore appear to be subject to the honoraria ban of section 501(b), the outside earned income limitation of section 501(a), and the employment restrictions of section 502 described above, you wish to confirm their applicability in light of the Director's unique circumstances.

You first ask whether these restrictions would apply to the Director given the statutory requirement that he be [engaged in a certain commercial pursuit]. Notwithstanding that a condition precedent to the Director's appointment was that he be engaged in this particular activity, we can find nothing in the Act that would exempt him on this basis from any of the restrictions of Title VI.

You next ask if these restrictions will apply to the Director given "his status as a special Government employee." A "special Government employee" is defined in 18 U.S.C. § 202[(a)] as "an officer or employee of the executive branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis" If in fact the Director is a special Government employee, he would not be subject to the provisions of sections 501(a), 501(b), or 502 since Title VI of the Act specifically excludes special Government employees, as defined in 18 U.S.C. § 202, from coverage. [5 U.S.C. App. § 505(2).] As you may wish to confirm

your conclusion concerning the Director's status, we [refer you to] 18 U.S.C. § 202 and Appendix C of Chapter 735, Federal Personnel Manual.

In a closely related question, you ask whether the number of days worked by the Director subsequent to the January 1 effective date of Title VI of the Act should be included with the days worked prior to the effective date of the Act for purposes of calculating the 130 days that is relevant for purposes of the statutory definition of "special Government employee." As noted in the Federal Personnel Manual, an agency should make its best estimate of the number of days to be worked at the time of an individual's original appointment and at the expiration of each 365-day period thereafter. This estimate would determine an employee's status as a special Government employee "[e]ven if it becomes apparent, prior to the end of a period of 365 days for which an agency has made an estimate on an appointee, that he has not been accurately classified" If, for example, the [agency] had estimated on June 14, 1990, that the Director would work for 130 days or less through June 13 of 1991, the Director would be exempted from the restrictions of sections 501(a), 501(b), and 502 for the duration of that appointment by virtue of his status as a special Government employee. He would continue to be exempt even though at some time during that period he exceeded the 130-day maximum. Thus, an employee's status as a special Government employee can predate the effective date of Title VI of the Act for purposes of determining that its provisions are not applicable. In answering your question in the absence of an estimate, we offer our view that an employee's Government service before the January 1 effective date is relevant for purposes of determining the applicability of sections 501(a), 501(b), and 502.

Your next question focuses on the effect of the Office of Personnel Management's grant of Schedule A status to [agency] positions at GS-15 and below. We are unable to see the nexus between the excepted status of the staff of the [agency] and the applicability of these various restrictions to the Director. Assuming that he is not a special Government employee, the Director is subject to these provisions by virtue of being a noncareer officer or employee of the Government whose rate of basic pay is in excess of the relevant threshold.

In turning specifically to the outside earned income limitation of section 501(b), you note that the Director is a

partner in a [business entity] for which he receives a share of any profits. Again assuming that the Director is subject to the restriction, you question whether income in the form of profits from this partnership is "earned" income for purposes of the 15-percent limitation if not received in the form of salary. While regulations implementing the 15-percent outside earned income limitation have not yet been issued, this new limitation is similar in many respects to a limitation that, until December 31, 1990, will continue to apply to full-time Presidential appointees subject to Senate confirmation. Under the regulations implementing that current limitation, the definition of "outside earned income" excludes income "[f]rom investments with respect to which the personal services of the reporting individual are not a material factor." 5 C.F.R. § 2634.501(b). It is expected that the new regulation will adopt such an exclusion. However, since the exact nature of the Director's activities as partner in the [business entity] are not specified in your letter, we are unable to gauge the extent to which the new outside earned income limitation of section 501 will impact on the Director.

Your letter also notes that the Director receives several hundred dollars in honoraria on an annual basis. Effective January 1, 1991, the Director will be prohibited by 5 U.S.C. § 501(b) from receiving any honoraria while serving as an officer or employee of the Government (unless he is a special Government employee). As defined by Title VI of the Act, the term "honorarium" means "a payment of money or any thing of value for an appearance, speech or article" [5 U.S.C. App. § 505(3).] Depending upon the OGE regulations that will eventually define the scope of these terms and upon the exact nature of his activities, the Director may be precluded from continuing to accept honoraria even though it does not cause him to exceed the 15-percent outside earned income limitation that may also apply to him. If compensation may be accepted for an activity consistent with the regulations implementing the ban of section 501(b), it is expected that it will have to be counted as outside "earned" income within the meaning of the regulations that will implement the earned income limitation of section 501(a). Regulations implementing the current 15-percent income limitation state that the term "outside earned income" means wages, salaries, commissions, professional fees and other compensation received from personal services actually rendered" 5 C.F.R. § 2634.501(b). This would include honoraria. See, e.g., OGE informal advisory opinion 82 x 9.

Finally, you ask whether "partnership status or service without compensation on academic boards or civic organizations falls within the prohibition against outside employment." With one exception, the employment restrictions of section 502 prohibit the acceptance of compensation for engaging in certain activities but do not prohibit the activities themselves. Thus, section 502 could not bar the Director from serving without compensation on academic boards or civic organizations. We lack sufficient facts, however, to determine with certainty whether the Director's "partnership status" would involve the receipt of compensation for "affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship" within the meaning of section 502. Moreover, the meaning of this provision must be clarified through regulation. As noted, one provision of section 502 does not focus on the receipt of compensation, but rather prohibits an officer or employee from permitting his name to be used by any entity with whom he may not affiliate or be employed for compensation. While the meaning of this restriction must also be clarified in the future by OGE, it seems unlikely that a [specific type of] partnership, academic board, or civic organization would provide "professional services involving a fiduciary relationship" within the meaning of section 502.

We hope to provide ethics officials with general guidance concerning the restrictions of Title VI of the Act in the very near future. We do not anticipate, however, that such guidance would provide any additional information that would assist you in confirming the Director's status as a special Government employee.

Sincerely,

Stephen D. Potts
Director

1 The Federal Employees Pay Comparability Act of 1990 was signed by the President on November 5, 1990. The outside earned income limitation of section 501(a) and the employment restrictions of section 502 will in the future be triggered by a level of basic pay in excess of that in effect on the date the President determines, but no earlier than 90 days and no later

than 180 days after enactment. Until such time, the rate of basic pay for GS-16 will remain the relevant threshold.