

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
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Letter to the Head of an Educational Institution
dated January 18, 1991

This is in response to your letter to this Office of December 17, 1990, protesting the application of the honoraria ban contained within the Ethics Reform Act of 1989 (the Act), Pub. L. No. 101-194, § 601, 103 Stat. 1716, 1760-63 (1989) [5 U.S.C. App. 7, § 501(b)], to rank-and-file Federal employees. Your letter indicates that [an educational institution] believes that applying the honoraria ban to these employees creates at least three harmful effects. Firstly, it injures both Federal employees and members of their professions outside the Government by diminishing their interaction as part of the scholarly and professional community. Secondly, the honoraria ban will make it more difficult for the Government to recruit and retain highly qualified professionals. Lastly, such a prohibition raises Constitutional concerns over the limitation of personal liberties. For these reasons, the [institution] urges the prompt change of the Act through amendments to this restriction.

As you know, not only is Congress responsible for enacting the statute, but also it is the only avenue for amendment. Since the 102nd Congress convened on January 3, 1991, four bills have been introduced in the House of Representatives that would amend the honoraria ban to lessen its impact on career employees of the executive branch. Their numbers are H.R. 109, H.R. 325, H.R. 414 and H.R. 474. We understand that Mr. Frank, who is the chairman of the judiciary subcommittee that has jurisdiction over ethics issues, will hold a hearing on this issue on February 5, 1991; we also understand that Senator Glenn intends to schedule a hearing on this subject for February 6. Finally, as you may be aware, the National Treasury Employees Union, the American Federation of Government Employees, and 12 employees represented by the American Civil Liberties Union are challenging the constitutionality of the honoraria restrictions. They have requested a preliminary injunction to prevent the honoraria ban from being enforced pending a decision by the U.S. District Court for the District of Columbia. A hearing is scheduled for January 29, 1991, before the U.S. Court of Appeals for the D.C. Circuit.

Although the honoraria ban is currently in force, it is still possible for Federal employees to receive compensation for certain limited kinds of scholarly activity, such as teaching a course involving multiple presentations by the employee offered as part of the regularly established curriculum of an accredited institution of higher education. OGE Memorandum of November 28, 1990 (providing guidance concerning the honoraria prohibition and the limitations on outside earned income and employment contained in the Act). The memorandum also indicates various other situations that fall outside the scope of the honoraria ban.

Despite the limitations indicated in our November 28 memorandum, however, there is no doubt that the honoraria ban will place some burden on Federal employees. The Act requires this Office to promulgate rules and regulations for officers and employees in the executive branch of the Government. See section 601(a) of the Act. These regulations are expected to be published in the Federal Register on January 17, 1991. The Designated Agency Ethics Officials will administer these rules and regulations. *Id.* Both the statutory language and the legislative history of the honoraria ban make it clear that Congress intended that the ban be interpreted broadly, so as to avoid the circumvention of the ban by individuals and organizations.

The regulations, which will be codified as part 2636 of title 5 of the Code of Federal Regulations, will generally correspond with the November 28 memorandum, but will more completely describe the administration and scope of the honoraria ban and the outside employment and earned income limitations contained in the Act. Unless and until Congress amends the restriction or the restriction itself is struck down by the courts, the ban will be implemented for executive branch employees in accordance with our November 28 memorandum and our upcoming regulations.

Sincerely,

Stephen D. Potts
Director