

OFFICE OF GOVERNMENT ETHICS

AGENCY: Office of Government Ethics

5 CFR Part 2636

Prohibition of Honoraria

RIN 3209-AA13

57 FR 601

Wednesday, January 8, 1992

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Government Ethics is issuing an amendment to 5 CFR part 2636 to implement section 314 of the Legislative Branch Appropriations Act for 1992 for executive branch employees. Section 314 of that act amends section 505(3) of the Ethics in Government Act to provide that the definition of the term ``honorarium" includes a payment of money or any thing of value for ``a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government."

DATES: Interim regulation effective January 1, 1992. Comments by agencies and the public are invited and must be received by March 9, 1992.

ADDRESSES: Comments on this interim regulation should be sent to the Office of Government Ethics, suite 500, 1201 New York Avenue,

NW., Washington, DC 20005-3917, Attention: Ms. Glynn.

FOR FURTHER INFORMATION CONTACT: Marilyn Glynn, Office of Government Ethics, telephone (202/FTS) 523-5757, FAX (202/FTS) 523-6325.

SUPPLEMENTARY INFORMATION:

A. Summary of Legal Background

This interim rule is being published by the Office of Government Ethics following consultation with the Department of Justice and the Office of Personnel Management. It amends 5 CFR 2636.203(a) to reflect the change in the definition of the term "honorarium" in Act"), at 5 U.S.C. App., as amended by section 314(b) of the Legislative Branch Appropriations Act for 1992 (Pub. L. 102-90, 105 Stat. 447, at 469). Interim regulations implementing sections 501-505 of the Ethics Act, 5 U.S.C. App., for the executive branch, including the honorarium prohibition at section 501(b) of the Ethics Act, were issued by the Office of Government Ethics as 5 CFR part 2636 (56 FR 1721-1730, January 17, 1991; 56 FR 21589, May 10, 1991; and 56 FR 51319, October 11, 1991).

Section 501(b) of the Ethics Act, 5 U.S.C. App., provides that:

An individual may not receive any honorarium while that individual is a Member, officer or employee." As enacted by the Ethics Reform Act of 1989 (Pub. L. 100-194, 103 Stat. 1716, at 1762), section 505(3) of the Ethics Act defined the term "honorarium" to mean a "payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee" and included an exception only for certain travel expenses. Effective January 1, 1992, section 314(b) of Public Law 102-90 amends that definition to mean a "payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee * * * .

The report of the Bipartisan Task Force on Ethics that drafted the original 1989 honorarium prohibition expressed an intention that it apply to appearances, speeches or articles individually or in a series:

The task force intends that the prohibition on honoraria for

speeches, articles, and appearances extends to payment or compensation for such activity in any form. The ban on honoraria could not be circumvented, for example, by arranging for a continuing series of talks, lectures, speeches, or appearances and recharacterizing the income as a "stipend" or "salary." 135 Cong. Rec. H9257 (daily ed. November 21, 1989).

The effect of the present amendment of the law is to create an exception to the honorarium prohibition for compensation for certain appearances, speeches or articles if they are made, delivered or published as a series. This interim rule adds a new paragraph (a)(13) to 5 CFR 2636.203 and modifies a few examples following that provision to reflect the new statutory exception. In the absence of a statutory definition of the word "series," the interim regulation adopts the primary meaning given in Webster's Third New International Dictionary: "a group of usually three or more things or events standing or succeeding in order and having a like relationship to each other."

The phrase "directly related to the individual's official duties" is not further defined in this interim regulation. A proposed definition of the similar phrase "relates to the employee's official" chapter in the proposed Standards of Ethical Conduct for Employees of the Executive Branch which was issued for comment by the Office of Government Ethics on July 23, 1991 (56 FR at 33812). As there proposed, relatedness would encompass subject matter that focuses specifically on responsibilities, programs, or operations of the employee's agency as well as subject matter that focuses specifically on the employee's individual duties. Pending issuance of a definition that can be cross-referenced in this 5 CFR part 2636, employees should rely on the guidance in Office of Government Ethics informal advisory opinion 85-18 issued October 28, 1985 in determining whether subject matter that does not deal with the employee's particular duties is nevertheless directly related to his or her official duties. That opinion is published at pages 589-600 of the Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics (1979-1988), and provides in pertinent part (at p. 596):

When the seminar, conference, or briefing in which the employee wishes to participate does not involve non-public information, but the subject matter thereof relates to the programs or operations of the employee's agency, the permissibility of the activity depends upon how closely the subject matter relates to the agency's responsibilities. Generally, an employee * * * may lecture on a subject

within the employee's inherent expertise based on his or her educational background or experience, even though the subject matter is related to the activities of the employing agency. The employee will be prohibited from receiving compensation only when the activity focuses specifically on the agency's responsibilities, policies, and programs * * *.

While that opinion deals specifically with speaking engagements and includes a different test for certain Presidential appointees, it is in part the basis for the proposed definition in 2635.807(a)(1) of this chapter and can be applied equally to the honorarium prohibition as to appearances, speeches and articles.

B. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to 5 U.S.C. 553(b), as the Director of the Office of Government Ethics I have found that good cause exists for waiving the general requirements of notice of proposed rulemaking and 30-day delayed effective date and for making this interim regulation effective on January 1, 1992. These requirements are being waived because the amended honorarium definition at section 505(3) of the Ethics Act, 5 U.S.C. App., is effective January 1, 1992. Because a violation of the honorarium prohibition of section 501(b) of the Ethics Act, 5 U.S.C. App., can result under section 504(a) of the Ethics Act, 5 U.S.C. App., in a civil penalty of up to \$10,000 or the amount of compensation received for the prohibited conduct, whichever is greater, there is a need to amend the interim regulation for the executive branch effective January 1, 1992. Any comments received in response to this interim rule will be considered in formulating a

E.O. 12291, Federal Regulation

As Director of the Office of Government Ethics, I have determined that this is not a major rule as defined under section 1(b) of Executive Order 12291.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal employees.

Paperwork Reduction Act

As Director of the Office of Government Ethics, I have determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget thereunder.

List of Subjects in 5 CFR Part 2636

Conflict of interests, Government employees, Reporting and record keeping requirements.

Approved: December 17, 1991.

Stephen D. Potts,
Director, Office of Government Ethics.