

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



January 11, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
United States House of Representatives
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz:

This responds to your letter dated December 23, 2016, requesting responses to four questions and the production of certain documents. The letter initially set a response deadline of January 6, 2016, but the Committee extended that deadline to January 11, 2016. Please find the enclosed responses to your questions. The requested documents are provided on a flash drive, which contains an index.

If your staff has any questions regarding these materials, please have them contact Shelley K. Finlayson, Chief of Staff and Program Counsel, at (202) 483-9314.

Sincerely,

A handwritten signature in blue ink that reads "Walter M. Shaub, Jr.".

Walter M. Shaub, Jr.
Director

Enclosures

cc: The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
United States House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

THE FOLLOWING INFORMATION RESPONDS TO QUESTIONS NUMBERED 1 THROUGH 4 IN THE COMMITTEE'S DECEMBER 23, 2015, LETTER.

1. What provision of 5 U.S.C. appendix § 102(a) contains the rule referenced by [OGE's spokesperson]? If the rule is not contained within the statute, what is the source of the rule?

Subsection 102(a) of the Ethics in Government Act establishes requirements for reporting a filer's income.¹ Earned income is reportable to the extent specifically required under subsection 102(a)(1)(A).² When a filer acts as an agent for an organization, including a charitable organization, any revenue belongs to the organization and is not earned income of the filer.³ Therefore, the organization's revenue is not reported as income in the filer's financial disclosure report because it is not the filer's own earned income.⁴

In contrast, a filer's own earned income is reportable, even if the filer donates it to charity. An honorarium is a type of earned income.⁵ Accordingly, an honorarium that a filer directs to be donated to charity, in lieu of payment to the filer, is reportable under the donated honoraria clause of subsection 102(a)(1)(A). The payment is reportable only if the filer could have received the payment if not donated to charity,⁶ meaning the filer had a personal financial interest in it.⁷

This concept is reinforced by the phrase "in lieu of" in the donated honoraria clause.⁸ The phrase means that the donated honoraria clause applies only when a payment is made to a charity

¹ This response analyzes requirements for public financial disclosure filers. The analysis also generally applies to the spouses of filers in the executive and legislative branches, pursuant to 5 U.S.C. app. § 102(e)(1)(A).

² Personal investment income is addressed in other paragraphs of section 102(a) not relevant to this analysis.

³ Under well-established principles of agency law, the acts of an agent are done for the benefit of the principal and "the gain realized by the agent's efforts is income to the principal," not income to the agent. *Comm'r v. Banks*, 543 U.S. 426, 437 (2005); see also *Md. Casualty Co. v. United States*, 251 U.S. 342, 347 (1920) (under tax law "receipt by an agent is regarded as receipt by his principal"); RESTATEMENT (THIRD) OF AGENCY §§ 1.01, 8.05, 8.12 (2006).

⁴ See OGE Informal Advisory Opinion 02 x 2, at 3 n.3 (2002) ("[T]he interests of an employee's general partner or outside employer are covered by section 208 but are not reportable under section 102" of the Ethics in Government Act.).

⁵ See U.S. OFFICE OF GOV'T ETHICS, PUBLIC FINANCIAL DISCLOSURE: A REVIEWER'S REFERENCE 3-9 (2d ed. 2004) ("Earned income includes fees, salaries, commissions, HONORARIA, and other compensation for personal services.") (emphasis in original); 5 C.F.R. § 2636.303(b) ("Outside earned income and compensation both mean wages, salaries, *honoraria*, commissions, professional fees and any other form of compensation for services....") (emphasis added); 135 Cong. Rec. H9254, H9271 (1989) (Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989) ("Proposed subsection (b) of the rule [at 5 U.S.C. app. § 501] provides that a Member may not have outside earned income, including honoraria."); 5 U.S.C. app. § 501 (inclusion of honoraria ban in Ethics in Government Act section limiting earned income of officials); H. COMM. ON ETHICS, INSTRUCTION GUIDE ON FINANCIAL DISCLOSURE STATEMENTS AND PERIODIC TRANSACTION REPORTS 27 (2015) (treating honoraria as earned income for new Members, employees, spouses and candidates).

⁶ See *Banks*, 543 U.S. at 433-35 (2005) (analogous decision holding that the determination as to whether an assigned payment is attributable as taxable income of the assignor turns on whether the payment was one the assignor "could have received himself").

⁷ See OGE Informal Advisory Opinion 02 x 1 (2002) (determining that a filer who is not a beneficiary of a trust but serves as its trustee is not required to disclose the trust's income because the filer has no "personal financial interest" in it); Mem. from Robert I. Cusick, Director, U.S. Office Gov't Ethics, to Designated Agency Ethics Officials, *Discretionary Trusts*, DO-08-024 (2008) (explaining that a filer does not need to disclose a discretionary trust's income because the filer, though an income beneficiary, does not have a financial interest in discretionary trust income that is not distributed to the filer).

⁸ 5 U.S.C. app. § 102(a)(1)(A) (addressing "payments made to charitable organizations in lieu of honoraria").

standing in place of a filer as recipient, i.e., receiving the filer's earned income.⁹ Therefore, if the filer could not have received the payment, that clause is inapplicable because the payment to the organization was not "in lieu of" a payment to the filer.¹⁰

2. What factors does OGE consider in determining whether an individual acts as an agent of an organization versus when speaking is done in a personal capacity?

For purposes of 5 U.S.C. app. § 102(a), OGE would advise that filers apply the well-settled principles of agency law to determine whether they or their spouses are agents of organizations.¹¹ The elements of agency are set out in § 1.01 of the Restatement (Third) of Agency.

3. If an individual serves as an agent for an outside entity in an outside activity, does that have to be disclosed in Schedule D of OGE form 278, or anywhere else?

An individual who acts as agent for an organization does not necessarily hold a "position" with that organization.¹² Only positions are reported in Schedule D, Part I, which requires disclosure of any position that a filer holds with an organization, unless the position is honorary or the organization is a religious, social, fraternal or political entity.¹³ This requirement does not apply to the spouses of filers.¹⁴

Schedule D, Part II requires disclosure of the source of any payments during the reporting period that exceed \$5,000 in a calendar year for a filer's services.¹⁵ Under the Ethics in Government Act, this reporting requirement applies when the payment for the filer's services is made to another person or organization, but the requirement applies only to new employees and

⁹ See, e.g., *Fed. Grp., Inc. v. United States*, 67 Fed. Cl. 87, 106 (2005) ("The phrase 'in lieu of' means 'instead of' 'in place of,' or 'in substitution of.'").

¹⁰ Inasmuch as the Committee's letter addresses the reporting requirements for "paid speeches over the past thirteen years," it bears noting that many of the financial disclosure reports filed during this 13-year period were filed with the Senate because the filer was a Senator from 2001 to 2009. Letter from Hon. Jason Chaffetz, Chairman, H. Comm. on Gov't Oversight and Reform, to Hon. Walter J. Shaub, Jr., Director, U.S. Office of Gov't Ethics, at 1 (Dec. 23, 2015). The same statutory authority applies to reviews of financial disclosure reports by both the Senate Select Committee on Ethics and OGE. 5 U.S.C. app. § 106(a)(2). National newspaper articles recount that these speeches were not reported in her Senate filings. See John Solomon & Matthew Mosk, *For Clinton, New Wealth in Speeches*, WASH. POST, Feb. 23, 2007 ("The Clintons declined to disclose the size and sources of the payments for speeches he delivered on behalf of the charity. Campaign law and Senate ethics rules require Hillary Clinton to disclose only the fees her husband has taken as personal income, not those he routed to charity."); Jeff Jacoby, *Harry Truman's Obsolete Integrity*, N.Y. TIMES, Mar. 2, 2007 ("The scale of Clinton's post-White House earnings is known only because financial-disclosure rules require his wife, Senator Hillary Clinton, to report them. (They don't include the additional millions his speeches have raised for the William J. Clinton Foundation, his nonprofit charity.)"). These articles would have been available to the Senate Select Committee on Ethics, yet there is no indication any of her Senate disclosures were rejected.

¹¹ See, e.g., RESTATEMENT (SECOND) OF AGENCY § 1 (1958); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *O'Neill v. HUD*, 220 F.3d 1354, 1360 (Fed Cir. 2000) (under the criminal government ethics prohibition at 18 U.S.C. § 205(a)(2), the term "agent" should be interpreted in light of its "well-settled common-law meaning").

¹² The conference committee specifically rejected a provision in the Senate version of the Ethics in Government Act that would have characterized service as an agent by a filer as a "position" and required it to be reported in Schedule D, Part I. S. DOC. 95-127, at 67, 70 (1978) (Conf. Rep.).

¹³ 5 C.F.R. § 2634.307.

¹⁴ *Id.* (requiring disclosure of positions held only "by the filer").

¹⁵ 5 C.F.R. § 2634.308(b)(6).

nominees—it does not apply to incumbent or former employees, elected officials, candidates, or the spouses of filers.¹⁶

4. Under what circumstances does OGE offer opinions on ethics issues to journalists or parties other than the government employee under investigation or ethics officials within their department or agency?

OGE’s strategic plan includes a goal of providing information to citizens about government ethics requirements.¹⁷ In support of this goal, OGE regularly responds to reporters and others who request information and technical assistance on the executive branch ethics laws and regulations. As OGE explained in its most recent Annual Performance Plan and Report,

OGE responds to requests for information and assistance from its external stakeholders on topics such as public financial disclosure, gifts from outside sources, and post-employment. For example, in fiscal year 2014, OGE responded to over 100 requests for assistance from the press. These interactions result in more accurate reporting about the ethics rules and regulations. These interactions also multiply OGE’s ability to reach the general public to further promote understanding of the executive branch ethics program and its role in ensuring government integrity. OGE also responded to requests for assistance from other stakeholders, including over 200 requests from public citizens. This assistance promotes understanding of the executive branch ethics program and related ethics rules and regulations.¹⁸

With regard to the articles mentioned in the Committee’s letter, OGE’s spokesperson was contacted by the reporters. Consistent with OGE’s practice, OGE’s spokesperson provided the reporters with information only about reporting requirements under the Ethics in Government Act. He declined to discuss the factual circumstances of any individual. For this reason, one of the reporters made a point of acknowledging in his article that, “[OGE] declined to comment on the specific case.”¹⁹

¹⁶ *Id.*

¹⁷ U.S. OFFICE OF GOV’T ETHICS, STRATEGIC PLAN FOR FISCAL YEARS 2014-2018, Strategic Goal 3, at 8 (2014), available at <http://www.oge.gov/About/Management-Reports-and-Policies/Performance-and-Strategic-Docs/Performance---Strategic-Documents/> (last visited Jan. 8, 2016).

¹⁸ U.S. OFFICE OF GOV’T ETHICS, FISCAL YEAR 2016: EXPLANATORY NOTES, ANNUAL PERFORMANCE PLAN, AND ANNUAL PERFORMANCE REPORTS 36 (2015), available at <http://www.oge.gov/About/Legislative-Affairs-and-Budget/Budget-and-Appropriations/Budget-Submissions-to-Congress/> (last visited Jan. 7, 2016).

¹⁹ Josh Gerstein, *Hillary’s Speech Disclosures Come Under Fire*, POLITICO, May 20, 2015.