

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 23 -- 11/20/90**

### **Letter to an Employee dated November 20, 1990**

This is in response to your letter of August 31, 1990, requesting guidance concerning restrictions on your ability to continue your free-lance speech writing, particularly in light 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)]. Your letter states that you are a part-time Schedule C employee (GS-11) with an [agency].

Because you indicate that you are familiar with the basic rules applicable to your outside speech writing, we will focus upon the effect of the honoraria ban. As a threshold matter, we note that the ban on honoraria does not apply to those employees designated as "special Government employees" at the time they are hired who work less than 130 days in a calendar year for the Federal Government. [5 U.S.C. App. 7, § 505(2); 18 U.S.C. § 202(a).] In your letter you state that you are a part-time employee, but you did not state whether you are a special Government employee. You can learn whether you are a special Government employee by contacting your personnel office.

If we assume that you are a part-time employee and not a special Government employee, then you are subject to the restrictions contained in the honoraria ban. This ban, contained in section 601(a) of the Act, [5 U.S.C. App 7, § 501(b)], defines the term "honorarium" as "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." Pub. L. No. 101-194, § 601(a), 103 Stat. 1716, 1762 (1989) [5 U.S.C. App. 7, § 505(3)] (emphasis added). This section will become effective on January 1, 1991. *Id.* § 603.

The answer to the question that you raise lies in the definitions of the terms "speech" and "article" as used in the Act. Although this Office is currently preparing a general guidance memorandum to be followed by regulations that will

address the scope of these terms, their precise parameters for the purposes of the Act have not yet been defined. The Federal Election Commission (FEC), in regulations promulgated under 2 U.S.C. § 441i (a statute completely separate from the Act that limits the amount of honorarium an officer, employee, or elected official may receive to \$2,000) defines the term "speech" as "an address, oration, or other form of oral presentation, regardless of whether presented in person, recorded, or broadcast over the media." 11 C.F.R. § 110.12(b)(2). The term "article" is defined as "a writing other than a book, which has been or is intended to be published." 11 C.F.R. § 110.12(b)(4).

It seems clear that, absent further facts, your speech writing would not be considered an "article" under the FEC regulations. Although there may be certain differences in the scope of the term "article" in our regulations implementing the honoraria ban, our regulations will if anything be less restrictive than the FEC regulations on this point. We can therefore tell you that, absent further facts, your speech writing will not fall within the definition of the term "article" for the purposes of the honoraria ban contained in the Act.<sup>1</sup> Nor does it seem that it will fall within the scope of the term "speech" as used in the Act. Our regulations, like those of the FEC, will focus upon the actual oral presentation, recording, or broadcasting of a speech. In your situation you will not be receiving fees for giving a speech, but instead for the writing of the speech given.

Based upon the above, we are of the opinion that the honoraria ban contained in the Ethics Reform Act will not prohibit you from receiving income for writing speeches for others. We do advise you to review carefully our regulations implementing the honoraria ban when those regulations are published, so as to avoid any inadvertent violation of the Act.

The Designated Agency Ethics Official for [your agency] will be receiving the guidance memorandum and notification of our regulations as they are issued. Because she can also help determine your employment status (part-time or special Government employee) and because she can also assist you in applying the standards of conduct to your outside activities, we suggest you contact her with any additional questions that you may have. We hope to have the memorandum issued shortly.

Sincerely,

Stephen D. Potts  
Director

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**1** Facts that would require further analysis would include (for example) receiving fees for the publication of the text of one of your speeches in a periodical or some other publication. If this situation or similar situation arises, we would advise you to contact your Designated Agency Ethics Official for further guidance.