

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).



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MEMORANDUM

TO: Designated Agency Ethics Officials, General Counsels and Inspectors General

FROM: Stephen D. Potts, Director

SUBJECT: Honoraria

On September 21, 1993, the Court of Appeals for the District of Columbia Circuit denied the Government's suggestion to rehear en banc the panel's decision in *NTEU v. United States*, 990 F.2d 1271 (D.C. Cir. 1993). The panel's decision affirmed a district court decision invalidating the statutory ban on executive branch employees accepting honoraria for speeches, articles or appearances. 5 U.S.C. app. § 501(b). Because of the denial of rehearing, the mandate of the court of appeals was issued yesterday, September 28, 1993, permitting enforcement of the district court's injunction against the ban. The Solicitor General decided not to ask the court of appeals to stay the issuance of the mandate. However, the Solicitor General has until December 20, 1993, to file a petition for certiorari requesting the Supreme Court to review the court of appeals' ruling. The Solicitor General has not yet decided whether to file a petition for certiorari.

The Department of Justice has advised the following: The consequence of the issuance of the court of appeals' mandate is that, pending possible action by the Supreme Court if the Solicitor General decides to request the Court's review, the Government is barred from requiring compliance with the statutory ban against executive branch employees accepting honoraria for speeches, articles or appearances. In addition, the Government cannot prevent executive branch employees from accepting honoraria placed in escrow or deferred in accordance with the Office of Government Ethics' DAEOgram dated June 24, 1991. The Solicitor General has made no decision as to what, if any, remedies may be available and appropriate where executive branch employees have accepted honoraria during this interim period if further review is sought in the Supreme Court and the decision of the court of appeals is ultimately reversed.

There remain in effect, however, a number of provisions which are unaffected by the court of appeals' decision and which may significantly restrict the ability of executive branch employees to accept honoraria. The Standards of Ethical Conduct at 5 C.F.R. § 2635.807 prohibit receipt of compensation for teaching, speaking or writing that relates to an employee's official duties. Where the activity for which an honorarium is to be paid took place before February 3, 1993, the effective date of the Standards of Ethical Conduct, agency standards of conduct are to be

considered in determining whether deferred or escrowed honorarium may now be received without violating those regulations.

For noncareer employees, other provisions may also apply. Certain noncareer employees are subject to a 15 percent limitation on outside earned income and may not receive any compensation for teaching except when specifically authorized in advance. See 5 C.F.R. §§ 2636.304 and 2636.307. Presidential appointees to full-time noncareer positions may not receive any outside earned income for outside employment or any other outside activity performed during their Presidential appointments. See 5 C.F.R. § 2635.804. These restrictions on noncareer employees' receipt of compensation have been in effect since the honoraria statute first took effect on January 1, 1991, and are applicable to deferred and escrowed honoraria, as well as to honoraria for current and future activities.