

Office of Government Ethics

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Letter to a White House Official dated April 13, 1983

[Recently, a member of your staff] asked a member of my staff to review a Covenant Not to Compete Agreement ("Agreement") entered into by [an individual] and [a] Corporation and its purchasers. [The individual] has accepted an appointment by the Secretary of [a Department] to a position which may also require him to work in the White House Office. While our Office would not normally review the financial disclosure of an individual with this type of appointment, we are happy to review this agreement under the circumstances.

Briefly, [the individual] and his family agreed to sell all outstanding stock of the Corporation, which is the parent of [a second] corporation. As part of the sale, [the individual] who had served as president of [the second corporation] agreed not to engage in any business which would directly compete with the business of [the second corporation] for a period of two years. Under this agreement, [the individual] received \$100,000 in January 1983, and will receive another \$100,000 in January 1984.

You have asked us to review this Agreement in light of applicable conflict of interest statutes and regulations. We reviewed the Covenant Not to Compete Agreement (but not the sales document) and received additional information from [a member of your staff]. Our conclusions are based on the following understandings:

1. The Covenant Not to Compete Agreement dated January 31, 1983 was entered into with no contemplation by [the individual] of Government service. [Your staff member] indicated it was his understanding that the first contact the White House had with him regarding a position with the Administration was after that date.

2. This Agreement and the document of sale of the [parent] Corporation do not under any circumstances require any services to be performed by [the individual].

3. The representations and warranties in the sales document referred to in Recital C of the Agreement are the normal

warranties of marketability associated with any sale.

First, because the payments to [the individual] were and are being made under an Agreement entered into before contemplation of Government service and for a normal business purpose, we do not see that these payments raise a question under 18 U.S.C. § 209. Under the circumstances it would not be reasonable to presume that these payments are intended as a supplementation of [the individual's] Government salary for carrying out his official duties.

Second, while [the individual] does not hold an advice and consent position and is therefore not subject to the outside earned income limitations imposed by section 210 of the Ethics in Government Act, because he may serve in the White House Office and because he would therefore by your practice be subject to that limitation, we have also reviewed that aspect of these payments. This Office has defined outside earned income as "wages, commissions, professional fees and other compensation received for personal services actually rendered, other than for services for the United States Government." 5 C.F.R. § 734.501(b). [The individual] is being paid for not providing services. While absence of services alone is not necessarily determinative, especially when the income for tax purposes is earned income, the payments do not fall within either of the two basic purposes of the outside earned income restrictions: to prevent executive branch officials from cashing in on their positions of influence or being affected by the prospects of outside income, and to ensure that outside activities do not detract unduly from an official's attention to his job. [The individual] had no Government position or potential position to use to his personal advantage at the time of this Agreement, nor will his carrying out the terms require any time away from his position in the Government.

Finally, [the individual] will retain a financial interest in the Corporation until payments under the Agreement are complete. Therefore he should, pursuant to 18 U.S.C. § 208, recuse himself with regard to any particular matter involving that corporation. Further, because the purchasers of the Corporation have personally guaranteed the obligations of the Corporation under the Agreement, we recommend that under the appearance of impropriety concepts of Executive Order 11222, it would be appropriate for [the individual] to refrain from taking action in matters involving those individuals for the same period of time.

If you have any further questions with regard to this matter,
please feel free to contact this Office.

Sincerely,

David R. Scott
Acting Director