

Office of Government Ethics

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Letter to a Department Ethics Official dated February 7, 1994

This is in response to your letter of January 10, 1994, with enclosed correspondence from [an official of one office within a Department] and from [an official of another office within that Department]. Together, the letters raise a number of issues, some of which involve problems in internal Department procedures and on which it would not be appropriate for this Office to comment. There are, however, two areas in which the comments of this Office might prove helpful. The first of these concerns difficulties faced by [the Department] in applying what you characterize as "new restrictions" against acceptance of gifts given by certain associations. The second concerns the suggestion made by [the first official] that an appropriate [Department] office make a list indicating the major non-Federal associations that are prohibited sources with respect to [the Department] and, further, that such office publish the list and keep it current.

As we understand the concerns expressed by [the first official], they are based on the decision by this Office to include within the definition of a "prohibited source" in subpart B of the new Standards of Conduct "any person who"--

Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.

5 C.F.R. § 2635.203(d)(5); [citation deleted]. Under this provision, an association will be considered a "prohibited source" if most of its members are prohibited sources -- that is, if most of them seek official action by the agency, do business or seek to do business with the agency, conduct activities regulated by the agency, or have interests that may be substantially affected by performance or nonperformance of the employee's official duties. See 5 C.F.R. § 2635.203(d)(1) - (d)(4). It follows that, in order to determine whether an association is a prohibited source, inquiry must be made regarding the status of at least most of the member organizations. As pointed out by [the first official], this is necessarily a time-consuming endeavor, especially if the association is national in scope or has many members.

While we sympathize with those who bear the burden of implementation, we

believe the restriction is a necessary one; it is not, moreover, new.

Although not codified until recently in the new Standards of Conduct, the restriction has long been followed by the Office of Government Ethics (OGE) and has been published and disseminated to the agencies. See OGE Informal Advisory Letters 84 x 5 (issued May 1, 1984) and 87 x 13 (issued October 23, 1987), both published in The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government

Ethics, 1979-1988. During the notice and comment period preceding issuance of the Standards, several agencies opposed the restriction. OGE decided, nevertheless, that it was still warranted:

[w]here, for example, an organization is composed largely of agency contractors, that organization should not give a gift to an agency employee that its individual members could not give. The explicit inclusion of such organizations in the definition of a "prohibited source" at § 2635.203(d)(5) addresses the fact that, through payment of dues or otherwise, gifts from such organizations are paid for wholly or in substantial part by their members.

Preamble to the final rule, 57 Fed. Reg. 35006, at 35014 (Aug. 7, 1992). This Office continues to believe that the rule is necessary in order to prevent the abuses that would likely occur in its absence.

On the other hand, we would certainly support appropriate efforts by agencies to reduce the administrative burden resulting from the restriction. The suggestion that an appropriate office within [the Department] create, publish, and keep current a list of [Department] prohibited sources under section 2635.203(d)(5), however, presents a number of problems. As you know, people and organizations generally are considered "prohibited sources" on an agencywide basis. See 5 C.F.R. § 2635.203(d). And "agency," in this context, generally means either an executive branch agency or department. See 5 U.S.C. § 105; 5 C.F.R. §§ 2635.203(a) and 2635.102(a). In other words, as a general matter, if an organization is a prohibited source with respect to an agency or department, it is a prohibited source with respect to gifts made to any employee of that agency or department, but not with respect to gifts made to employees of other separate agencies and departments. Executive departments, however, such as [your Department], have the authority, by supplemental regulation, to "designate as a separate agency any component of . . . [the] department which the department determines exercises

distinct and separate functions." 5 C.F.R. § 2635.203(a). When a department makes such a designation, the "prohibited source" concept applies on an agency- or componentwide basis.

Pursuant to section 2635.203(a), [the Department] has designated as separate agencies or components [certain] components. Employees of other [Department] components not designated as separate are considered employees of [the Department], which is treated as a distinct agency or component. [Citation deleted.]

In light of these designations, an organization that is a prohibited source with respect to [one of the separate components], for example, would not necessarily be a prohibited source with respect to [another component]. Accordingly, it does not make sense to think in terms of a [Department]-wide list of associations that are prohibited sources.

On the other hand, it might be a useful endeavor for each [Department] component to develop a list of such associations on a componentwide basis. We use the word "list," however, with some reluctance, given the limitations inherent in such a project. It might be more helpful or appropriate to think of the project not as a list but as a workbook, to be shared throughout the component and updated frequently. Our concern, in this context, is that there must be a recognition that any list is necessarily always subject to change. Any determination that an association is a prohibited source within the meaning of section 2635.203(d) may only be good for the point in time at which the determination is made. The membership in associations changes. The status of the individual members may also change. Companies, for example, that did contracting [with the Department] may no longer do it. And if the change in status of member companies tips the majority balance of the association, the association's status will change.

Notwithstanding this concern, it does seem to us that sharing research on the status of associations could alleviate a good deal of the administrative burden. If a [component] ethics official knew that 90 percent of the members of association X were prohibited sources with respect to the [component] on January 1, 1994, the research required of a second official [of the same component] in determining the status of the organization two months later would be very minimal. Thus, we do think that a shared "workbook" approach could be useful, and we would have no objection should [the Department] as a whole or any of the components decide to implement it. We would, however, caution that, if [the Department] decides to go forward with this concept, it must be made clear to users of the workbook that the workbook is not all-inclusive. The absence of any mention of a particular association should not be

understood as indicating that it is not a prohibited source.

If you would like to discuss these matters further, please feel free to call [this Office].

Sincerely,

Stephen D. Potts
Director