

Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated August 11, 1993

This is in response to your letter of July 19, 1993, regarding a written finding of [your agency] to the effect that it is in the interest of [your agency] for individual Board members to accept gifts of free attendance at periodic meetings of various organizations [of a certain] industry. In your letter you ask for comments from the Office of Government Ethics regarding the Board's finding, a copy of which is attached to your letter.

The finding, signed or to be signed by the three members of the Board, states that it is in the interest of the Board for any one of its three members "to accept a gift of free attendance at periodic meetings of organizations whose members consist of [companies of a certain industry], their managers, and/or their employees." The finding explains "that the agency's interest outweighs concern that acceptance of the gift of free attendance may or may appear to improperly influence any individual Board member in the performance of his official duties." The finding further asserts that "it is very important for individual Board members to talk to those who work in and/or manage the [specific] industry in order to maintain our awareness of the concerns of labor and management regarding benefits under the Acts that the agency administers."

We assume that the various organizations that are sponsoring the meetings at which Board members would like to accept free attendance are "prohibited sources" as that term is used in 5 C.F.R. § 2635.203(d) of the new Standards of Conduct and that these sponsors are offering the free attendance to the Board members. We also assume that there is no independent statutory authority that would allow Board members to accept the gifts of free attendance. If these assumptions are correct, the gifts of free attendance would be prohibited under section 2635.202 unless authorized under the exception for certain widely attended gatherings and other events in section 2635.204(g). In this context, our understanding is that you are seeking our advice on whether the finding by the Board satisfies the requirements of section 2635.204(g) so as to allow the Board members to accept the

gifts of free attendance.

In view of the broad reach that the Board apparently intends its finding to have, we have concluded that the finding does not satisfy the requirements of section 2635.204(g)(2). Our reasoning, together with some more general comments on this section and related section 2635.204(g)(1), is set forth below.

As a preliminary matter, it is important to note that section 2635.204(g) actually comprises two distinct although related exceptions to the rule against acceptance of certain gifts from outside sources. The first exception, set forth in section 2635.204(g)(1), covers acceptance of free attendance by speakers at conferences or other events. To invoke the exception, an employee must be assigned to participate in the event. His participation, furthermore, must involve speaking, acting as a panel participant, or otherwise presenting information on behalf of his agency. If these requirements are met, the exception allows the employee to accept free attendance at the event when provided by the sponsor of the event, but only on the day of the employee's presentation. The fact that the employee is "assigned" to present information at the event establishes the agency's interest in his participation on the day of his presentation. It is not necessary for the employee to obtain a "determination of agency interest" as that phrase is used in sections 2635.204(g)(2) and (g)(3).

The second exception, in section 2635.204(g)(2), also allows employees to accept free attendance at certain events. But while the first exception may be invoked only for the day on which an employee is imparting information, the second exception may be invoked by employees simply attending certain events. While the second exception is more broadly applicable in this respect, it can be invoked only if certain requirements are met. The event or gathering must be "widely attended" as that term is used in the exception. Furthermore, the employee must obtain a "determination that his attendance is in the interest of the agency because it will further agency programs or operations." 5 C.F.R. § 2635.204(g)(2).

Generally, determinations of agency interest are to be made by "agency designees." 5 C.F.R. § 2635.204(g)(3). The term "agency designee" is defined in subpart A of the Standards of Conduct:

Agency designee refers to any employee who, by agency regulation, instruction, or other issuance, has been

delegated authority to make any determination, give any approval, or take any other action required or permitted by this part with respect to another employee.

5 C.F.R. § 2635.102(b). When, however, the person whose conduct is in issue is the agency head, determinations of agency interest are to be made by the agency head, in consultation with the Designated Agency Ethics Official (DAEO). See *id.* Where an agency is headed by more than one person, "head of an agency" means the chairperson of the agency. 5 C.F.R. § 2635.102(i).

Generally a determination of agency interest may be made in writing or orally. 5 C.F.R. § 2635.204(g)(3). A written determination is required, however, if the sponsor providing the gift of free attendance is a person who has interests that may be substantially affected by the performance or nonperformance of an employee's official duties or an association or organization the majority of whose members have such interests." 5 C.F.R. § 2635.204(g)(3)(i). In such a case, moreover, the rule specifies that the determination is to be made using a balancing test. The agency designee (or, with respect to a chairperson, the chairperson, in consultation with the DAEO) must make a written finding that the "agency's interest in the employee's participation in the event outweighs concern that acceptance of the gift of free attendance may or may appear to improperly influence the employee in the performance of his official duties." Some of the relevant factors that "should be considered" in making this determination are set forth in the rule:

the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the sponsor of the event, the significance of the employee's role in any such matter, the purpose of the event, the identity of other expected participants and the monetary value of the gift of free attendance.

5 C.F.R. § 2635.204(g)(3).

If, in accordance with these requirements, an employee obtains a determination that it is in the agency's interest for him to attend a widely attended gathering, then he may accept the sponsor's gift of free attendance, provided that it is unsolicited. In contrast to the exception for speakers, which applies only on the day or days that an employee is imparting information, the widely attended gatherings exception allows an employee to accept

free attendance at all or appropriate parts of a multi-day conference, depending on the breadth of the agency determination of interest. 5 C.F.R. § 2635.204(g)(2) and example 4.

Based on the applicable regulatory provisions, we have a number of comments regarding the Board's determination of agency interest. First, to the extent that the Board members seek to attend meetings of the various [specific] industry organizations for purposes of imparting information (to participate as speakers, panel members, or otherwise to present information on behalf of the agency), and assuming that these are one day meetings or that the Board members only seek to attend on the day they will impart information, the Board members may be able to rely on the first exception to accept free attendance. The Board members must be assigned to participate in the meetings, but we assume they have the authority to make their own assignments. If this is so, the requirements of the exception will be met and no formal determination of agency interest -- written or oral -- will be required.

If the Board members' attendance at these meetings is not for the purpose of imparting information, then whether they may accept the free attendance will depend on whether the second exception, for widely attended gatherings, applies. Here the critical issue is whether the requirements of the exception are satisfied by the Board's blanket determination of agency interest -- a determination clearly drafted to cover a number of unspecified events involving unstated subjects and sponsored by two named and other unspecified organizations.

Insofar as the Board's determination purports to apply a balancing test and to reach a determination that the agency's interest outweighs improper influence concerns, a test required only where the sponsor or its members have interests that could be substantially affected by how the employee performs his official duties, 5 C.F.R. § 2635.204(g)(3)(i), we assume that the organizations sponsoring the meetings which the Board members seek to attend fall within this category of prohibited sources. Under this circumstance, we find that a blanket determination of the type proposed by the Board is not adequate.

The balancing test required by the rule and the list of factors to be considered in reaching the determination clearly contemplate a more particularized inquiry than that undertaken by the Board. See 5 C.F.R. § 2635.204(g)(3)(i). It would seem

impossible to consider, for example, "the importance of the event to the agency," *id.*, without knowing precisely what the event is. Similarly, it would be impossible to consider "the nature and sensitivity of any pending matter affecting the interests of the sponsor of the event," *id.*, without knowing precisely who the sponsor is and how its interests might be affected by the agency's resolution of the matter. Finally, we also note that the limited authority in section 2635.204(g)(3)(ii) for blanket determinations of agency interest does not obviate the need for determinations based on the unique circumstances of each case. That section addresses a determination of agency interest covering multiple invitees, not multiple events. Accordingly, the finding of agency interest by the Board does not meet the requirements of section 204(g)(3)(i).

Even if the sponsoring organizations were not the type of prohibited sources requiring a balancing test under section 204(g)(3)(i), we would find that the type of blanket determination undertaken by the Board fails to satisfy even the simpler determination, under section 2635.204(g)(2), that the employee's "attendance is in the interest of the agency because it will further agency programs or operations." In our view, the regulation contemplates that this determination can only be made when both the sponsoring organization and the specific subject matter to be addressed in the meeting are known, thus making it possible to identify the agency's interest in having an employee attend and the agency programs or operations that will benefit from that attendance.

It is also noteworthy that, regardless of who the sponsor is, this second exception, in section 204(g)(2), requires that the meetings in question be "widely attended gatherings of mutual interest to a number of parties," as that term is used in the regulation. Even an appropriate determination of agency interest is not an adequate predicate for use of the exception if this requirement is not met. If we were to sanction use of the exception based on an advance blanket approval of unspecified meetings about which details are not provided, it seems likely that one result would be acceptance of free attendance at events that are not actually "widely attended." On the other hand, if events are considered in a particularized context, it is unlikely that this requirement will be overlooked.

Finally, we appreciate that a blanket determination, as

proposed by the Board, would necessarily be more efficient than the case-by-case determinations of agency interest that the regulation requires. On the other hand, we do not think that case-by-case determinations are unduly onerous. Contrary to the suggestion in your letter, all three Board members will not have to meet to decide whether individual Board members may accept free attendance at specified widely attended gatherings. As indicated above, when acceptance of free attendance by the Chairman is in issue, the chairman, in consultation with you as DAEO, has the authority to make the agency determination of interest required by sections 2635.204(g)(2) and (g)(3). When acceptance of free attendance by either of the other two Board members is in issue, the agency designee has the authority to make the agency determination of interest.

We are not aware of who at the Board has been delegated the authority to act as agency designee. However, regardless of who the designee is, the Board has the authority to designate additional designees. 5 C.F.R. § 2635.102(b). If it deemed such action advisable, the Board could delegate the authority to make determinations or give approvals regarding conduct by the other two Board members to any number of employees. We suggest that some candidates the Board may wish to consider are the Chairman, or the Chairman in consultation with you as the DAEO, or you alone, as the DAEO.

If this Office can be of further assistance, please do not hesitate to contact us.

Sincerely,

Stephen D. Potts
Director