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
92 x 18 -- 05/28/92

Letter to an Individual dated May 28, 1992

This is in response to your letter requesting an opinion on whether, under the provisions of the Ethics Reform Act of 1989 ("the Act"), Public Law 101-194, 5 U.S.C. App. § 501 et seq., you, as an appointee of the Mayor of the District of Columbia, would be permitted to hold a part-time teaching position at a local law school. In particular, you sought an opinion on the applicability of sections 501 and 502 of the Act.

I understand from your letter that you are a noncareer employee whose rate of basic pay is equal to or greater than the annual rate for GS-16, Step 1 of the General Service Schedule. You also stated that you teach one to three hours per week; that you accepted the offer to teach prior to your appointment; and that your position [at a D.C.] agency is not related to your teaching position.

In accordance with section 503 of the Act, the Office of Government Ethics issued implementing regulations at 5 C.F.R. part 2636. 55 Fed. Reg. 1721 (January 17, 1991). The provision applicable to teaching by a covered noncareer employee may be found at section 2636.307. Please note that under this provision, the decision to grant or deny advance authorization to teach for compensation must be in writing, is final, and may be made only by the Designated Agency Ethics Official (DAEO) or the Alternate Designated Agency Ethics Official (ADAEO).

According to section 2636.307(d), the DAEO may authorize compensated teaching for a covered employee only when:

> (1) The teaching will not interfere with the performance of the employee's official duties or give rise to an appearance that the teaching opportunity was extended to the employee principally because of his official position;
>
> (2) The employee's receipt of compensation does not violate any of the limitations and prohibitions on honoraria, compensation or outside earned income contained in this part; and

> (3) Neither the teaching activity nor the employee's receipt of compensation therefore will violate applicable standards of conduct or any statute or regulation related to conflicts of interests.

You addressed the first of these criteria in your letter.

The second criterion is affected by two changes that have occurred since you wrote to us. First, the Act was amended by Public Law 102-90, and, second, on January 8, 1992, we amended our implementing regulations; both changes were effective on January 1, 1992.

Under the Act, as amended, the term "honorarium" is defined for the purposes of this section as:

> a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) 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.

5 U.S.C. App. § 505(3).

In implementing the statutory change in the definition of the term "honorarium," this Office published a new exception to that definition. 57 Fed. Reg. 601 (January 8, 1992). The effect of the new exception at 5 C.F.R. § 2636.203(a)(13) is to permit compensation for a series of three or more related speeches, articles, or appearances, provided that the subject matter does not directly relate to official duties and further that the payment is not made because of the employee's Government status.

I suggest that you contact your agency ethics official to ask for a determination whether the subject matter that you teach is directly related to your official duties and whether payment is made because of your status with the Government. If the answer to both of these questions is "No," and if in the course of your

classes you make three or more different but related appearances or speeches, it would appear that your receipt of compensation would not violate the honoraria prohibition. This would address the second criterion for authorization for teaching activity by a covered employee.

The third and remaining criterion with respect to authorization for teaching activity, i.e., violation of applicable standards of conduct or any statute or regulation related to conflicts of interest, should also be taken up with the [ethics officer] for the District of Columbia.

The [D.C. ethics official] has the authority to authorize teaching by a covered employee. In accordance with section 504(b) of the Act, if you receive a written advisory opinion authorizing such teaching, and if you act in good faith in accordance with the provisions and findings of that opinion, you would not be subject to sanction under section 504(a) of the Act.

What is not clear is whether, as an employee of the District of Columbia, you are a covered employee within the meaning of the Act. The Act applies to "any officer or employee of the Government." Neither the statute, nor the legislative history addresses whether Congress intended the Act to apply to officers or employees of the District of Columbia. We have asked the Department of Justice for an opinion on the applicability of the Act to officers and employees of the District of Columbia. Until we receive a response from the Department of Justice, if you assume that the statute is applicable, [the ethics official] may authorize your teaching. If the Act is applicable, you will have followed the appropriate procedure. If the Act is not applicable, the Act would have no bearing on your teaching. We will, of course, notify you when we receive a reply from the Department of Justice.

As you are probably already aware, on March 19, 1992, Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia declared that section 501(b) of the Ethics Reform Act of 1989 (the honoraria ban) is unconstitutional as it applies to executive branch employees and permanently enjoined enforcement of the ban, but in the same opinion he also stayed the judgment and the permanent injunction pending appeal. The Justice Department has until June 16, 1992, to decide whether to appeal Judge Jackson's decision. We do not know at this time whether Judge Jackson's ruling will be appealed.

However, even if Judge Jackson's decision is upheld or the Justice Department decides not to appeal, and even if you receive authorization to teach, the question of whether the 15-percent limitation on outside earned income in section 501(a) of the Act remains an open question dependent upon whether an officer or employee of the District of Columbia is an officer or employee of the Government.

I hope this information is helpful to you.

Sincerely,

Stephen D. Potts
Director