

Office of Government Ethics

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Letter to an Alternate Designated Agency Ethics Official dated March 12, 1993

This is in response to your letter of February 25, 1993, in which you request our opinion as to the definition of a "targeted" solicitation, as that term is used in the fundraising activities section of the standards of conduct regulation.

Your question arose because [an organization] has asked the head of your agency and his wife to serve as honorary committee members for a benefit performance there, and to be listed as such (without his official title or position) on an invitation to the event. This invitation would be sent to the [organization's] top 5,000 contributors, approximately 25% of whom, you say, could be considered "prohibited sources" within the meaning of 5 C.F.R. § 2635.203(d) of the standards of conduct.

Section 2635.808(c) of the standards of conduct provides that an employee may engage in fundraising in a personal capacity provided that he or she does not, inter alia, personally solicit funds or other support from any person known to the employee to be a prohibited source within the meaning of section 2635.203(d) of the standards. Under section 2635.808(a)(4) of these rules, the term "personally solicit" includes requesting or otherwise encouraging donations or other support "through the use of one's name or identity in correspondence or by permitting its use by others." However, "[i]t does not include solicitation of funds through . . . the contemporaneous dispatch of like items of mass-produced correspondence," if such correspondence is "addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted . . . at persons who are prohibited sources within the meaning of § 2635.203(d)." *Id.*

Whether a contemporaneous dispatch of like items of mass-produced correspondence is a "targeted" solicitation, and therefore an impermissible personal fundraising activity under the standards of conduct, depends upon the circumstances. The factors to be considered in this regard include the extent to which the persons being solicited, as a group, have homogeneous interests in that they each are seeking official action by the employee's agency,

are doing business or seeking to do business with the employee's agency, are conducting activities regulated by the employee's agency, or have interests that may be substantially affected by the performance or nonperformance of the employee's official duties; the criteria for selecting persons to whom the correspondence will be sent; and whether the employee's name is being used by itself or with the names of others.

In this case, the persons to whom the correspondence will be sent reportedly have been grouped together for the purpose of being solicited solely on the basis of the size of their previous contributions to the [organization], not because of anything they have in common with your agency. Moreover, the head of your agency and his spouse will be listed with various other agency heads and their spouses as honorary committee members in the correspondence. The fact that some persons in the group of persons to whom the correspondence will be sent are prohibited sources for your agency's personnel therefore is coincidental, and would not in and of itself make this a "targeted" solicitation.

Although you did not raise this matter in your letter of February 25, 1993, we note that the head of your agency and his wife have been invited to attend the benefit performance free of charge, as guests of the [organization]. Their attendance at the fundraising event free of charge would be permissible under the standards, since their service on the honorary committee for the event would constitute participation in the conduct of the event, and the sponsor's waiver of a fee for attendance at an event by a participant in the conduct of that event is not a gift covered by the standards of ethical conduct. See 5 C.F.R. § 2635.808(a)(2).

Finally, we want to correct a misconception you have about section 2635.808(b) of the standards, concerning fundraising in an official capacity. This section provides, "An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties." You state in your letter of February 25, 1993, that you read the preamble in the Federal Register notice for the standards, at 57 Fed. Reg. 35040 (Aug. 7, 1992), to indicate that the phrase "otherwise as determined by the agency" in section 2635.808(b) means that an employee may engage in fundraising in an official capacity so long as the fundraising is consistent with his or her agency's mission or otherwise furthers its programs. However,

that is not what the preamble indicates, nor is it a correct interpretation of section 2635.808(b).

What the preamble indicated was that some agencies had commented that the language of proposed section 2635.808(b) was "overly restrictive in limiting fundraising in an official capacity to that specifically authorized by statute, Executive order or regulation," and that those agencies "recommended more flexibility to allow official fundraising that is consistent with the agency's mission or otherwise furthers agency programs." The preamble went on to explain that the phrase "otherwise as determined by the agency" was being added to section 2635.808(b) "to recognize that an agency may have authority to permit official fundraising notwithstanding that such authority is not expressly set forth in a statute, Executive order or regulation."

Thus, if the use of your agency head's name is to be permitted in connection with this fundraising event, it could not be permitted based solely on a determination that the fundraising is consistent with the agency's mission or otherwise furthers its programs. Without a more specific and identifiable authority for the head of your agency to engage in this fundraising activity in his official capacity, the fundraising could only be permitted in a personal capacity.

We trust that this guidance about the fundraising activities section of the standards of conduct regulation will be of assistance to you.

Sincerely,

F. Gary Davis
General Counsel