

Office of Government Ethics

90 x 20 -- 11/02/90

Letter to an Agency Official dated November 2, 1990

This is in response to your letter of September 6, 1990, in which you have posed five questions concerning application of the 15-percent outside earned income limitation to your employment as a race car driver. Applicable only to certain higher-level noncareer officers and employees, 5 U.S.C. app. 501[(a)] was enacted as part of Title VI of the Ethics Reform Act of 1989 and will take effect on January 1, 1991, unless the salary provisions contained in section 703 of the Act are repealed. It prohibits a covered noncareer employee from having "outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule"

Based on your understanding that you will be subject to the limitation when it takes effect on January 1, 1991, you ask whether there will be any provision for exemption or waiver of the limitation and, if not, whether you can avoid a violation by donating to a charity any amount that exceeds the 15-percent limitation. The statute contains no provision for exemption or waiver. While there is a provision in Title VI whereby an honorarium donated to charity is deemed not to have been received by an employee, that provision applies only to an "honorarium," which is defined in the statute to mean a "payment of money or anything of value for an appearance, speech or article by a Member, officer or employee" There is no similar provision by which compensation other than honoraria may be donated to charity in order to avoid the outside earned income limitation.

You also ask whether the 15-percent limitation could be avoided by accepting compensation in a form other than cash, such as through the use of a vehicle. While regulations implementing 5 U.S.C. app. 501 have not yet been issued, it is unlikely that they would exclude from the definition of earned income any form of compensation, such as use of a vehicle or residence, that would be included in gross income for tax purposes. Nothing in the statute limits its application to compensation in the form of legal tender.

Your fourth question is whether dividends paid by the corporation would be counted as outside earned income if you were to incorporate your business and be salaried at a level not to exceed the 15-percent limitation. The limitation that is to take effect January 1, 1991, under 5 U.S.C. app. 501 is similar in many respects to a limitation that previously applied to full-time presidential appointees subject to Senate confirmation. The regulations implementing that limitation excluded from outside earned income any income received "[f]rom investments with respect to which the personal services of the reporting individual are not a material factor." 5 C.F.R. § 2634.501(b)(2) (1990). Under this standard, dividends received from a corporation created to operate your race-car driving business would be included in outside earned income. It is unlikely that regulations implementing the new statute would incorporate a more liberal standard for application to investment vehicles used to shield income attributable to personal services performed by an officer or employee.

Your last question is whether it would be possible to enter into a deferred payment or any other arrangement in order to comply with the 15-percent outside earned income limitation. Regardless of when it is received, the statute would include in earned income for a given calendar year any outside earned income "attributable" to that calendar year. Thus, deferring receipt of income in excess of the 15-percent limit until a subsequent year would not avoid a violation of the statute in the year in which the services were performed.

We hope this information will be of assistance to you.

Sincerely,

Stephen D. Potts
Director