

Office of Government Ethics

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Letter to a Private Individual dated July 6, 1989

This is in response to your letter of June 25, 1989, requesting information concerning the impact upon your society's programs of the new ethics restrictions that go into effect July 16, 1989. The restrictions to which you refer are the Procurement Integrity provisions contained in the Office of Federal Procurement Policy Act Amendments of 1988 applicable to Federal employees and others who come within the statutory definition of the term "procurement official."

I understand that your request relates specifically to the interim rule. However, because of the information contained in your letter, I would be remiss if I did not advise you that your society's practice, insofar as it involves soliciting and accepting cash contributions from entities that market their [type of] products to the Government, may well place individual society members in the position of violating the Standards of Conduct that have long applied to all employees of executive branch agencies. I am referring specifically to 5 CFR § 735.202 which provides that, in the absence of an exception thereto, an employee:

. . . shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

- (1) Has, or is seeking to obtain contractual or other business or financial relations with his agency;
- (2) Conducts operations or activities that are regulated by his agency; or
- (3) Has interests that may be substantially affected by the performance or nonperformance of his official duties.

Your letter indicates that the members of your society are Federal employees who are at the supervisory or management level

in [a certain field]. Although members pay annual dues, you indicate that the society derives a portion of its revenues from corporations or other entities who make presentations of their products and processes at monthly meetings attended by society members. As we understand it, these entities are manufacturers, distributors and suppliers of equipment or services used in [this] field. These entities, many of whom undoubtedly do business with the Government, pay a portion or all of the cost of meals provided to society members at the monthly meetings in exchange for the opportunity to demonstrate their products. Revenues derived from their contributions that are not needed to pay for meals are used to award scholarships to relatives of members, to make charitable donations and to produce a monthly bulletin.

If one of these entities seeks to sell its products to an individual member's employing agency, that member is prohibited from soliciting or accepting anything of monetary value from that entity. (We assume it is the very desire to sell to members' agencies that motivates these entities to participate in your monthly meetings). Because the standards of conduct prohibit even the indirect acceptance of a gift from a prohibited source, the practice of vendors paying for individual meals, albeit indirectly through contributions to a society whose membership consists almost solely of Government employees, could nonetheless result in violations by members as to whom they are prohibited sources. Officers of the society and others who arrange for the vendor demonstrations and actively solicit the contributions are particularly at risk. We would strongly advise that your society find some other way to finance its operations. In offering this advice we have taken into consideration the fact that none of the exceptions commonly-adopted in agency regulations would allow acceptance of the subsidized meals offered to employees at monthly meetings. Although there is a commonly adopted exception for food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting, that exception would not permit a Government vendor to provide meals to employees who are attending their demonstrations. The enclosed copy of our opinion of October 23, 1987, describes the parameters of that exception.

As you indicate, there are new limitations on receipt of gifts scheduled to go into effect July 16. The Office of Government Ethics was given no role in implementing the new Public Integrity provisions to which you refer and we have no

authority to interpret the Act or the regulations issued thereunder, except insofar as they may require an interpretation of statutes and regulations that do come within our jurisdiction. To some degree, your request falls into the latter category because of the particular language contained in the interim rule issued May 11, 1989, by the Federal Acquisition Regulatory Council. A copy of the interim rule is enclosed for your reference.

Under subparagraph 3-104-3(b)(2) of the interim rule a person who is a procurement official may not, during the conduct of an agency procurement, knowingly:

- (2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement.

The terms "procurement official," "competing contractor," and "during the conduct of an agency procurement" are defined in subparagraph 3-104-4. When you study these definitions carefully, you will find that the above restriction on seeking or receiving gifts only applies to an employee who is involved in the award or modification phase of a particular procurement for supplies and services and that it only restricts receipt of gifts from likely contract competitors and their subcontractors. Note that there is a corollary restriction applicable to competing contractors that should concern any vendor who does business with Federal agencies.

Subparagraph 3-104-4(f) of the interim rule defines the phrase "money, gratuity or other thing of value" as follows:

- (f) "Money, gratuity, or other thing of value," except where expressly permitted by agency standards of conduct regulations, means any gift, favor, entertainment, hospitality, transportation, loan, or any other tangible item, and any intangible benefits, including discounts, passes and promotional vendor training, given or extended to or on behalf of Government personnel, their immediate families, or households, for which fair market value is not paid by the recipient or the Government (emphasis added).

As indicated above, most agency standards of conduct regulations will not permit employees to accept meals paid for or subsidized by its vendors. Thus, our advice as to your society's practice of accepting contributions from vendors in exchange for the opportunity to demonstrate their products is the same, regardless of whether the issue is analyzed under the Standards of Conduct or the new Procurement Integrity rules. Note that the rule as to acceptance of samples and other tangible products given by vendors in conjunction with their demonstrations is also the same under both sets of rules. Most agencies have adopted an exception that allows acceptance of unsolicited advertising or promotional materials such as pens, pencils, note pads, calendars and other items of nominal intrinsic value. Many agency regulations do not further define nominal value. However, the Department of Defense has adopted a \$10 rule that is probably prudent guidance in the absence of any other.

There is one issue raised by the interim rule that cannot be disposed of by reference to agency standards of conduct. We know of no government-wide standard or ruling that would prohibit an employee's attendance at vendor demonstrations unless the demonstration were coupled with some prohibited form of entertainment or offering such as a meal. On the other hand, we know of no exception in agency standards of conduct that would specifically permit attendance at vendor promotional training not paid for by the Government or the employee. For example, the relevant provision in Department of Defense Directive 5500.7 allows "attendance at vendor training sessions when the vendor's products or systems are provided under contract to the Department of Defense and the training is to facilitate the use of those products or systems by DoD personnel."

When the interim rule takes effect on July 16 an employee who becomes a procurement official will be barred from attending "vendor promotional training" that is not paid for by [the employee] himself or the Government. We can understand that this will make it very difficult for your society to meet its goal of disseminating technical information to its members. We can only suggest that you offer your comments on the effect of the interim rule to the Federal Acquisition Regulatory Secretariat by July 10 in order that your concerns may be taken into account in formulating the final rule.

Sincerely,

Frank Q. Nebeker
Director