

**Office of Government Ethics**  
**89 x 17 -- 09/26/89**

**Letter to a Designated Agency Ethics Official**  
**dated September 26, 1989**

This is in response to your letter of September 7, 1989, in which you request guidance in regard to [a presidential appointee's] desire to write a book. In this book, [the official] hopes to spell out his vision for a modern effort to fight social and economic problems. You ask whether [the official] may publish such a book in his personal capacity, noting that he intends to dedicate all royalties to charity. If that is not feasible, you request guidance in issuing the book as an official Government publication.

The simple answer to your initial question is that [the official] may not publish the book he envisions in his personal capacity, regardless of the disposition of any royalties. There are several ethics provisions that pose an obstacle to [the official's] authoring such a book other than as an official publication. Most particularly in point is 5 C.F.R. § 735.203(c). Under this standards of conduct regulation, an [official] appointed by the President is prohibited from receiving compensation or anything of monetary value for any writing:

"... devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information."

The Department of Justice has taken the position that this regulation, as incorporated in its own standards of conduct regulations, is intended to preclude an employee from profiting from publication of any writing likely to be attractive to the public because it represents the views of a Department official on subject matter within the Department's responsibilities. In an opinion intended as guidance for Presidential employees wishing to engage in writing activities, the Office of Legal Counsel has, therefore, adopted a broad reading of the phrase "devoted substantially to the responsibilities, programs, or operations of his agency". 2 OLC 361, 363 (1977). In the enclosed opinion of October 28, 1985, this Office concurred in

the Department's broad construction, quoting the Department of Justice view that a matter comes within the restriction imposed upon Presidential appointees by 5 C.F.R. § 735.203(c) if it encompasses "the general subject matter or sector of the economy or society with which the individual's agency is concerned, even though the writing does not specifically relate to the functions of the agency."

Several of the problem areas [the official] would like to address relate specifically to [the agency's purpose]. For this reason and based on your statement that the thrust of the book "is well within the [agency's] mission," it appears that the book will be devoted substantially to the responsibilities, programs or operation of the [agency]. [The official], therefore, would be prohibited by section 735.203(c) from receiving any compensation or anything of monetary value for the book he would like to write.

While section 735.203(c) does not specifically address the issue, [the official] cannot avoid its limitation by donating any royalties to a charity. As we stated in the enclosed informal advisory memorandum 85 x 18 of October 28, 1985, an employee who is prohibited from receiving compensation or anything of monetary value for a lecture, writing or other such activity cannot get around the prohibition by having it paid to a charitable organization on his or her behalf.

The prohibition imposed upon Presidential appointees by section 735.203(c) is an application to that specific class of officials of the more general standards of conduct enunciated by sections 201(c)(1) and 202 of Executive Order 11222.<sup>1</sup> Section 202 prohibits an employee from engaging in any outside employment, including writing, which might result in a conflict or apparent conflict and section 201(c)(1) requires employees to avoid any action which might result in or create the appearance of using public office for private gain.<sup>2</sup> As applied to Presidential appointees, the above-quoted prohibition reflects the determination that individuals of this stature, when speaking or writing on subjects devoted to the programs of their agencies, are likely to be identified with their official positions. They are likely, therefore, to be perceived as speaking or writing in their official capacities and, if compensated, to be using their public office for private gain regardless of any disclaimer that might be invoked. The use of official title by a Presidential appointee in conjunction with the publication or promotion of any

book or other writing relating to the programs of his or her agency would serve only to compound the impropriety.

The Office of Legal Counsel has cautioned that even those Presidential appointees not subject to the portion of section 735.203(c) quoted above could run afoul of the prohibition against use of public office for private gain, or raise at least a significant question of appearances, were they to accept compensation for any writing related to their official responsibilities. 2 OLC 361, 363 (1977). In our informal advisory memorandum 85 x 18 of October 28, 1985, this Office similarly cautioned that the prohibition against use of public office for private gain prohibits an employee from receiving compensation for any speech that focuses specifically on the agency's responsibilities, policies and programs, or when the employee may be perceived as conveying the agency's policies.

The position of this Office with regard to the charitable donation of otherwise-prohibited compensation is consistent with the Justice Department's interpretation of its own standards of conduct regulations. Specifically, Justice has interpreted the prohibition against activities that create the appearance of using public office for private gain to apply even where the private gain will be realized by a person or organization other than the Government. For this reason, the Office of Legal Counsel states that Department employees, including Presidential appointees:

"should avoid lending their official position to support the financial causes of private organizations - through speeches, the writing of articles, or in some other fashion."

For purposes of applying the standards of conduct, it makes no difference whether the organization to which the employee lends his or her official position is a charitable or for-profit entity. Similarly, it makes no difference whether the employee supports its financial causes by speaking at the organization's fundraising event, by directing others to make a contribution in consideration of a writing or speech related to the functions of his agency, or by personally contributing to its coffers compensation received for any such writing or speech. It would be improper for [the official] to donate royalties to a charity or to waive compensation to the benefit of a private publisher.

As a Presidential appointee to a full-time noncareer position, [the official] also is subject to section 102 of Executive Order 12674, April 12, 1989, which prohibits his receipt of "any earned income for any outside employment or activity performed during that Presidential appointment."<sup>3</sup> The language of section 102 is very similar to that of section 210 of the Ethics in Government Act of 1978, 5 U.S.C. App. 4 § 210, and, in practical terms, supersedes the 15% earned income limitation imposed by the statutory provision. In interpreting section 210, we have drawn a distinction between those events creating "intellectual property," such as the writing of a manuscript, and the subsequent retention of a royalty interest after the book is published. Income attributable to the former, such as an advance on royalties, is "earned income" while the retention of a royalty interest following publication is a mere property right in the residual income stream. Informal advisory memorandum 83 x 4 dated March 25, 1983, copy enclosed. This distinction is equally applicable to section 102 and would preclude [the official] from receiving any form of advance from a publisher, regardless of whether he retains the payment or donates it to charity. Our holding that the limitation imposed by section 210 cannot be avoided by donating earned income to a charitable organization would apply as well to section 102 of Executive Order 12674. Informal advisory letter 82 x 9 dated June 11, 1982.

As to the possibility of its production as an official government publication, this Office would have no reason to question your position that the thrust of the book is "well within the [agency] mission." Regular principles of appropriations law would govern the determination to use Department funds for this purpose and its publication would be subject to any constraints on printing and publications imposed by title 44 of the United States Code. [The official] would, of course, be free to use his official title in conjunction with such a publication.

Sincerely,

Frank Q. Nebeker  
Director

Enclosures (2)

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**1** Very similar standards are created by the Principles of Ethical Conduct for Government Officers and Employees set forth in subsections 101(g) and (j) of Executive Order 12674,

**2** These provisions of Executive Order 11222 are implemented by 5 C.F.R. §§ 735.201(a) and 735.203(c), as well as by your Department's standards of conduct regulations.

**3** Although regulations have not yet been issued, the earned income limitation imposed by section 102 is currently in effect and, under section 502 of Executive Order 12674, supersedes irreconcilable provisions of the existing regulations.