

Office of Government Ethics

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Letter to an Inspector General dated January 26, 1996

This is in response to your letter of December 7, 1995, requesting guidance regarding the application of fundraising regulations to a person who serves as a member of a Government commission and also holds a position as an officer of a private nonprofit organization that supports the commission's program.

As indicated in your letter, the Commission is an entity within the executive branch established to administer [a] Program. A Member of the Commission is appointed by the President and serves as a special Government employee (SGE) without compensation. The Foundation is a private nonprofit organization established to support the Program through various activities including fundraising. The officers of the Foundation are not Government employees.

A Commission Member serves as an SGE and is subject to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) codified at 5 C.F.R. part 2635. A Commission Member engaged in fundraising is subject to the regulations governing fundraising set forth at 5 C.F.R. § 2635.808. Section 2635.808(b) states that an employee may participate in fundraising in an official capacity only if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, the employee is authorized to engage in the fundraising activity as part of his or her official duties. When authorized to participate in fundraising in an official capacity, an employee may use his or her official title, position, and authority.

An agency, however, would be required to have express authority for official fundraising. It would not be enough for the fundraising activity to be consistent with the agency's mission or for the fundraising simply to further the agency's programs. See OGE Informal Advisory Letter 93x19. You note that the Program has gift acceptance authority but do not indicate whether the Commission has express authority not only to accept donations but also to solicit funds. 1 Absent such express authority, a Member of the Commission could not engage in official fundraising. We would emphasize, however, that normally whether an agency has such authority is the agency's call and the Office of Government Ethics will not substitute

its judgment for that of the agency.

An employee may engage in fundraising in a personal capacity subject to the restrictions set forth in section 2635.808(c). That section prohibits both employees and SGEs from personally soliciting funds or other support from a subordinate. An employee is prohibited from soliciting funds or support from a prohibited source as set forth in section 2635.204(d). However, an SGE is subject to a more limited restriction with respect to prohibited sources and is barred from soliciting those persons whose interests may be substantially affected by the performance or nonperformance of his or her official duties. An employee engaged in fundraising in a private capacity may not use or permit the use of his or her official title, position or any authority associated with the employee's public office to further the fundraising effort. Thus, while a Member of the Commission would not be precluded from engaging in fundraising in a personal capacity on behalf of the Foundation, such activity would be subject to the restrictions of section 2635.808(c).

A person who serves as both a Commission Member and the President of the Foundation must be careful to keep in mind the distinction between acting in an official and in a personal capacity. For example, a Commission Member could give a speech in an official capacity at a Foundation event, provided that the Commission has determined that the event provides an appropriate forum. ² However, when giving such an official speech, the Commission Member could not request donations or other support for the Foundation.

A Commission Member acting in a personal capacity could participate in the conduct of a Foundation fundraising event (such as by serving as an honorary chairperson, sitting at the head table during the event and standing in the reception line) but could not use or permit the use of his or her official title, position or any authority associated with his or her public office to further the fundraising effort.

A Commission Member acting in a personal capacity could also solicit funds through mass mailings addressed to a group consisting of many persons provided that the mailing is not targeted at subordinates or persons who are applicable prohibited sources. A Commission Member would not be precluded from certain behind-the-scenes assistance in the solicitation of funds such as drafting correspondence or accounting for contributions.

In addition to the fundraising regulation, there are other provisions of the Standards of Conduct that could apply to activities a Commission Member might undertake in a personal capacity on behalf of the Foundation. Especially relevant are the regulations concerning misuse of position set

forth in 5 C.F.R. §§ 2635.701-705. Section 2635.702 states that an employee shall not use public office for private gain and contains specific guidance on questions of appearance of governmental sanction and endorsements. Section 2635.703 prohibits the improper use of nonpublic information to further a private interest. Section 2635.704 requires an employee to conserve Government property and not to use it for other than authorized purposes. This would include equipment, telecommunications services and facilities. Section 2635.705 provides that, unless otherwise authorized, an employee shall use official time to perform official duties. This includes the use of a subordinate's time. Finally, the conflict of interest statutes set forth at chapter 11 of title 18 of the United States Code are applicable to a Member of the Commission.

We have provided general guidance in response to your broad inquiry. Should more particular questions arise, it would, of course, be prudent for the affected individual to consult with an appropriate ethics official.

Sincerely,

Stephen D. Potts
Director

1 Ed. Note: There is some authority, however, for the proposition that an agency's authority to accept gifts includes the authority to solicit such gifts. See, e.g., Comp. Gen. Decision B-255474, April 3, 1995.

2 In order to avoid concerns under 18 U.S.C. § 208, a Commission Member, who is also an officer of the Foundation, should not participate in a decision to give a speech to the Foundation.

Ed. Note: Ordinarily, an employee may not give an official speech to a private organization he serves as officer or director, without first receiving a waiver under 18 U.S.C. §208(b)(1). The delivery of an official speech amounts to participation in a particular matter, typically affecting the financial interest of the organization.