Office of Government Ethics
95 x 8 -- 07/10/95

Letter to a Designated Agency Ethics Official
dated July 10, 1995

This is in response to your letter of April 10, 1995, regarding a proposed arrangement between [your agency] and the independent, nonprofit organization "Friends of [your agency]" (Friends). Friends was created by a former [agency employee] and seeks to provide various services for the [agency]. Your letter requests advice on the ethics implications of the proposed relationship.

Based on your April 10 letter, an attachment to that letter entitled "A Brief Proposal on the History of the [agency]" by [the former agency employee], and several phone conversations between you and an attorney in this Office, we understand the facts as follows: In 1992, [the former employee] organized Friends for the purpose of collecting materials reflecting the history of the [agency], preserving those materials, and publicizing the history of the [agency]. To date, Friends has made considerable progress in achieving these objectives; however, much work remains to be done. As an example, apparently 128 taped interviews have been completed, including interviews of all former [agency] directors, but fewer than one-third of the 128 interviews have been transcribed.

In anticipation of the [agency's] upcoming anniversary, [the former employee] approached the [agency] and proposed that Friends head up the anniversary celebrations and serve formally as [agency] historian. Anxious to celebrate the anniversary with special activities, but limited in its resources, the [agency] is interested in taking advantage of the Friends' offer.

More specifically, [the former employee's] proposal, as we understand it, contemplates that Friends and the [agency] enter into an agreement pursuant to which Friends would head up the anniversary celebrations; serve as [agency] historian (continuing with the development of historical materials); and prepare, for the [agency], an archive to be located within the agency's offices. The [agency] would not pay Friends for any of these services but would designate an [agency] employee to serve on a Friends' advisory committee; designate one or two [agency] employees to coordinate with Friends; provide clerical support for transcribing taped interviews and organizing the archive; provide a secure space for the archive within the [agency's] offices; officially recognize the role of [the former

employee]/Friends in the history project; encourage [agency] employees and former employees to join Friends and to provide materials for the archive; help raise foundation and other funds to support the project; co-sponsor, with Friends, an event "kicking off the project"; and use some portion of the [agency's] September conference to highlight the projects being undertaken by Friends and the [agency].(1)

Your question, as we understand it, is whether there are any restrictions that would preclude [the agency] from entering into these arrangements. If so, you ask that we suggest alternatives.

Non-ethics issues

As a preliminary matter, we feel constrained to point out that the initial and, in many ways, most critical, issues raised by the proposed arrangement with Friends are not within the subject matter areas for which the Office of Government Ethics (OGE) has responsibility. First and foremost is the issue of whether the [agency] has the authority to enter into an agreement for these purposes. In addition, in light of the benefits to be conferred on the [agency] by Friends, the proposed arrangement may raise issues of improper augmentation of appropriations by the agency and improper acceptance of volunteer services by agency employees.(2) The agency's acquisition of services from the organization may also raise an issue of compliance with applicable procurement law.

In resolving these issues, you may need to consider not only your agency's organic statute(s) and regulations, but also law applying to Federal agencies generally. On the augmentation issue, you may wish to seek advice from the Comptroller General. See also OGE Informal Advisory Letters 84 x 5, 85 x 16, 86 x 10.

Our discussion below of how the conflict of interest statutes and the Standards of Ethical Conduct (Standards) apply to the proposed arrangement assumes that these preliminary issues do not preclude the proposed arrangement, but this assumption is only for purposes of allowing us to address ethics considerations under the statutes and the Standards. Other than to note that these preliminary issues, like the related non-ethics issues noted below, are serious and, indeed, possibly determinative, we offer no opinion on these issues, which, as indicated, are outside OGE's purview.

Assignment of [agency] employees to serve on a Friends' advisory committee, to provide support in other ways, and to act in matters affecting Friends

Assuming the [agency] has the authority to assign [agency] employees to coordinate with Friends, to serve on an advisory committee, or to provide clerical or organizational help in support of authorized projects, the agency and affected employees will need to be aware of and take care to avoid conduct prohibited by the criminal conflict of interest statutes and the Standards. As a general matter, avoidance of such difficulties will be easier if one keeps in mind that, even though the objectives of the [agency] and Friends may sometimes overlap, they remain separate entities with distinct interests.

One concern that arises whenever Federal employees serve outside organizations is the basic conflict of interest prohibition set forth in 18 U.S.C. § 208. In the absence of a waiver issued pursuant to section 208(b), section 208(a) prohibits Federal employees from participating "personally and substantially as . . . Government employee[s] [in particular matters in which organizations they serve as] officer, director, . . . or employee . . . [have] a financial interest." The rationale for the disqualification is that the fiduciary duty owed to any organization served in one of the enumerated capacities may conflict with the duty an employee owes the Government.

In this context, the concern is that if [agency] employees were assigned to serve Friends in their official capacities as officers, directors or employees, they would be disqualified from participating "personally and substantially" in "particular matters" with a "direct and predictable" effect on the financial interests of Friends, unless the conditions of section 208(b) were satisfied. While it seems highly unlikely that any [agency] employee assigned to provide occasional clerical or organizational support to Friends, in furtherance of an agreement between Friends and the [agency], would ever be considered an "employee" of Friends, much less an "officer" or "director," the situation presented by an [agency] employee serving on a Friends advisory committee or board may
be more problematic. While there are precedents indicating that section 208 is inapplicable where an employee serves as director of an outside organization in his official governmental capacity, those precedents have been construed narrowly, as applying only (1) where the employee's service as an "ex officio" director of the outside organization is "expressly authorized by statute" or (2) where "the rules of the private entity designate that official as a member of the board and neither the rules or State law appear to impose a fiduciary duty to the private entity on the

director." Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury (June 22, 1994) at 3.

As we understand your situation, what is needed is to have an employee or employees of the [agency] represent the views of the [agency] to Friends and coordinate efforts jointly undertaken by the two organizations. These objectives may be achieved and difficulties under section 208 avoided if the employees assume the position of "coordinators," "liaisons to Friends," or "liaisons to the Friends advisory committee or board" and do not assume "employee," "director" or "officer" positions within Friends. Of course, great care should be taken to ensure that all parties understand that the duty of such employees is to represent the interests of the United States and the [agency] and that they have no fiduciary obligations to Friends.

In addition, we suggest that, in order to avoid any conflicts under section 208 or under the impartiality provisions in the Standards, the [agency] should exercise care not to assign to work officially with Friends -- or on Friends-related matters -- [agency] employees who have significant involvement with Friends in their personal capacities. Section 208 clearly would restrict the official activities of any current [agency] employees serving Friends as employees, officers, or directors in their personal capacities. In the absence of a waiver under section 208(b), such employees would be prohibited from participating "personally and substantially," in their official [agency] capacities, in particular matters that could have a direct and predictable effect on the financial interests of Friends. Subpart E of the Standards of Ethical Conduct, Impartiality in Performing Official Duties, 5 C.F.R. § 2635.501 et seq., reaches further than section 208. Under section 2635.502(b)(1)(v) of the Standards, employees are said to have a "covered relationship" with organizations in which the employees are "active participants."(3) Because of this relationship, unless specifically authorized by their agencies, such employees may not participate in "particular matters involving specific parties" to which they know such organizations are parties if the employees "determine . . . that the circumstances would cause a reasonable person with knowledge of the relevant facts to question . . . [their] impartiality in the matter." Thus, in some circumstances, subpart E would restrict the official activities of employees who are simply "active" in Friends, even if they do not serve the organization as employees, officers, or directors.(4)

Fundraising

The proposal by [the former employee] attached to your April 10 letter suggests that, pursuant to the proposed agreement with Friends, the [agency] would "encourage staff and retirees to join" Friends and, further, that it would "help raise foundation and other funds to support the project." The proposal thus seems to contemplate that the [agency] will participate actively in fundraising to benefit Friends and projects to be undertaken jointly by Friends and the [agency].

Any fundraising for Friends by [agency] employees would be covered by the Standards, which define "fundraising" as "the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. § 527(e), through [inter alia] . . . [s]olicitation of funds or sale of items." 5 C.F.R. § 2635.808(a)(1). Section 2635.808(b) describes the circumstances under which an employee may engage in fundraising in an official capacity. It provides that "[a]n 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." Our understanding is that fundraising for Friends by the [agency] is not authorized by a statute, Executive order, regulation, or any other authority. The phrase "or otherwise as determined by the agency," moreover, does not provide an agency with authority to engage in fundraising simply because the fundraising is consistent with the agency's mission or in furtherance of its programs. See OGE Informal Advisory Memorandum 93 x 19.

Fundraising for Friends by [agency] employees acting in their personal capacities stands on a different footing but is also regulated by the Standards. Under section 2635.808(c), employees may not personally solicit funds or other support from subordinates or from persons known to be "prohibited sources" within the meaning of section 2635.203(d) of the Standards,(5) except that generally solicitations addressed to large groups are permissible unless the employee knows that the solicitation is targeted at subordinates or persons known to be prohibited sources. See 5 C.F.R. §§ 2635.808(a)(4) and 2635.808(c). Thus, any [agency] employee who, in a one-on-one setting or by means of a targeted solicitation, encouraged his subordinates to pay a membership fee and join Friends, or otherwise donate funds to Friends, would violate this restriction; and the same result would obtain if like encouragement were directed at people or organizations that do business with the [agency] or are, for other reasons, "prohibited sources." In addition, section 2635.808(c)(2) prohibits employees engaged in personal fundraising from using or permitting use of "official title, position or any authority associated with . . . public office to further the fundraising effort." This provision would impact the manner of fundraising efforts directed at other

likely donor candidates -- former [agency] employees and organizations with former ties to the agency -- along with persons and organizations or foundations that have no present or past relationship with the agency. Current [agency] officials may participate in such fundraising efforts but are prohibited from using their official titles, positions, or authority to further the fundraising.(6)

Finally, it is also noteworthy that, while not entirely clear, [the former employee's] proposal seems to contemplate the raising of funds earmarked for projects undertaken jointly by the [agency] and Friends -- perhaps the archive, or the anniversary celebration. To the extent that such funding is provided for agency programs or activities, as distinct from the Friends organization, it may not be covered by section 2635.808, which, as noted, applies to the raising of funds for nonprofit organizations. However, such fundraising would have to be based on an agency gift acceptance authority that includes the authority to solicit gifts as well as accept them. Without such gift acceptance authority, the activity could be an improper augmentation of agency appropriations. Again, however, we express no view on this issue, which, as previously noted, is not within our purview.

Promoting the Friends' organization or staff, or projects jointly undertaken by the [agency] and Friends

The proposal submitted by [the former employee] indicates that, pursuant to the proposed agreement between the [agency] and Friends, the [agency] would be expected to promote certain activities undertaken jointly by the [agency] and Friends. These promotional efforts would include encouraging
[agency] employees and former employees to provide materials for the archive to be located within the [agency] offices, using some portion of the September [agency] staff conference to highlight the affiliation between Friends and the agency and the history project/archive; recognizing [the former employee's] role in the history project; and co-sponsoring, with Friends, an "event kicking off the project." The issue is whether such official activities promoting Friends and Friends' projects would be considered use of public office for private gain, in violation of section 2635.702 of the Standards.

Subject to the qualification noted below, and again assuming the existence of agency authority to enter into the proposed agreement with Friends for the specified purposes, our view is that such promotional activities are appropriate and permissible under the Standards. The primary purpose of section 2635.702 is to prohibit use of public office to

promote activities for private, i.e., nonpublic purposes. It has no application to promotion of an authorized Government project, notwithstanding that a separate, private entity involved in the project may reap some benefit from the promotion, provided that the official involved in the promotion is not affiliated with the private entity in a nongovernmental capacity.

In this context, we again emphasize that, in order to avoid even the appearance of use of public office for private gain, the [agency] should exercise care when assigning agency employees to work on Friends- related matters. We strongly advise that the agency not involve in such matters [agency] employees who are privately affiliated with Friends.(7) With this caveat, however, we do not believe that an [agency] official who is participating in the history project/archive as part of his official responsibilities would be precluded by the Standards from either directing current employees or requesting former employees to search for and provide
relevant materials for use in the history project/archive. We also see no ethics issue if an [agency] official takes the opportunity presented by the September conference to advise agency staff regarding the affiliation between Friends and the [agency], to explain the development of the history project to date, and to describe future plans for its completion and incorporation in an archive. In this connection, recognition of [the former employee's] role in the project would seem appropriate. On the other hand, endorsement of the Friends' organization generally, as distinct from jointly undertaken and properly authorized projects, should be avoided. In our view, it would be improper for an agency official to use his office to encourage agency employees to join Friends, even if payment of a membership fee were not required.

Regarding the proposed co-sponsorship of an "event kicking off the project," we hesitate to comment without more information about the scope of the event and its purpose. If the envisioned event is, for example, a fundraiser, it would raise ethics issues under section 2635.808 of the Standards, as discussed above. If the purpose of the event is informational, however, it may be entirely proper, provided that it is an appropriate means of disseminating word of properly authorized projects undertaken jointly with Friends and if it is accomplished consistent with applicable appropriations law.

Using Government time and property

Although your letter does not specifically raise these issues, questions regarding proper use of Government time and property are likely, we think,

to arise if the [agency] enters into the proposed arrangement with Friends. Section 2635.704 of the Standards prohibits use of Government property for other than authorized purposes.(8) Section 2635.705 prohibits use of official time for activities not required in the performance of official duties or otherwise authorized in accordance with law or regulations.

As we understand the proposed arrangement with Friends, there would likely be a number of [agency] employees involved in Friends- related mattersin an official capacity. These matters would include the history project/archive and the anniversary celebration. There may also be other [agency] employees active in Friends in their private capacities who are involved in Friends-related matters to which the [agency] is not a party and which are not authorized by the agency. Such matters might include membership and fundraising. Under these circumstances, the concern is that the line separating authorized from unauthorized projects and activities may become blurred and the misimpression created that it is appropriate to use Government time and equipment to support all Friends' activities. In order to avoid this situation, we would advise the agency to take the time to advise employees about the rules on use of Government time and property and how those rules apply to Friends- related projects.(9)

Status of [the former employee] or others similarly situated

Our discussion above assumes that, in working on the archive or the anniversary celebration, [the former employee], founder of the Friends' organization, or others similarly involved, would not be acting as "special Government employees." As you know, "special Government employees" or "SGEs" are part-time or intermittent employees who serve the Government on 130 or fewer days during any consecutive 365-day period. 18 U.S.C. § 202. Generally, SGEs are appointed as such; in rare situations, however, individuals have been deemed de facto SGEs. The classification is a critical one for, while nonemployees are not subject to the Standards, 18 U.S.C. §§ 205 and 208, or most of the applications of 18 U.S.C. § 203, SGEs are subject to most of these restrictions, albeit in some instances to lesser restrictions than those that apply to regular employees.

Our understanding is that [the former employee], pursuant to the proposed arrangement, would be working on the archive or the anniversary

celebration as a representative of Friends, not the United States, and that he would not be authorized to speak, or purport to speak, on behalf of the agency. In addition, our assumption is that his activities would not be subject to routine supervision by agency staff. To our knowledge, moreover, the [agency] does not intend to compensate [the former employee], either directly or through the Friends' organization, and it has no plans to formally appoint [the former employee] to a Government position. Under these circumstances, our assumption is that [the former employee] would not be considered an SGE. See OGE Informal Advisory Memorandum 82 x 22; 4B Op. O.L.C. 441 (1980); 1 Op. O.L.C. 20 (1977).

On the other hand, if our assumptions are incorrect, or if you are aware of other factors suggesting that [the former employee] would be an SGE, we would defer to the personnel classification adopted by your agency. If [the former employee] is deemed to be an SGE, his ability to undertake a number of contemplated activities will be impaired and the agency will need to reassess the viability of the proposed arrangement with Friends.

* * *

We hope that the foregoing advice regarding the conflict of interest statutes and the Standards of Ethical Conduct assists you in deciding whether to accept [the former employee's] proposal. Again, however, we caution that the concerns raised by the proposal are not exclusively ethics issues. Questions regarding the scope of the [agency's] authority and augmentation of agency appropriations, as well as [the former employee's] official status, are critical.

If the [agency] decides to proceed with the proposed arrangement, additional ethics issues are sure to arise in the future. For example, the anniversary celebration and the "event kicking off . . . [the] project" may raise issues regarding employee acceptance of gifts from prohibited sources to the extent food or other entertainment is provided for [agency] employees at these events. Retirement of [agency] employees who play an official role in Friends-related projects may raise issues under the post- employment statuse, 18 U.S.C. § 207. As these or other ethics issues arise, please feel free to contact us.

We have not consulted the Department of Justice concerning your inquiry or this response.

Sincerely,

Stephen D. Potts
Director

Endnotes:

(1) Your letter of April 10 also requested advice on whether the agency could provide office space within the agency for [the former employee]. However, you have since advised this Office that [the former employee] has accepted an offer of office space elsewhere. This issue is therefore moot.

(2) In this connection, we understand that the [agency] does not now have agency gift acceptance authority but is in the process of seeking such authority. Without gift acceptance authority, agencies may accept certain types of benefits pursuant to 5 U.S.C. § 4111 and 31 U.S.C. § 1353. The circumstances under which benefits may be accepted pursuant to these statutes are, however, narrowly defined. See 5 C.F.R. §§ 410.701-410.706 (implementing 5 U.S.C. § 4111) and 41 C.F.R. part 304-1 (implementing 31 U.S.C. § 1353). See also OGE Informal Advisory Letter 84 x 5.

(3) 5 C.F.R. § 2635.502(b)(1)(v) sets forth examples of activities that constitute "active participation." They include serving "as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, . . . [participating] in directing the activities of the organization . . . [devoting significant time to] promoting specific programs of the organization, including coordination of fundraising efforts." On the other hand, the rule makes clear that "[p]ayment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation."

(4) All [agency] employees involved with Friends in their private capacities should be cautioned that, depending on the circumstances, taking official actions affecting Friends could result in a violation of 18 U.S.C. § 208 or the impartiality section of the Standards. Such employees should also be made aware of the restrictions on private conduct imposed by 18 U.S.C. § 205. Section 205 generally prohibits Federal employees from acting as "agent or attorney" for anyone other than the United States before departments or agencies in connection with certain covered matters "in which the United States is a party or has a direct and substantial interest." Thus the statute precludes certain representational activities taken by employees acting in their personal capacities. In view of these restrictions, employees of the [agency] who are involved

with Friends in their private capacities should be very cautious about any communications with the [agency] and [agency] officials, or other agencies and agency officials, regarding matters in which Friends has an interest. All communications are not necessarily precluded. See OGE Informal Advisory Letter 94 x 15; Memorandum for Janet Reno, Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (November 7, 1994) at 7-10. However, in order to avoid the risk of a prohibited communication, we advise that Friends use people who are not currently Federal employees to serve as conduits of communications between Friends and the [agency]. Permissible candidates include [the former employee], or other former [agency] employees, whose representational activities are not covered by section 205. See id. at 1, 2- 3; OGE Informal Advisory Letter 95 x 15.

(5) The term "prohibited source" is defined in section 2635.203(d) to mean--

any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs . . . (1) through (4) of this section.

(6) Note, however, that nothing in the Standards restricts the ability of nonemployees to engage in fundraising. Accordingly, notwithstanding his status as a former [agency employee], [the former employee] and the Friends' organization generally are not precluded by the Standards from engaging in fundraising for Friends or [agency]/Friends' projects whether the fundraising efforts are directed at [agency] employees or others.

(7) Under section 2635.802 of the Standards, [agency] employees who are assigned official responsibilities involving Friends may in fact be precluded from engaging in Friends' matters as an outside activity if the Standards set forth in section 2635.402 (conflicts of interest) or section 2635.502 (impartiality) "would require the employee's disqualification from matters so central or critical to

the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired." 5 C.F.R. § 2635.802(b). Under section 2635.702, even a lesser involvement than that contemplated by these two provisions -- e.g. mere membership in the outside organization -- could, in appropriate circumstances, raise the issue of use of public office for private gain. See 5 C.F.R. § 2635.702. Accordingly, the interests of all may best be served if no one person is involved in Friends-related matters in both a private and an official capacity.

(8) "Authorized purposes" are "those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation." 5 C.F.R. § 2635.704(b)(2).

(9) Under the proposed arrangement, the [agency] would agree to provide "a secure space [within the national [agency] offices] for an archive." Our understanding is that this archive would be part of the history project/archive to be jointly undertaken by Friends and the [agency] and that it would become a part of the [agency]. Under these circumstances, using Government resources for the archive would not raise Standards of Ethical Conduct issues provided that the decision to develop and maintain the archive is within the agency's authority and does not otherwise contravene applicable non-ethics law.

(10) We defer discussion of these issues until the circumstances underlying an offer of food or entertainment are known.