

INFORMATION NOTE

Restrictions on Outside Employment of Members of the United States Congress

1. Background

1.1 In response to the request of the Committee on Members' Interests made at its meeting held on 12 December 2000, the Research and Library Services Division looked up further information on rules concerning the outside employment of Members of the United States Congress. This paper presents a summary of the findings.

2. Findings

Specific Federal Statutory Prohibitions

2.1 Outside employment of Members of the United States Congress is mainly regulated by the Ethics in Government Act of 1978 as amended by the Ethics Reform Act of 1989. The law prohibits a Member from:

- (1) affiliating with or being employed by a firm, partnership, association, corporation, or other entity to provide professional services which involves a fiduciary relationship for compensation;
- (2) permitting his name to be used by any such firm, partnership, association, corporation, or other entity;
- (3) practising a profession which involves a fiduciary relationship for compensation;
- (4) serving for compensation as an officer or member of the board of any association, corporation, or other entity; and
- (5) receiving compensation for teaching, without the prior notification and approval of the appropriate entity, which, in the case of the House of Representatives, is the Committee on Standards of Official Conduct. The law does not mention the Senate.

2.2 The Ethics Reform Act of 1989 also imposes a limit on outside earned income in a calendar year to 15 per cent of a Member's annual basic salary.

2.3 Broad ethical standards are codified in the Code of Ethics of Government Service, details of which are extracted in Appendix I.

Other Federal Statutory Prohibitions

2.4 Federal law at 5 United States Code ("U.S.C." hereafter) sec. 501 provides that a firm, business, or organization that practises before the Federal Government may not use the name of a Member of Congress to advertise the business.

2.5 The Ethics Reform Act of 1989 severely curtails the paid practice of law by Members of Congress. Members of Congress may still practise without compensation within the parameters permitted by their local bar associations. Federal law prohibits Members of Congress from practising in the United States Claims Court or the United States Court of Appeals for the Federal Circuit¹ or from serving as attorneys to contractors or charters holding contracts under the Merchant Marine Act².

2.6 There is provision in the federal criminal law prohibiting Members from seeking or receiving compensation for "representational services" before any Government agency, department, court, or officer in any matter or proceeding in which the United States is a party or has an interest.³

2.7 The Federal Criminal Code prohibits any Member of Congress from entering into a contract or agreement with the United States Government. Any such contract is deemed void and the Member and the officer or employee who makes the contract on behalf of the Government may be fined.⁴ To ensure that these prohibitions are carried out, public contracting law requires every Government contract to contain a clause expressly stating that no Member of Congress shall share in any benefits arising from the contract.⁵

2.8 The United States Constitution prohibits any Member of Congress from receiving an "emolument" of "any kind whatever" from a foreign government or a representative of a foreign state, without the consent of the Congress.⁶ An "emolument" means "any profit, gain, or compensation received for services rendered."⁷

¹ 18 U.S.C. sec. 204.

² 46 U.S.C. sec. 1223(e).

³ 18 U.S.C. sec. 204.

⁴ 18 U.S.C. secs. 431-32.

⁵ 41 U.S.C. sec. 22.

⁶ U.S. Const. Art. I, sec.9, cl 8.

⁷ Comp. Gen. Op. B=169035, 49 Comp. Gen. 819, 820 (1970); see also Comp. Gen. Op. B-180172 (Mar. 4, 1974).

2.9 The Ethics Reform Act of 1989 imposes an absolute ban on Members of Congress from accepting honoraria. Honorarium is defined as "a payment of money or any thing of value for an appearance, speech, or article ...by a Member..., excluding any actual and necessary travel expenses."⁸ The ban is absolute. It encompasses every appearance, speech, or article, regardless of its subject matter or relationship to official duties. The statute does not authorize any Committee to grant waivers under any circumstances. The prohibition arises from a growing concern that the practice of acceptance of honoraria by Members, particularly from interest groups with important stakes in legislation, creates serious conflict of interest problems and threatens to undermine the institutional integrity of Congress.⁹

2.10 The Ethics Reform Act 1989 enacted post-employment restrictions on Members. The law imposes a one-year "cooling-off period" on Members. For one year after leaving office, former Members may not seek official action from current Members, officers, or employees of either House of Congress or from current employees of any other legislative office.¹⁰ In other words, Members may not become lobbyists¹¹ after leaving office until one year has passed. The prohibition arises from a concern that former Members may exert undue influence on their colleagues as a result of the Member's former positions.

2.11 Federal law, at 5 U.S.C. sec. 3110, generally prohibits a Member of Congress from hiring or promoting a relative, including a spouse. A Member's spouse may work in the congressional office, but only on an unpaid basis (unless the employment predated the marriage). The reason for this prohibition is to counter nepotism.

Prohibitions Laid Down in the Rules of the United States Congress

2.12 Specific rules governing outside employment of Members are laid down in the *Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives* and the Standing Rules of the Senate as published in the *U.S. Senate Manual* respectively. They generally address the potential for conflicts of interest.

⁸ 5 United States Code app.7, sec. 505(3).

⁹ Bipartisan Task Force on Ethics Report, at 13-14, 135 Cong. Rec. H9257.

¹⁰ 18 U.S.C. sec. 207(e)(1). Other legislative offices include the Architect of the Capitol, the United States Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, and the Capitol Police. See 18 U.S.C. sec. 207(e)(7)(G).

¹¹ Lobbyists are required to be registered under the Federal Regulation of Lobbying Act.

2.13 House Rule 43 of The House Code of Official Conduct and Section 37 of the Standing Rules of the Senate lay down the general framework on avoiding potential conflict of interest in relation to outside employment. The following summarizes restrictions which are common to Members of the House of Representatives and of the Senate:

- (1) These rules prohibit any Member of Congress from receiving any compensation from any source by virtue of influence improperly exerted from his position as a Member;
- (2) They further prohibit a Member from being engaged in any outside business or professional activity or employment for compensation which is inconsistent or in conflict with the conscientious performance of official duties;
- (3) They prohibit Members from using their public position to introduce or aid the passage of a legislation, the principal purpose of which is to further only his pecuniary interest or that of his client;
- (4) They prohibit affiliation with a firm, partnership, association, or corporation for the purpose of providing professional or fiduciary services for compensation. Please see paragraphs 2.19 to 2.22 below for more details.

Restrictions on Outside Earned Income

2.14 Earned income refers to compensation for personal services, and is distinguished from moneys received from ownership or other investments of equity (so-called "unearned income"). Rules of the House of Representatives and Senate restrict outside earned income to that derived from outside employment only, rather than investment income. The rules define the term "outside earned income" as "wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered."

2.15 These rules specifically exclude the following from being calculated as outside earned income:

- (1) the individual's congressional salary;
- (2) compensation for services rendered prior to coming to Congress or before the effective date of the rule;
- (3) amounts paid to a qualified pension, profit-sharing, or stock bonus plan;

- (4) in the case of a family-controlled business or farm, amounts received in connection with protecting or managing one's investment as long as the personal services rendered do not in themselves generate a significant amount of income; and
- (5) copyright royalties received from established publishers under usual and customary contractual terms.

Amount of Outside Earned Income

2.16 The Ethics Reform Act of 1989 caps the earnings at 15 percent of a Member's base annual salary. In 2000, the cap was US\$21,195 (or, HK\$165,321).

2.17 In businesses where capital is not a material income-producing factor, such as in the practice of one's profession as a doctor, lawyer, or carpenter, the Committee on Standards of Official Conduct generally considers the entire share of profits as earned income, unless it can be shown that some income actually derives from a return on investment. Even where the Member performs no personal services, it is presumed, lacking a strong showing to the contrary, that the Member's share of profits from a service business is for attracting or retaining clients and thus is considered earned income.

2.18 The reasons for laying down an earned income limitation are as follows:

- (1) Substantial payments to a Member of Congress for rendering personal services to outside organizations present a significant and avoidable potential for conflict of interest;
- (2) Substantial earnings from other employment are inconsistent with the concept that being a Member of Congress is a full-time job; and
- (3) Substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials.

Types of Outside Employment

(A) Fiduciary and Related Restrictions

2.19 Further restrictions limit the type of outside work that Members may do. The Ethics Reform Act of 1989 prohibits Members from acting in certain fiduciary capacities. Thus, Members may not receive compensation for practising a profession that offers services involving a fiduciary relationship. They may neither affiliate with nor lend their names to firms that provide fiduciary services.

2.20 Two major considerations underlie this restriction:

- To ensure that honoraria do not re-emerge in various kinds of professional fees from outside interests; and
- Fiduciary professional activities were believed to pose a particular risk of conflict of interest as fiduciary relationships denote an obligation to act in another person's best interests or for that person's benefit, or a relationship of trust in which relies on the integrity, fidelity and judgement of another. This creates a serious potential of conflict of private and public interests.

2.21 Professional activities embraced by this prohibition include law practice, insurance, accounting, and possibly real estate, consulting and financial services. Restriction on law practice arises from the lawyer's duty of undivided loyalty to his or her clients which makes the practice of law particularly susceptible to conflicts with the wide-ranging responsibilities of Members.¹² In addition, Members may not privately represent others before Federal agencies. Even if contacting a Federal agency on behalf of a private individual or organization is within the scope of official duties, an individual who accepts compensation for such services has violated the law.¹³

2.22 The House of Representatives Committee on Standards of Official Conduct and the Senate Select Committee on Ethics respectively evaluate the nature and circumstances of each individual's particular employment on a case-by-case basis. Further details on the tests applied by the House of Representatives Committee on Standards of Official Conduct to determine an individual employment opportunity are extracted at Appendix II. For Senate, the prohibition on receiving compensation for rendering "professional services" includes all professional services and is not limited to those which involve a fiduciary relationship.

¹² ABA Model Rules of Professional Conduct Rule 1.7 (1989); Model Code of Professional Responsibility, Canon 7, DR 5-105, EC 5-1, EC 5-14, EC 5-15, EC 5-21 (1981).

¹³ A federal court has commented on such behaviour in holding a Member of Congress liable for repayment of compensation unlawfully received: "...unquestionably demonstrates a breach of trust, for in order to fall within its prohibition, a Member of Congress must shed the duty of disinterested advocacy owed the government and his constituents in favour of championing private interests potentially inconsistent with this charge." *United States v. Podell*, 436 F. Supp. 1039 (S.D.N.Y.1977).

(B) Serving as a Paid Officer or Board Member

2.23 A Member may not serve as a **paid** officer or board member of any organization, including a non-profit organization. This restriction arises from the same sets of concerns as the fiduciary prohibitions. The ban applies to all entities, including non-profit and campaign organizations. Members may still serve, but they may not be paid any salary or directors' fees. They may accept reimbursements for travel and other expenses incurred on behalf of such organizations and may continue to be covered by organizational insurance policies.

(C) Teaching

2.24 A Member may not teach for compensation without prior written approval from the Committee on Standards of Official Conduct. The main consideration is to ensure that teaching does not become an avenue for circumventing the honoraria ban. The House of Representatives Committee on Standards of Official Conduct and the Senate Select Committee on Ethics scrutinize each request. The criteria used in an evaluation by the House of Representatives Committee on Standards of Official Conduct are extracted in Appendix III.

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Appendix I

(An extract from the U.S. House of Representatives Ethics Manual, Code of Ethics for Government Service)

Resolved by the House of Representatives {the Senate concurring},

That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including officeholders:

CODE OF ETHICS FOR GOVERNMENT SERVICE

Any person in Government service should:

1. Put loyalty to the highest moral principals and to country above loyalty to Government persons, party or department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labour for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favours or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favours or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly which is inconsistent with the conscientious performance of his governmental duties.
8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.

(passed July 11, 1958.)

Appendix II

Fiduciary Relationships: Evaluations by the Committee on Standards of Official Conduct

(extracted from the Ethics Manual for Members of
the U.S. House of Representatives)

Tests

Specifically, the Committee first looks at the company offering the compensation to determine if it primarily "provides professional services involving a fiduciary relationship." If its regular work is to transact business or to handle money or property for another's benefit "in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part,"¹⁴ then employment with that entity in any capacity is precluded.

If the firm itself does not provide professional services involving a fiduciary relationship, the Committee then applies the following three-pronged test to determine whether the individual employment opportunity involves a forbidden fiduciary relationship:

Could the employment result in a conflict of interest between private and public responsibilities?

Does the employment create an appearance that an official position is being used for private gain?

Does the compensation appear to be an effort to circumvent the ban on honoraria?

If any one of these criteria is met, the Committee is likely to find a fiduciary relationship and rule against the employment. The Committee considers factors such as whether the individual is acting on behalf of this or her family or a private client; whether the relationship pre-dates the individual's government service; and whether the employment is consistent with policies enunciated in other laws or House rules. No one factor necessarily controls.

¹⁴ See Black's Law Dictionary 625 (6th ed. 1990) (fiduciary capacity).

Examples

Example 15 Member A, before his election to Congress, was Vice President and General Counsel of a small manufacturing company. Now that he has assumed office, the company would like him to continue in his prior capacities, at a reduced salary to reflect his reduced time commitment to the company. Member A may not accept any compensation from the company under these circumstances since the payment would either be an officer's fee or compensation for providing legal advice, a professional service involving a fiduciary relationship.

Example 16 A political consulting firm that specializes in advising candidates for state office offers a consulting contract to Member B. The firm is hoping to attract new clients by making available the demonstrated political savvy and expertise of a Member of Congress. B may not enter into the contract because its purpose is to capitalize on her status as a Member.

Example 17 Member C was a name partner in a law firm before election to Congress. Upon his election, the firm changed its name to reflect his resignation but requested that it be allowed to list him as "of counsel" on its letterhead so as to maintain the goodwill of his former clients. Even if he accepts no compensation from the firm, C must refuse the request. To accede would be to violate the law against permitting his name to be used by a firm providing professional services involving a fiduciary relationship.

Example 18 Member Jane Doe is a certified public accountant. Prior to her election, she was employed by the accounting firm of Doe & Moe, named for its founder and her father, Joe Doe. Since the firm was not actually named for her, it does not have to change its name upon her election.¹⁵

Example 19 Member E, a lawyer, would like to represent an indigent client on a pro bono (no fee) basis. Since he will not be compensated, he may do so, provided that he observes all other limits on the practice of law by Members.¹⁶

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Example 22 Member H serves as executor of her late husband's estate. She may accept an executor's fee.

Example 23 Before coming to Congress, Member J practiced law. A former client writes a will which designates J as guardian of the client's disabled child and provides a fee to compensate J for so serving. Member J may serve. J May accept the fee, as long as it does not cause J to exceed the 15 percent outside earned income limit.

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¹⁵ See Bipartisan Task Force Report.

¹⁶ See discussion of Practice of Law.

Appendix III

Teaching: Evaluations by the Committee on Standards of Official Conduct

In order to receive approval, the teaching must conform to the following criteria:

1. The teaching is part of a regular course of instruction at an established academic institution.
2. All compensation comes from the funds of the institution and none is derived from federal grants or earmarked appropriations.
3. The payment is for services on an ongoing basis, not for individual presentations or lectures.
4. The teacher's responsibilities include class preparation and student evaluation (for example, grading papers, testing, and homework).
5. The students receive credit for the course taught.
6. The compensation does not exceed that normally received by others at the institution for a comparable level of instruction and amount of work.
7. No official resources, including staff time, are used in connection with the teaching.
8. The teaching does not interfere with official responsibilities nor is it otherwise inconsistent with the performance of congressional duties.
9. The employment or compensation does not present a significant potential for conflict of interest.

Items 1 through 6 should be confirmed in writing by the institution at which the paid teaching will occur. Documentation might be in the form of an explanatory letter or copy of a teaching contract attached to the request for Committee approval. Items 7 through 9 should be affirmed in writing by the individual seeking to teach.

The Committee also approves requests to teach for compensation in less formal settings such as Sunday School, piano lessons, aerobics classes, and other situations clearly unrelated to official duties or an individual's status in Congress. No documentation need be submitted from the employing institution in such instances.

References

Books

1. Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives
2. United States Senate Manual
3. United States Code
4. Ethics in Government Act of 1978
5. Ethics Reform Act of 1989

Websites

1. <<http://www.house.gov/ethics/Ethicforward.html>>
2. <<http://www4.law.cornell.edu/uscode/5/501.text.html>>

Research Paper No.:

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