

Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated September 15, 1993

This is in reply to your letter dated August 10, 1993, in which you request a formal advisory opinion from this Office as to whether section 2635.808(c) of the "Standards of Ethical Conduct for Employees of the Executive Branch" (the Standards), regarding fundraising in a personal capacity, prohibits an employee from soliciting funds from an independently-incorporated philanthropic foundation of a corporation that is a "prohibited source" of gifts. Although your request does not meet the criteria for the rendering of a formal advisory opinion, we are pleased to furnish the following information to you.

Section 2635.808(c) of the Standards provides that an employee may engage in fundraising activities in a personal capacity if, inter alia, the employee does not personally solicit funds or other support from anyone known to the employee to be a prohibited source for purposes of the gift restrictions in subpart B of the Standards.¹ A "prohibited source" is defined in the Standards as any "person," including any organization more than half of whose members are persons, seeking official action by the employee's agency; doing or seeking to do business with the employee's agency; regulated by the employee's agency; or having interests that may be substantially affected by the performance or nonperformance of the employee's duties. 5 C.F.R. § 2635.203(d). In turn, the Standards define "person" to include a "corporation and subsidiaries it controls" and "any officer, employee, or agent of [the corporation and its subsidiaries]." 5 C.F.R. § 2635.102(k).

One way of determining if an entity is a subsidiary controlled by a corporation for purposes of the Standards would be ownership of the subsidiary's voting securities. A corporation will be deemed to control a subsidiary if it owns 50 percent or more of the subsidiary's voting securities. *Id.* In the case of an entity such as a corporation-affiliated philanthropic foundation that does not have voting securities, "control" for purposes of the Standards would depend on other factors, including the source(s) of funding for the foundation and the proportional share(s) of the foundation's funding provided by the source(s); the composition of the foundation's Board of Directors or other governing body; and

the extent to which the foundation's charitable purpose and distribution of funds are influenced by the corporation with which the foundation is affiliated.

The only fact upon which your inquiry is based is that the foundations are "independently incorporated." That would be one factor in determining if a foundation is a subsidiary controlled by a corporation for purposes of the Standards; however, it would not be the only factor. If, for example, a foundation receives all or most of its funding from a corporation and the foundation is governed by a Board of Directors composed of officers and employees of that corporation, the foundation would be a subsidiary controlled by the corporation for purposes of the definition of "person" in section 2635.102(k) of the Standards. The foundation would therefore be a "prohibited source" under the Standards if the corporation which controls it is a prohibited source, and an employee would be prohibited from soliciting funds from the foundation just as the employee would be prohibited from soliciting funds from the corporation under the fundraising activities section of the Standards, at 5 C.F.R. § 2635.808(c).

We trust that this information will be of assistance to you.

Sincerely,

Stephen D. Potts
Director

1 In addition, an employee could not use his official title, position, or authority to further the fundraising effort; personally solicit funds or other support from subordinates; or violate other provisions of the Standards of Ethical Conduct, such as the provisions in subpart G regarding misuse of position and subpart H regarding outside activities. A special Government employee may solicit charitable contributions from a prohibited source as long as that person does not have interests affected by the performance or nonperformance of his official duties.