DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

November 3, 2006

MEMORANDUM

TO: Kathleen D. Heuer
Associate Commissioner for Management
Deputy Ethics Counselor
Food and Drug Administration

FROM: Edgar M. Swindell
Associate General Counsel for Ethics
Designated Agency Ethics Official

SUBJECT: Outside Activity Prior Approval for Certain Press Contacts and News Media Interviews

Introduction

This office has been asked whether employees who wish to speak to the press or participate in news media interviews, without compensation, have to obtain prior written approval. This memorandum is issued in my capacity as the Designated Agency Ethics Official (DAEO) and as such can be broadly disseminated. The determination discussed below pertains only to personal capacity conduct undertaken by employees on non-duty time as an uncompensated outside activity. Official press contacts must be coordinated with the Office of the Assistant Secretary for Public Affairs through component press offices and are not subject to the HHS Form 520 review process.

The situation at issue involves two FDA employees who want to speak with or be interviewed by reporters, commentators, or other journalists representing the press and news media as these terms are traditionally understood, including the major television, cable, and radio networks, ABC, CBS, NBC, FOX, PBS, CNN, FOX NEWS, MSNBC, CNBC, PBS, and NPR. The statements or interviews potentially may be disseminated in articles, books, commentary, radio talk shows, television news segments, documentaries, and the various internet sites operated by these recognized news media outlets. This response is limited to speaking with or being interviewed by such outlets.

For the reasons discussed below, these uncompensated expressive activities do not require prior written approval when performed by employees as citizens outside the scope of their official duties. The employees, nevertheless, remain subject to various prohibitions against the use or disclosure of nonpublic information, as well as limitations on the reference to official title or position in connection with personal activities, and remain subject to such restraints and discipline for improper conduct as may properly be imposed under applicable law.

Discussion

The HHS Supplemental Standards of Ethical Conduct require employees to obtain prior written approval before engaging, with or without compensation, in certain types of outside activities. 5 C.F.R. § 5501.106(d)(1). The request for approval must provide detailed information concerning the proposed activity and be submitted on the standard form prescribed for this purpose, HHS Form 520. 5 C.F.R. § 5501.106(d)(4); DAEO Supplemental Instruction No. 06-1 (January 5, 2006). The prior approval requirement applies, among other activities, to outside teaching, speaking, writing, and editing that relate to the employee's official duties or that are undertaken at the invitation of a prohibited source. 5 C.F.R. § 5501.106(d)(1)(ii).

A "speaking" activity relates to an employee's official duties if, among other situations, the individual has been invited to speak primarily because of official position rather than subject matter expertise or if the topic deals in substantial part with the employee's current or recent assignments or any ongoing or announced policy, program, or operation of the employee's agency. 5 C.F.R. § 2635.807(a)(2)(i)(B)–(E). A "prohibited source" is defined generally as an outside entity that does business with, is regulated by, or seeks official action from an employee's agency. 5 C.F.R. §§ 2635.203(d), 5501.102(c)(1)(ii). Representatives of the press and news media regularly seek official comment from and interviews with agency officials and consequently may be prohibited sources.

The term "speaking" is not defined in the outside activity prior approval regulation. Potentially, "speaking" could encompass a broad range of oral communications. Spoken expressive activities undertaken by an employee as a private citizen about agency matters or at the invitation of external entities align along a continuum of declining formality from lectures, speeches, and panel presentations to informal conversations or mere utterances. The dictionary generally defines the verb "to speak" as the act of communicating vocally, but also provides a more specific meaning: "to deliver an address or discourse." Random House College Dictionary 1261 (rev. ed. 1982).

The HHS Supplemental Ethics Standards provide that, unless a term is otherwise defined, the definitions in the Executive Branch Standards of Ethical Conduct, 5 C.F.R. Part 2635, issued by the Office of Government Ethics (OGE) apply. 5 C.F.R. § 5501.101(c). The OGE Ethics Standards bar compensated "teaching, speaking, and writing" that is related to official duties, but do not define the term "speaking." 5 C.F.R. § 2635.807. Examples following the regulatory text refer to "lectures," but provide no further guidance.

The cited OGE provision was derived from an informal advisory opinion addressing compensated "speeches," "lectures," and "articles," OGE 85 X 18 (October 28, 1985), and an earlier conduct rule, 5 C.F.R. § 735.203(c), originally applicable to high level officials, that prohibited compensation for any "consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of [the individual's] agency." *See* Preamble to Proposed Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed. Reg. 33778 (July 23, 1991).

These examples inform the interpretation of "speaking" for prior approval purposes, but they are not necessarily dispositive due to the remunerative context in which the words were used in the conduct rule and OGE advisory opinion. Conversations and other informal discussions generally are not among the expressive activities for which employees are paid. Moreover, as a matter of journalistic ethics or industry practice, most traditional news media do not pay for an interview. *See, e.g.*, New York Times, *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments* ¶ 19 at 8 (2004) ("[Times staff members] may not pay for interviews or unpublished documents"); Radio-Television News Directors Association, *Code of Ethics and Professional Conduct* 2 (2000) ("Professional electronic journalists should not pay news sources who have a vested interest in the story"). *But see* Kelly Heyboer, *Paying for It*, Am. Journalism Rev. (April 1999) (mainstream media's taboo against purchasing news eroding as "checkbook journalism" increases). Because the prior approval requirement applies to outside "speaking" without regard to compensation, the term arguably could apply to a broader category of expression.

The literal interpretation of a regulatory term, however, should not lead to absurd results. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 454 (1989) ("[w]here the literal reading of a ... term would compel 'an odd result,' ... we must search for other evidence of [the drafter's] intent to lend the term its proper scope"). Accordingly, section 5501.106(d)(1) clearly does not, for example, require an employee to obtain prior approval for every spoken word related to official duties or elicited by a prohibited source that is uttered outside the workplace. The impracticality and administrative burden inherent in such an expansive interpretation are patent.

At the same time, the term "speaking" for purposes of the prior approval requirement includes at least those instances of oral communicative expression involving advance preparation, logistical planning, and/or a degree of formality that are directed, either in person or through electronic means, at a sufficiently numerous audience to be commonly understood as a "speaking engagement" or other "oral presentation." Examples would include speeches, lectures, addresses, orations, debates, presentations, panel discussions, or similar personal appearances requiring substantive verbal discourse.

Without deciding precisely whether the less formal speech at issue—providing comments to the press or participating in unscripted news media interviews—falls within the definition of "speaking" for prior approval purposes, it is important to observe that speaking to the press as a citizen on a matter of public concern is an activity that implicates constitutional protections, although when undertaken by a government employee such conduct is subject to prior government restraint or subsequent discipline in certain circumstances. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Given the historical role of the press in our democracy, some expressive activities involving communications with the media arguably may never have been intended to be within the scope of the term "speaking" for prior approval purposes.

In an opinion involving the "honoraria ban," the Office of the Government Ethics faced a similar interpretive quandary in another First Amendment context, religious speech. OGE 91 X 8 (February 21, 1991). The Ethics Reform Act of 1989, Pub. L. No. 101-194, § 601, 103 Stat. 1716, 1760-63 (1989), 5 U.S.C. app. 4 § 501(b), prohibited federal employees from receiving an "honorarium," defined as "a payment of money or anything of value for an appearance, speech or article." 5 U.S.C. app. 4 § 505(3). Implementing regulations defined a "speech" as an "address, oration, or other form of oral presentation, whether made in person, recorded or broadcast." 5 C.F.R. § 2636.203(c) (1991). When asked whether an employee who was an ordained minister could be compensated to officiate at weddings, deliver a sermon, or perform a child dedication, OGE concluded that he could be paid to do so.

Rather than confronting a difficult constitutional question, OGE simply interpreted the term "speech" to exclude core religious activities, stating that "[b]ecause they have not traditionally been considered to be 'speeches,' the term does not include the conduct of worship services or religious ceremonies." OGE 91 X 8 at 2. The opinion distinguished expressive religious activities from lectures about theological topics, permitting the receipt of fees for the former, but denying honoraria for the latter. Although the opinion may simply stand for the proposition that a "sermon" is not commonly considered a "speech," one may reasonably infer from the context that constitutional concerns influenced the interpretation. In distinguishing a religious ceremony from other types of "address, oration, or other form of oral presentation" that expound theology, the interpretation suggests that certain forms of "speaking" are so traditionally recognized as embodying constitutionally protected interests that, when crafting a limitation on speech, the drafter can reasonably be presumed to have never intended a restraint.

Several years ago I issued an exemption from the prior approval requirement for "writing" that permitted employees, subject to certain caveats, to submit letters to the editor of newspapers and other periodicals without advance clearance. DAEO Supplemental Instruction No. 98-1 (November 20, 1998). In a memorandum explaining that determination, I noted that letters to the editor generally are not written for compensation. Consequently, there was little risk that such writing would involve potential violations of the various ethical prohibitions on receiving outside compensation. *See, e.g.*, 18 U.S.C. § 209 (prohibition on supplementation of federal salary); 5 U.S.C. app. 4, § 501(a) (limitation on outside income of certain non-career employees); 5 C.F.R. § 2635.804(a) (prohibition on outside earned income for Senate confirmed Presidential appointees); 5 C.F.R. § 2635.807(a) (prohibition on compensation for writing related to official duties).

I also emphasized that "the letters page is a fixture of participatory democracy, and letters to periodicals have a unique historical role pre-dating even the adoption of the United States Constitution" and referred the reader to a law review article that examined the importance of letters to the editor from the Federalist Papers through the modern information age. Memorandum from Edgar M. Swindell, Acting Associate General Counsel for Ethics, dated November 20, 1998, to Deputy Ethics Counselors, citing Donna R. Euben, *Comment: An Argument for an Absolute Privilege for Letters to the Editor After Immuno AG v. Moor-Jankowski*, 58 Brooklyn L. Rev. 1439 (1993).

I further observed that "letters to the editor provide a relatively accessible and immediate outlet for personal expression," adding that they "often have a high degree of topicality, written, as they frequently are, in response to current events or even other recent letters." Because "timeliness of publication typically is of the essence," I considered "a prior approval system impracticable in many instances" and was "hesitant to risk any unnecessary burden on employees' freedom of expression."

The uncompensated press contacts and news media interviews that are the subject of the instant inquiry exhibit attributes of letters to the editor and raise similar issues. Therefore, as the Designated Agency Ethics Official charged with interpreting the supplemental agency ethics regulations, I have determined that such uncompensated press contacts and news media interviews were not intended to be and are not covered by the term "speaking" in 5 C.F.R. § 5501.106(d)(1)(ii). Consequently, the submission of an HHS Form 520 in these circumstances is not required, and any extant forms should be returned to the applicants without a disposition.

It should be emphasized, however, that this determination does not mean that such activities can never pose ethical issues. Even though employees will be excused from the procedural requirement of prior approval for certain press contacts and news media interviews, they remain subject to several substantive requirements. These include, among others, the limitations on reference to official title or position in connection with outside personal activities, 5 C.F.R. § 2635.807(b), and various prohibitions against using or disclosing certain types of nonpublic information, such as 18 U.S.C. § 1905 (trade secrets generally), 21 U.S.C. § 331(j) (trade secrets acquired under FDA authority), 5 U.S.C. § 552a(i) (Privacy Act protected records maintained on individuals), or 5 C.F.R. § 2635.703 (nonpublic information generally).

The OGE Standards define "nonpublic information" as information that an employee "gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public." 5 C.F.R. § 2635.703(b). The term includes information that "is protected from disclosure by statute, executive order, or regulation;" "is designated confidential by an agency;" or "has not actually been disseminated to the general public and is not authorized to be made available to the public on request." 5 C.F.R. § 2635.703(b)(1)–(3). For example, an employee cannot publicly disclose information that would reveal an agency's internal deliberative process. *See* Example 5 following 5 C.F.R. § 2635.703(b) (Army Corps of Engineers employee actively engaged in environmental organization cannot give the organization or a newspaper reporter nonpublic information about the agency's long-range plans to build a particular dam). Violation of these provisions may result in disciplinary action. *See Baker v. Department of Health and Human Services*, 912 F.2d 1448, 1454-55 (Fed. Cir. 1990) (sustained removal of employee who disclosed official government information "not made available to the general public" in violation of the then applicable HHS Conduct Standards at 45 C.F.R. § 73.735-307(a)(4)).

Conclusion

The submission of an HHS 520 was designed, in part, to facilitate counseling of employees concerning the ethical obligations imposed by an individual's personal activities. The prior approval requirement was not intended, however, to cover every type of outside activity for which such advice would be beneficial. Accordingly, I have determined that the term "speaking" as used in the outside activity prior approval requirement in 5 C.F.R. § 5501.106(d)(1)(ii), and for no other purpose, does not include speaking to the press or participating in news media interviews of the type presented by the factual scenario involving the two FDA employees. This construction is based on my examination of analogous regulatory provisions, and avoids having to confront the question of the extent to which requiring prior approval for such activities would raise constitutional difficulties. The employees, even when speaking in a personal capacity, remain subject to a number of substantive limitations on employee conduct—principally those involving the improper dissemination of nonpublic information. The employees should understand that failure to adhere to such restrictions may result in discipline.

If my office can provide further assistance, please contact us at (202) 690-7258.