



# DAEO

## SUPPLEMENTAL INSTRUCTION

No. 98-1

Date: November 20, 1998

Pursuant to the authority vested in me as Designated Agency Ethics Official (DAEO), under the delegation from the Secretary, dated November 12, 1997, and the provisions of section 5501.106(d)(5)(i) of title 5 of the Code of Federal Regulations, I hereby exempt the following type(s) of outside writing activities from the prior approval requirements specified in the Department of Health and Human Services Supplemental Agency Ethics Regulations at section 5501.106(d) of title 5 of the Code of Federal Regulations:

### **LETTERS TO THE EDITOR(S) OF NEWSPAPERS AND OTHER PERIODICALS**

The basis for this determination is stated in a DAEO memorandum of even date. The change shall be effective immediately.

Edgar M. Swindell  
Designated Agency Ethics Official

For further information, contact:

Office of the General Counsel  
Ethics Division  
Room 700-E, Humphrey Building  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

Telephone: (202) 690-7258


Facsimile: (202) 690-5452



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MEMORANDUM

TO: Deputy Ethics Counselors  
Ethics Contacts

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

SUBJECT: Instruction Exempting Letters to the Editor from Prior Approval Requirement

Introduction

The HHS Supplemental Standards of Ethical Conduct require employees to obtain prior approval before engaging in certain types of outside activities. This requirement specifically applies to certain outside writing activities, including writing that is related to the employee's official duties and writing that is undertaken at the invitation of a prohibited source. See 5 C.F.R. § 5501.106(d)(1)(ii). However, the Supplemental Standards also provide that the Designated Agency Ethics Official "may issue an instruction or manual issuance exempting categories of employment or other outside activities from a requirement of prior written approval." 5 C.F.R. § 5501.106(d)(5)(i). The DAEO may issue such an exemption upon "a determination that those categories would generally be approved and are not likely to involve conduct prohibited by statute or Federal regulations, including 5 C.F.R. part 2635 and this part." Id. This memorandum transmits, as an attachment, an exemption for the above-referenced category of outside writing activities.

Discussion

My office recently has received inquiries about whether HHS employees are required to obtain prior approval before publication of letters to the editors of newspapers and other periodicals. We concluded that this activity may be covered by the terms of the prior approval rule, under certain circumstances. Nevertheless, I have determined that the publication of letters to the editors of newspapers and other periodicals constitutes a category of activity that meets the standard for exemption set out in section 5501.106(d)(5)(i). Several factors have informed this determination.

First, letters to the editor generally are not written for compensation. Consequently, there is little risk that this category of activity will involve potential violations of the various ethical prohibitions on receiving compensation. See, e.g., 18 U.S.C. § 209 (prohibition on supplementation of federal salary); 5 U.S.C. App. 7, § 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).

Second, the nature and public perception of letters to the editor would suggest that there is a diminished risk of the appearance that the employee would be misusing his or her public office. See 5 C.F.R. § 2635.702 (prohibiting misuse of position, including suggestion of government sanction or endorsement for personal activities). Although even letters to the editor are subject to certain restrictions on the use of the employee's title and official position, see 5 C.F.R. § 2635.807(b), most letters to the editor are clearly viewed by the writer and the public as simply an expression of personal opinion. The letters page in newspapers and other periodicals often is seen as a forum for "venting," and the risk that such letters would be misinterpreted as expressing official views of the agency is minimal, unless the author expressly represented them as such.

A third factor is that letters to the editor provide a relatively accessible and immediate outlet for personal expression. 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. See 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)(examining the importance of letters to the editor from the Federalist Papers through the modern information age). Indeed, one suspects that, for many people, a letter to the editor is the most likely—and probably also the fastest—avenue of publication for their views in the print media. One recent study indicates "a dramatic increase in the number of citizens who use the letters to the editor column as a means of expressing their views and concerns," as well as an increase in the amount of space devoted to letters in newspapers in the past ten years. National Conference of Editorial Writers, Letters to the Editor (1996). Moreover, letters to the editor often have a high degree of topicality, written, as they frequently are, in response to current events or even other recent letters; timeliness of publication typically is of the essence, thus making a prior approval system impracticable in many instances. In light of these circumstances, we are hesitant to risk any unnecessary burden on employees' freedom of expression.

It should be noted, however, that the determination to exempt letters to the editor from the prior approval requirement does not mean that such activities can never pose ethical or legal issues. Even though employees will be excused from the procedural requirement of prior approval, they should be aware that all substantive requirements still apply. These include, among others, various prohibitions against disclosing certain types of nonpublic information, such as 21 U.S.C. § 331(j), 5 U.S.C. § 552a(i), or 5 C.F.R. § 2635.703, and the limitations on reference to official title or position in connection with outside writing, 5 C.F.R. § 2635.807(b).

### Conclusion

In sum, letters to the editor constitute a category of activities that would generally be approved in any event and that are not likely to involve conduct prohibited by statute or regulation. Accordingly, I am issuing an exemption pursuant to my authority in 5 C.F.R. § 5501.106(d)(5).

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As this is the first exercise of this regulatory authority, please disseminate this change widely and maintain a copy in a separate binder for permanent retention in each component. Please consult your labor relations staff concerning any requirements that may apply to dissemination of the document to union representatives and bargaining unit employees.

Attachment

cc: Deputy General Counsels  
Associate General Counsels  
Chief Counsels, Regions I-X

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prep by: rmt:letted.exmpt

subject: Outside Activity (520); Section 807; HHS Supplement Interpretations