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MEMORANDUM FOR GENERAL COUNSELS OF THE MILITARY DEPARTMENTS
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SUBJECT: Guidance on Analyzing Invitations to DoD Officials To Participate in Fundraising
 Activities and to Accept Gifts Related to Events

DoD officials often receive invitations from various organizations requesting their participation in certain events, such as serving as chairs or honorary chairs, attending, or making speeches. These invitations are further complicated when the events are designed to raise funds on behalf of the organization or to benefit a charitable entity. This memorandum provides guidance on analyzing those invitations under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the Joint Ethics Regulation (JER), DoD 5500.7-R. It also discusses the rules governing the acceptance of free attendance at events for which there are normally charges.

Official Capacity

Under 5 C.F.R. § 2635.808, a DoD official, unless authorized, may not "participate in fundraising in an official capacity." Fundraising includes "active and visible participation in the promotion, production, or presentation of" an event at which any portion of the cost may be taken as a charitable tax deduction. Participation includes serving as an honorary chairperson, sitting at a head table, or standing in a reception line. In accordance with Section 3-210 of the JER, a DoD official may not "officially endorse or appear to endorse" fundraising for any non-Federal organization, with certain specified exceptions. Under Section 3-209 of the JER, DoD officials may not officially state or imply, or use their titles or positions to suggest, an official endorsement or preferential treatment of any non-Federal organization or event, with the exception of those in section 3-210: Combined Federal Campaign; emergency and disaster appeals approved by the Office of Personnel Management; Army Emergency Relief; Navy-Marine Corps Relief Society; Air Force Assistance Fund; and "other organizations composed primarily of DoD employees or their dependents when fundraising among their own members for the benefit of welfare funds for their own members of their dependents when approved by the head of the DoD Component command or organization."

Under these regulations, a DoD official should decline an invitation to serve, in his official capacity, as the chairperson or honorary chairperson of a fundraising event for an organization that is not authorized under Section 3-210 of the JER. Serving in such a position clearly constitutes fundraising, which is not allowed under the regulations. These invitations seek the visibility of the

DoD official and his name to help solicit attendance and money for the event. Participating under these circumstances would also constitute an unauthorized endorsement of the organization's fundraising.

There are only two exceptions under which a DoD employee could be associated with a fundraising event in her official capacity. First, under 5 C.F.R. § 2635.808(a)(2), an employee may merely attend a fundraising event as long as the organization does not use the fact of her attendance to promote the event.

Second, under 5 C.F.R. § 2635.808(a)(2) & (3), an employee may deliver an official speech, which is one given in an official capacity on a subject matter that relates to her official duties. This may include the employee's own official duties; the responsibilities, programs, or operations of the agency; or matters of Administration policy on which the employee is authorized to speak. The employee may not request donations or any other support for the organization. Further, the employee's agency must first determine that the event provides an appropriate forum for the dissemination of the information.

DoD allows the heads of DoD Component commands or organizations to make that determination. Section 3-211 of the JER and DoD Directive 5410.18 set out the conditions under which they may make that determination. All of the conditions of section 3-211 must be met before DoD may provide a speaker. It is DoD policy that official speeches at fundraisers are generally disfavored, but may be given if a more appropriate forum is not available and the DoD information needs to be disseminated within a certain time period. The emphasis is whether DoD needs to meet certain public affairs goals and whether the forum in question is the most appropriate to accomplish those goals. A review of the conditions follows.

The speech and its preparation may not interfere with the performance of official duties or detract from readiness. DoD community relations or other legitimate DoD public affairs interests must be served by the speech. These include increasing understanding of U.S. defense posture and capabilities, fostering and sustaining good relations with elements of the public, increasing public awareness and understanding of the Military Services, and supporting the personnel recruiting of the Services. The event must also be of interest and benefit to the local civilian community as well as DoD.

The organization and the event must be appropriate for association with DoD and the speech. For example, nonpartisan events open to the public are usually of common interest and benefit to the general public. Events attended only by invitation, however, may be considered only where a broad cross section of the community is represented, such as an annual convention of an association, or where the organization is particularly connected with the DoD. If organizations have a narrow membership base or interest, the DoD support must benefit the community, not the sponsoring organization.

The deciding official must also be able and willing to provide the same support to comparable events sponsored by similar organizations. For example, if the Secretary of a Military Department determines that a fundraising annual dinner of a public policy organization with a conservative approach is appropriate for him to make an official speech, then he must be willing to make an official speech at a fundraising annual dinner of a public policy organization with a liberal

approach. The same support is not provided if a lower-level official makes a speech at the second event. There are many civic, social, and fraternal organizations, including thirteen organizations that are listed at 32 U.S.C. § 508, that may be considered similar organizations.

DoD should not provide a speaker at an event that charges a fee in excess of the reasonable costs of sponsoring the event. This limitation applies to commercial activities making a profit and fundraising activities. The only exception to speaking at a profit-making or fundraising event is if DoD support is incidental to the event, in accordance with public affairs guidance. For example, if the event is an annual dinner, which is going to be held with or without a DoD speaker, then DoD support is probably incidental to the event. DoD participation must be carefully evaluated on a case-by-case basis.

Whenever the head of a DoD Component command or organization determines that a fundraising event is an appropriate forum, certain precautions must be taken to prevent the appearance that an official's participation is an endorsement of the fundraising event. First, the official may not request donations or other support for the sponsoring organization. Second, his attendance may not be used for promotion of the event. Therefore, any sponsoring organization should be advised that the official may not appear to endorse the organization or its fundraising activities. The organization may certainly include in its invitation package the fact that the DoD official will make an official speech, but must be careful not to use that fact to promote attendance. DoD Public Affairs offices, in consultation with Ethics Counselors, should try to advise on appropriate language and request the opportunity to review and comment on the wording.

As an example of applying the analysis discussed above, to accept an invitation to speak at the Mom, Apple Pie, and DoD Supporter (MAPADS) annual dinner fundraiser, the head of a DoD Component command or organization must make the following determinations. First, she must determine that there are specific DoD community relations interests that may be satisfied by a speech to the MAPADS. Second, because the event is attended by invitation, she must determine whether the MAPADS attendance represents a sufficiently broad cross section of its representative interest group. Alternatively, she may determine that the MAPADS is particularly connected with a message that DoD needs to convey. DoD must also determine that other appropriate fora, which do not involve fundraising, are not available at the time. Third, she must determine that she is willing and able to address the annual dinner fundraiser of a similar organization that does not actively support DoD. The point here is that DoD may not give or appear to give preferential treatment to any particular type of group. Finally, she must determine that the presence of DoD, or the presence of a specific DoD speaker, is not one of the primary attractions of the event. In other words, should DoD presence, or the presence of a specific speaker, be canceled, the event will continue. If this determination is made, then any speech by a DoD official would be incidental to the event. If all these determinations are made, the precautions discussed on page 3 must be observed.

Personal Capacity

There is also a question of whether very senior officials may endorse, fundraise for, or assist an organization in their personal capacities. These officials are the Secretary of Defense, the Deputy Secretary of Defense, the Secretaries of the Military Departments, and the Chairman and members of the Joint Chiefs of Staff. In 1992, the Standards of Ethical Conduct for Employees of the Executive Branch were published. It was the Office of Government Ethics' (OGE's) determination

that it is theoretically possible for senior officials to have a personal capacity. It is DoD's position that, for these officials, the capacity is minimal, especially in the area of fundraising, and should be used only on rare occasions.

The determination of personal capacity would depend on the specific circumstances, including the office of the employee, how much the public identifies the employee with his office, the notoriety of the employee, and past history of association between the employee in his personal capacity and the organization. If the official previously supported something in his personal capacity, it would probably be permissible to continue the personal support. For example, if he had supported his local animal shelter in his personal capacity for the past 10 years, he could probably continue to offer the same type of support in his personal capacity. However, if he now receives for the first time a request from a national humane society for his support, he does not have the kind of historical relationship that could support a personal capacity. Thus, fundraising in a personal capacity would be precluded.

Accordingly, attempting to serve as Honorary Chairperson of the annual fundraising dinner of a national humane society in a personal capacity would be impermissible. Under circumstances where there is no history of a strong association in a personal capacity and where a public organization is requesting support at a highly visible forum, it is virtually impossible to avoid the appearance or implication of an official endorsement. Therefore, we recommend that a DoD official not accept such an offer in his personal capacity.

If he were to do so, however, there are other restrictions that must be observed. Under the OGE standards, at 5 C.F.R. § 2635.808(c), the DoD official may not personally solicit from subordinates. He may also not personally solicit from a prohibited source, which includes, at a minimum, every contractor listed on the DoD Contractors List for the most recent fiscal year. Personal solicitation includes using, or letting others use, his name in correspondence. It does not include mass-produced correspondence addressed to a group of many persons, as long as the solicitation is not targeted at subordinates or prohibited sources.

If the service requires a speech, the official could not give a speech expressing official DoD policy; however, he could use DoD speechwriters if the organization could be considered a non-profit professional association or learned society. Under section 3-300b. of the JER, administrative support services may be used in a limited manner to prepare speeches for presentation at such organizations when related to DoD "functions, management or mission," DoD can derive a benefit, such as improved public confidence from the recognition, and the use does not interfere with performance of official DoD duties. If the organization is not such an association or society, DoD personnel may not be used to assist the official.

A DoD official may not use, or permit others to use, his official title or position to assist the fundraising. Terms of address, such as "The Honorable" or "General" may be used, although this use weakens the attempt to divorce the speech from the employee's official capacity. Finally, he must do everything possible to eliminate the appearance of an official endorsement.

Gifts

Another issue that may arise is whether a DoD official may accept gifts of an invitation to an event, which may include lodging, meals, and entertainment, and of any related transportation in either his official or personal capacity. Under section 3-200 of the JER, a DoD official may attend a "meeting, conference, seminar or similar event" in his official DoD capacity if his Agency Designee determines that there is a legitimate Federal Government purpose in accordance with training or gathering information of value to DoD. If that determination is made, the Federal Government may pay all related expenses. Under 31 U.S.C. § 1353, DoD may then accept travel, subsistence, and related expenses from a non-Federal source for attendance of the official at a meeting or similar function relating to his official duties. Therefore, if the official makes the determination, he may accept both gifts in his official capacity. If the gift of travel exceeds \$250, it must be reported to the Director of OGE through the DoD Component's ethics office.

Under 5 C.F.R. Part 2635, employees may not accept in their personal capacities gifts from a prohibited source or offered because of the employee's official position, unless an exception applies. Determining whether a donor is a prohibited source should be fairly easy. Determining whether the official is being offered the gifts due to his official position may be more difficult.

In a situation where the potential donor is not a prohibited source, the ethics official needs to examine closely the circumstances of the offered gift. If the official were invited for several years prior to his current official position, it would not appear likely that the invitation this year was offered because of his official position. If the official were not invited in the past, however, the gift is more likely based on his current official position. Two exceptions may apply. Under 5 C.F.R. § 2635.204(h), the official may accept food and entertainment from a non-prohibited source if no fee is charged to any person in attendance. Under 5 C.F.R. § 2635.204(b), the official may also accept a gift if it is clear that the motivation is a personal friendship rather than his position. Factors to consider are the history of the relationship and whether the friend personally pays for the gift. Where a gift is paid by an organization, however, rather than a personal friend, OGE considers that it is a business relationship, not a personal friendship, that is the primary motivation.

If you have any questions about application of this guidance to a particular situation, please contact the DoD Standards of Conduct Office at (703) 695-3422.