

**Memorandum** December 4, 2003

**TO:** House Committee on Energy and Commerce  
Attention: Alan Slobodin

**FROM:** American Law Division

**SUBJECT:** Cash “Awards” and “Prizes” to Agency Heads from Grantees of the Agency

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This memorandum is prepared in response to the Committee’s request, as discussed with counsel Alan Slobodin. The American Law Division previously provided a legal analysis to your Committee, dated May 20, 2003, discussing federal law and interpretation concerning the receipt of cash gifts, including “awards,” by an agency head from a grantee of that official’s agency. In response to the Committee’s subsequent inquiry to that agency, the Committee received an unsigned memorandum (or “white paper”) from the Department of Health and Human Services, dated July 11, 2003, which attempted to justify the receipt of cash awards by the head of an agency in the Department, the National Cancer Institute of the National Institutes of Health, based on a particular exemption to the executive branch gifts regulation. The Committee has asked for a legal analysis of the HHS response.

The Department memorandum would construe the gifts restriction, and the narrow exemption in it for *bona fide* “awards” to federal officials from disinterested sources, in such a permissive manner as to condone the personal enrichment of the Director of an agency directly from a source receiving significant grant funding from his agency. The reasoning employed by the Department obscures and overlooks the obvious and serious ethical implications in this scenario. On its face, allowing the top administrator and final decision maker of an agency to receive cash “awards” or “prizes” from those private entities concerning whom the agency must make determinations involving millions of dollars in grant funds implicates the precise conflicts of interest and ethical issues that are addressed in various criminal laws, statutes on gifts, and standards of conduct regulations. As developed below, under the common understanding of the language used in the gift regulations and exemptions, and under relevant administrative rulings and examples, as well as legal interpretations by the Supreme Court, – a private grantee of the Federal Government clearly “has interests that may be substantially affected” by the official powers and duties of the Director of the grantor federal agency, and as such, may not be the source of substantial gifts of cash, even in the form of “awards,” given to that particular Government official.<sup>1</sup>

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<sup>1</sup> 5 U.S.C. § 7353(a)(2); 5 C.F.R. §§ 2635.202, 2635.203(d), 2635.204(d); 8 Op. O.L.C. 143, 144 (1984); Office of Government Ethics [OGE] Advisory Opinions Nos. 83 x 11 (July 26, 1983), and 92 x 7 (February 26, 1992); see *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405-411 (1999).

**Background.** The limitations and restrictions on gifts, and the prohibitions on private salary supplementation of federal employees are, as noted by the Office of Government Ethics, “aimed at preventing the Government employee from becoming beholden to anyone in the private sector who might affect the independence or judgment of that employee.”<sup>2</sup> There is, of course, a grave concern that official decisions may actually be influenced, even subtly influenced, when a private recipient of federal largess “awards” the responsible federal official with cash in appreciation of his public duties.<sup>3</sup> Such conduct not only provides a potential lucrative reward for those *past* decisions favorable to the grantee, but also provides an opportunity for a potentially generous “incentive” for *future* official conduct favorable to the grantee by that official and other agency officials who are possible future recipients of such “awards.” In addition to actual influence over official decision-making, however, there is an extended concern that permitting such conduct diminishes the confidence of the public in the independent, impartial and even-handed administration of federal programs.<sup>4</sup> The Supreme Court has noted the important interest of the Government in adopting rules to avoid even “potential conflicts of interest in the performance of governmental service” to “maintain[ ] the public’s confidence in the integrity of the federal service.”<sup>5</sup>

To address the ethical issues inherent in the receipt of things of value by federal officials from private sources when there exists any “nexus” between the interests of the donor entity and the official duties and responsibilities of the recipient federal official, there has developed in the Federal Government a multi-layered structure of criminal laws, general statutes, and standards of conduct regulations which seek to regulate these situations. The criminal laws include the federal bribery statute which provides criminal penalties for any federal official who receives something of value “in return for” being influenced in the performance of an official act; the “illegal gratuities” clause of the same bribery statute which prohibits the receipt of things of value that are connected to official duties in particular ways, – received “for or because of” a particular official act performed or to be performed by the officer or employee; and a criminal

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<sup>2</sup> Office of Government Ethics, Opinion 81 X 31, October 2, 1981, in *Informal Advisory Letters and Formal Opinions, 1979 - 1988*, at 210; Paul H. Douglas, *Ethics in Government*, at 45 - 49 (Harvard University Press 1952); Roswell B. Perkins, “The New Federal Conflict of Interest Law,” 76 *Harvard Law Review* 1113, 1137 (1963), discussing 18 U.S.C. §209.

<sup>3</sup> *Id.*; the late Senator Paul Douglas, explained in his treatise *Ethics in Government, supra* at 44, that often “the corruption of public officials by private interests takes a more subtle form” than outright bribes, through indirect financial support which may “put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public ....” Douglas noted that sometimes subtle “shifting loyalties” from the community to narrow private interests may lead an official to make decisions favorable to “his private benefactors and patrons” while all the time “the official will claim – and may indeed believe – that there is no causal relationship between the favors he received and the decisions which he makes.”

<sup>4</sup> “The proper operation of a democratic government requires that officials be independent and impartial; ... and that the public have confidence in the integrity of its government.” H. R. Rpt. No. 748, 87th Congress, 1st Session, 4-6, House Judiciary Committee (1961). The Office of Government Ethics has recognized the imperative to “ensure that every citizen can have complete confidence in the integrity of the Federal Government ....” 5 C.F.R. 2635.101(a).

<sup>5</sup> *Crandon v. United States*, 494 U.S. 152, 164-165 (1990).

conflict of interest provision which prohibits federal employees in the executive branch from working on or being involved “personally and substantially” in any official particular matter in which they have a personal or imputed financial interest.<sup>6</sup> In addition to these provisions of criminal law, it should be noted that a specific criminal provision of federal law also prohibits the receipt of money or things of value intended as private “compensation,” or as a salary supplementation, for one’s official duties performed for the United States Government.<sup>7</sup> Under this latter provision, 18 U.S.C. § 209, there has been developed and recognized by the Department of Justice an exemption from the criminal law for *bona fide* awards to federal officials for their public service from sources “detached from” and “disinterested in” the area of responsibilities of the recipient federal official.<sup>8</sup>

***Statute and General Regulations on Gifts.*** In addition to the provisions of federal criminal law noted above, there are non-criminal statutes of general applicability, as well as administrative regulations governing the acceptance of gifts and other “self-enriching” activities of federal officials.<sup>9</sup> The principal statutory provision in federal law regarding gifts from private sources was adopted as part of the Ethics Reform Act of 1989,<sup>10</sup> codifying for the most part somewhat similar ethical rules and limitations on the receipt of gifts by federal employees which had been in effect for the executive branch since 1965 by way of Executive Order and agency regulations.<sup>11</sup>

The current law on gifts from outside sources, codified at 5 U.S.C. § 7353, prohibits the receipt of “anything of value” by a federal official from what have come to be known as “prohibited sources.” In the current gifts law, the “prohibited sources” are expressly set out in two separate categories of persons or entities, to include those persons:

- (1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual’s employing entity; [5 U.S.C. § 7353(a)(1)] or
- (2) whose interests may be substantially affected by the performance or nonperformance of the individual’s official duties. [5 U.S.C. § 7353(a)(2)]

Under the gifts statute, the supervisory ethics offices for particular employees and officials may issue regulations detailing the gift limitations and providing reasonable exceptions to the general prohibitions.<sup>12</sup> The Office of Government Ethics has issued gift regulations under this

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<sup>6</sup> 18 U.S.C. § 201(c)(1)(B); 18 U.S.C. § 201(b)(2); 18 U.S.C. § 208.

<sup>7</sup> 18 U.S.C. § 209.

<sup>8</sup> 8 Op. O.L.C. 143, 144 (1984).

<sup>9</sup> As noted by the Supreme Court there is now “an intricate web of regulations ... governing the acceptance of gifts and other self-enriching actions by public officials.” *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 409 (1999).

<sup>10</sup> P.L. 101-194, Sec. 303, November 30, 1989, 103 Stat. 1746.

<sup>11</sup> See Executive Order No. 11222, Section 201, May 8, 1965 (now superseded by E.O. 12674, April 12, 1989), and former regulations, 30 F.R. 12529, October 1, 1965, 5 C.F.R. §735.202.

<sup>12</sup> 5 U.S.C. § 7353(b).

statutory provision for the executive branch of Government, setting out numerous restrictions and exemptions to the general prohibition. Under the regulations, the Office of Government Ethics sets out the categories of what constitutes a “prohibited source” from whom things of value may not be received as follows at 5 C.F.R. § 2635.203:

(d) *Prohibited source* means any person who:

- (1) Is seeking official action by the employee’s agency;
- (2) Does business or seeks to do business with the employee’s agency;
- (3) Conducts activities regulated by the employee’s agency;
- (4) Has interests that may be substantially affected by performance or nonperformance of the employee’s official duties; or
- (5) Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.<sup>13</sup>

***Regulatory Exemption for Certain Bona Fide Awards.*** Based on the guidance and principles developed in the Department of Justice’s exemption for *bona fide* awards under 18 U.S.C. § 209, the Office of Government Ethics promulgated an exception from the gifts prohibitions for certain “*bona fide* awards” for meritorious public service given by certain entities to federal officials when the recipient federal officials are not in positions to affect the interests of the donor of the award or prize. The current regulatory exemption provides as follows, at 5 C.F.R. § 2635.204:

(d) *Awards and honorary degrees.* (1) An employee may accept gifts, other than cash or an investment interest, with an aggregate market value of \$200 or less if such gifts are a *bona fide* award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee’s official duties or by an association or other organization the majority of whose members do not have such interests. Gifts with an aggregate market value in excess of \$200 and awards of cash or investment interests offered by such persons as awards or incidents of awards that are given for these purposes may be accepted upon a written determination by an agency ethics official that the award is made as part of an established program of recognition:

- (i) Under which awards have been made on a regular basis or which is funded, wholly or in part, to ensure its continuation on a regular basis; and
- (ii) Under which selection of award recipients is made pursuant to written standards.

The examples given by the Office of Government Ethics and the rulings by that agency, as well as the Department of Justice interpretations under § 209, have demonstrated that a *bona fide* award, to fit the exemption, must (among other qualifications for a cash award) come from a person, group, or entity that is to a certain degree “independent” of the recipient public official, in the sense that the public official is not in a position to act favorably to the giver’s interests. The Department of Justice has expressly stated that the exemption from the criminal statute at 18 U.S.C. § 209 that it has recognized for *bona fide* awards to federal officials from outside

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<sup>13</sup> 5 C.F.R. § 2635.203(d).

sources, must come from donors who are “detached from and disinterested in the performance of the public official’s duties.”<sup>14</sup>

The example expressly provided in the published regulations of the Office of Government Ethics uses the Nobel Prize to illustrate the type of “award” from independent sources that may be received by a federal official:

*Example 1:* Based on a determination by an agency ethics official that the prize meets the criteria set forth in § 2635.204(d)(1), an employee of the National Institutes of Health may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.<sup>15</sup>

Similarly, an advisory ruling from the Office of Government Ethics provided another example of when the receipt of a *bona fide* award by a particular official would not raise ethics and conflict of interest concerns, that is, again, when the recipient/awardee is not in a position to exercise official duties or responsibilities that may substantially affect the interests of the donor:

A nonprofit organization presents its annual award consisting of \$5,000 and a medallion for “Greatest Public Service Performed by an Elected or Appointed Official” to an employee of the Bureau of Prisons. The organization applied long-standing written criteria in judging all of the candidates. *The organization has no relationship with the Bureau of Prisons.* Because it is a *bona fide* award for public service, it is not intended to compensate the employee for his services to the Bureau of Prisons and would not violate section 209.<sup>16</sup>

Where there existed apparent or potential conflicts of interest for employees of an agency with respect to the donor entity, however, because those employees worked in a subject “area” of interest to the donor, the Office of Government Ethics, in applying an earlier version of the exemption, found that the requisite independence or disinterestedness of the donor was not present, and that the awards could not be accepted.<sup>17</sup>

The Office of Government Ethics has not published an interpretation specifically addressing the issue of the head of an agency receiving cash “awards” from a grantee of that agency. There is, however, *no* ruling from the Office of Government Ethics which interprets this narrow exception from the general gifts prohibition for *bona fide* “awards” in such a manner as to allow the personal enrichment of a federal official, such as an agency Director, from any entity, such as a grantee of the Director’s agency, which is so vitally concerned with and connected to the area of official responsibilities and powers of the intended recipient. Under the general principles of the administrative and regulatory exemptions, a grantee of an agency can

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<sup>14</sup> 8 Op. O.L.C. 143, 144 (1984).

<sup>15</sup> 5 C.F.R. §2635.204(d), *note*.

<sup>16</sup> OGE, Memorandum, DO-02-016, “18 U.S.C. § 209 Guidelines,” July 1, 2002, *see* OGE Advisory Letter 83 x 10. Emphasis added.

<sup>17</sup> OGE Opinion 83 x 11, July 26, 1983.

hardly be said to be “detached from” or “disinterested in” the official duties and responsibilities of the Director of the grantor federal agency. As explained below, such conduct not only raises general ethics and conflict of interest concerns and appearances, it appears to specifically violate the express prohibition on gifts from interested parties.

***Meaning of Phrase “Interests That May Be Substantially Affected” by the Officer’s Duties.*** The regulatory exception for *bona fide* awards thus does *not* allow, for obvious ethics and conflict of interest reasons, a public official to receive an award from an entity which is in the “fourth category” of regulatory “prohibited sources,” that is, from an entity that “has interests that may be substantially affected” by the performance or nonperformance of that official’s public duties. The Memorandum from the Department of Health and Human Services admits its confusion and lack of understanding of the plain language of this category of “prohibited sources” in the OGE regulations.<sup>18</sup> The Department “white paper” speculates that this fourth category in the regulations could not mean “grantees” of the agency because, it argues, such entities are already covered by the regulations in another category of prohibited sources, that is, those doing business with the agency. Such an interpretation, the Department “white paper” argues, would create a meaningless “tautology” that an employee could “accept an award from a ‘prohibited source’ provided that it is not a ‘prohibited source,’”<sup>19</sup> and the Department eventually concludes that the provision does not limit an award to the agency’s director merely because the donor is a grantee of that agency.

The Department’s expressed confusion concerning the categories of “prohibited sources” may be substantially clarified, in the first instance, by looking at the explanations of the Office of Government Ethics in its advisory opinions and rulings. OGE has explained that the first three categories of “prohibited sources” in its regulations (which correspond to the first category of prohibited sources in the statute, 5 U.S.C. § 7353(a)(1)) are intended as “agency-wide” prohibited sources of gifts.<sup>20</sup> That is, that such entities in the first three categories are “prohibited sources” from whom gifts may not be received by *everyone* employed in the particular agency, regardless of the employee’s duties, responsibilities or functions. The “fourth category” of prohibited sources in the OGE regulations (which corresponds to the second, separate category in the statute, 5 U.S.C. § 7353(a)(2)), however, is not merely a repetitious statement of, or another, agency-wide limitation, but rather is intended to be a restriction which is *personal* for the particular public official in question, and is dependant upon the incumbent’s official authority, powers and duties.

Thus, an entity such as a research laboratory and treatment facility which receives grants from a federal agency and has a continuing relationship with that agency,<sup>21</sup> would be a

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<sup>18</sup> “Analysis of Ethics and Related Issues Concerning the Receipt of Lecture Awards by National Institutes of Health Employees,” 2-3, July 11, 2003.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> OGE Opinion 94 x 5, February 7, 1994.

<sup>21</sup> In the facts provided by the Committee, one grantee facility which gave the agency Director a several thousand dollar “lecture award,” the Arizona Cancer Center of the University of Arizona, advertizes itself as a “National Cancer Institute-Designated Comprehensive Cancer Center” (<http://www.azcc.arizona.edu>). In the relevant time period, in Fiscal Year 1999, for example, the

“prohibited source” of “gifts” generally for every officer and employee in the agency under one of the first three regulatory categories of prohibited sources (those seeking action from, doing business with, or regulated by the agency). However, that laboratory would also be a “prohibited source” under the *fourth* category of the regulations, and thus a “prohibited source” even of “awards,” only if the particular officer in question were in a position to exercise governmental authority which could substantially affect the interests of that grantee.<sup>22</sup> Clearly, a laboratory/facility which is a “grantee” of a particular agency may be a “prohibited source” for general “gifts” for every officer and employee of the agency (merely because of the laboratory’s status as an agency “grantee”) and, at the same time, may also be a “prohibited source” for the Director of that agency for an “award,” because the Director’s general supervisory, administrative and operating authority relative to all of his agency’s decisions may, obviously, have a substantial effect on the interests of the laboratory/facility. It is thus the “status” of the position that the intended recipient holds, and the incumbent’s ability or capacity to exercise governmental authority affecting the donor entity, that is the relevant measure of the application of the fourth “prohibited source” category.

In further clarification of the phrase used in the regulatory exemption, the Supreme Court of the United States clearly explained that for a particular public official, this “fourth category” of “prohibited sources” in the Office of Government Ethics regulations, from whom things of value may not be received because the donor has “interests that may be substantially affected” by the duties of the official, relates to those situations where the public official “is in a position to act favorably to the giver’s interests,” that is, where the public official has the “capacity to exercise governmental power or influence in the donor’s favor,” regardless of whether there is a particular, identifiable matter immediately before the official.<sup>23</sup> The clause in the ethics regulation thus clearly is directed at the powers and responsibilities of the office of the incumbent recipient, rather than the immediacy of any particular matter and, in the case of a grantee of a federal agency, would obviously be applicable to the Director of the agency who has final statutory, administrative and operational authority over the agency decision-making vitally affecting the interests of the donor entity.

In *United States v. Sun-Diamond*, the Supreme Court analyzed a prosecution of a federal official, the Secretary of Agriculture, under the “illegal gratuities” clause of the bribery statute for his receipt of various gifts from business entities which could be affected by the exercise of the Secretary’s official duties because they had businesses that were regulated by the Department. It should be noted that for a number of years, in several federal circuits, so-called

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University of Arizona received grants from the National Cancer Institute in the amount of \$22,193,000, and contracts in the amount of \$237,000; and in Fiscal Year 2000 received grants from NCI in the amount of \$25,249,000 and contracts in the amount of \$486,000. *Fact Book*, National Cancer Institute, 1999, at E-12; *Fact Book*, National Cancer Institute, 2000, at E-11.

<sup>22</sup> Employees in the agency who are in jobs that do not involve the making, evaluation, approval, or oversight of grants to that laboratory/facility, nor supervising those who have such responsibilities, would still be prohibited from receiving “gifts” from that facility (merely because of its status as a grantee of the agency), but would not be prohibited from receiving a *bona fide* award from that laboratory/facility because their particular responsibilities do not affect its interests.

<sup>23</sup> *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405-411 (1999).

“status gifts” were successfully prosecuted as “illegal gratuities.”<sup>24</sup> Status gifts were things of value received by an official which were given because of that employee’s official position in the Government, that is, given to an officer or employee who “was in a position to benefit” the private donor entity. The United States Government in *Sun-Diamond* argued unsuccessfully for that specific interpretation in the case of the Secretary of Agriculture:

The Independent Counsel asserts that “section 201(c)(1)(A) reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, specified later time, be *in a position to act* favorably to the giver’s interests.” Brief for United States 22 [Court’s emphasis]. The Solicitor General contends that § 201(c)(1)(A) requires only a showing that a “gift was motivated, at least in part, by the recipient’s *capacity to exercise governmental power or influence* in the donor’s favor” without necessarily showing that it was connected to a particular official act. Brief for United States Dept. of Justice as *Amicus Curiae* 17 [Court’s emphasis].<sup>25</sup>

The Supreme Court, however, found that for a violation of the “illegal gratuities” provision, there must be some particular, identifiable “official act” to which the gift is connected.<sup>26</sup> The Supreme Court noted in *Sun-Diamond* that so-called “status gifts,” that is, gifts to a federal official which were prohibited “by reason of the recipient’s mere tenure in office” because they were in a position to act favorably on the donor’s behalf,<sup>27</sup> were not necessarily “illegal gratuities,” but rather would come within, be regulated by, and would violate the OGE *regulations* on gifts. Specifically, the unanimous court found such gifts, that is, things of value given to a public official who has the capacity to act favorably on the donor’s behalf at some time, to be gifts which would violate the regulations expressly prohibiting the receipt of gifts from anyone who “has interests that may be substantially affected by performance or nonperformance of the employee’s official duties:”

[I]t is interesting to consider the provisions of 5 C.F.R. § 2635.202 (1999), issued by the Office of Government Ethics ... The first subsection of that provision, entitled ‘General prohibitions,’ makes unlawful approximately (if not precisely) what the Government asserts [the statute] makes unlawful: acceptance of a gift “[f]rom a prohibited source” (defined to include any person who “[h]as interests that may be substantially affected by performance or nonperformance of the employee’s official duties ...”<sup>28</sup>

The Supreme Court in *Sun-Diamond* thus explicitly explained that the prohibition in the executive branch regulation on accepting gifts from one who “has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties,”

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<sup>24</sup> *United States v. Niederberger*, 580 F.2d 63, 69 (3rd Cir. 1978), *cert. denied*, 439 U.S. 980 (1978)(golfing trips for I.R.S. officer paid for by Gulf Oil Corp. when officer was merely “in a position to use his authority in a manner which could affect the gift-giver”); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976), *cert. denied*, 426 U.S. 94 (1976)(gift to prison administrator).

<sup>25</sup> 526 U.S. at 405-406.

<sup>26</sup> 526 U.S. at 406.

<sup>27</sup> 526 U.S. at 408.

<sup>28</sup> 526 U.S. at 411, citing to the gifts regulations at 5 C.F.R. § 2635.203(d)(4).

is a prohibition on receiving things of value from private sources by a federal official who is merely “in a position to act favorably to the giver’s interests,” that is, that the recipient public official has the “capacity to exercise governmental power or influence in the donor’s favor.”<sup>29</sup> There need not be any identifiable, particular governmental matter currently before, or “on the desk of,” the official to violate this provision of ethics regulation under the Supreme Court explanation. In fact, if there is a particular, identifiable matter involving the donor-entity immediately before the Government official who is at the same time receiving significant cash “awards” or other gifts from that entity, there may very well be more than merely an “ethics” violation of the gift regulation, but rather potential felony violations of federal criminal law.<sup>30</sup>

***Authority of Agency Director.*** As a general matter, it is obvious and beyond reasoned argument that a Director of a federal agency has the official capacity and authority to exercise governmental power or influence which could have a favorable or unfavorable impact on the interests of a grantee of that agency, particularly an entity with a continuous grantee and certification relationship with that federal agency. In fact, under federal law, the Director of the agency in question, the National Cancer Institute, has *express* administrative control and statutory authority over all of the relevant functions of the Institute,<sup>31</sup> and thus oversees the grant functions, administration and oversight of grantee programs.<sup>32</sup>

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<sup>29</sup> 526 U.S. at 405, 411.

<sup>30</sup> The timing of the offer and receipt of things of value, in relation to a particular official matter actually pending before a recipient Government official is a relevant circumstantial consideration in determining the requisite “intent” needed for an “illegal gratuity,” that is, the intent to be rewarded or compensated for a particular official act. *United States v. Biaggi*, 853 F.2d 89, 99-100 (2<sup>nd</sup> Cir. 1988), *cert. denied* 489 U.S. 1052 (1989), evidence of required intent to reward may be inferred from the size of gift, and “the nature and sequences of events”; *United States v. Jennings*, 160 F.3d 1006, 1014, 1017-1018 (4<sup>th</sup> Cir. 1998), (referring to federal bribery law at 18 U.S.C. § 201 and similar language at 18 U.S.C. § 666, regarding bribery and gratuities in federally funded programs): “Direct evidence of intent is not necessary,” but may be inferred from circumstances including timing and sequences of gifts and acts. *Note* also 18 U.S.C. § 209, where donor’s interest in immediate official matter, although clearly not necessary for a violation, may arguably provide further evidence of “intent to compensate” and “appearance of a conflict of interest ... sufficient to violate § 209.” *United States v. Moore*, 765 F.Supp. 1251, 1254 (E.D.Va. 1991). The law at §209 has been described as a conflict of interest statute “in the strictest sense,” that is, an “employee does not have to *do* anything improper in his office to violate the statute,” but rather his special status as a government employee “makes an unexceptionable act wrongful - wrongful because of the potential dangers in serving two paymasters.” Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, at 55-56 (Harvard University Press 1960). There may also be other considerations of felony violations when a public official actually participates “personally and substantially” in a particular agency matter in which the official has his own personal, financial interest. 18 U.S.C. § 208.

<sup>31</sup> 42 U.S.C. §§ 285a-1, 285a-2.

<sup>32</sup> According to the NCI web-site (<http://www3.cancer.gov/mab/hnc1.htm>), the Office of the Director “(1) Serves as the focal point for the National Cancer Program; (2) develops a National Cancer Plan and monitors implementation of the plan; (3) directs and coordinates the Institute's programs and activities; and (4) develops and provides policy guidance and staff direction to the Institute's programs in areas such as program coordination, program planning, clinical care and administrative management.”

One may not convincingly argue, under either general or conflict-of-interest-specific legal principles, that an agency grantee has no interests which may be substantially affected by the official authority, duties and responsibilities of that agency's Director merely because the Director has "delegated" certain functions regarding grants to subordinate officials. A delegation of authority by a federal official is *not* a divestiture of official authority or responsibility.<sup>33</sup> As noted by the United States Court of Appeals, the head of an agency who delegated authority to a subordinate official "did not, however, divest ... himself of the power to exercise his authority or relieve him of his responsibility for action taken pursuant to the delegation."<sup>34</sup> In fact, the Supreme Court has found that an official may *not* administratively divest himself of statutory authority.<sup>35</sup>

A superior thus clearly has "official responsibility" for, as well as "official authority" over, the actions of those subordinate officials in the chain of authority and command in his federal agency.<sup>36</sup> The assignment, review, oversight, and supervision of official actions of subordinate employees, as well as the express authority retained by that official to direct the overall functions and programs of the agency, are all among the official responsibilities and duties of a federal officer such as an agency Director. In explaining the conflict of interest principles in the concept of the "official responsibilities" of a federal officer, Professor Manning expressly noted that: "[T]he head of a department or agency would have 'under his official responsibility' all matters in the department or agency."<sup>37</sup>

It should be emphasized that there is *not* a requirement under the gifts prohibition/"award" restriction that the recipient official must actually participate "personally and substantially" in any current governmental matter affecting the donor/grantee for the prohibition on awards to apply, as there is under several *criminal* conflict of interest laws.<sup>38</sup> As

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<sup>33</sup> *Skokomish Indian Tribe v. General Services Administration*, 587 F.2d 428, 432 (9<sup>th</sup> Cir. 1978).

<sup>34</sup> *Skokomish Indian Tribe*, *supra* at 432. For conflict of interest purposes it may be noted that the act, decision and discretion of delegating certain authority or not delegating authority, to whom such authority is delegated, and the nature – reviewability, timing, extent – of such delegation may involve, in themselves, the exercises of official duties that may substantially affect a grantee.

<sup>35</sup> *NLRB v. Duval Jewelry Company*, 357 U.S. 1, 7-8 (1958); *Equal Employment Opportunity Commission v. Exchange Security Bank*, 529 F.2d 1214, 1218-19 (5<sup>th</sup> Cir. 1976).

<sup>36</sup> *See*, for example, definition of "official responsibility" for purposes of certain criminal conflict of interest laws as including "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and *either personally or through subordinates*, to approve, disapprove, or otherwise direct Government action." 18 U.S.C. § 202(b). Emphasis added.

<sup>37</sup> Bayless Manning, *Federal Conflict of Interest Law*, at 207-208 (Harvard University Press 1964).

<sup>38</sup> While not requiring "personal and substantial" participation in a particular governmental matter affecting the donor to incur the prohibition on "awards," even that much stricter criminal standard of responsibility and duties would not, as discussed by Roswell Perkins, "create a loophole for the lazy executive in the chain of command who may not have bothered to dig into the substance" of a particular matter. Roswell Perkins, "The New Federal Conflict of Interest Law," 76 *Harvard Law Review* 1113, 1128 (1963).

noted, the restrictions on awards from interested parties is concerned, for obvious ethical and conflict of interest reasons, with the power to exercise governmental authority in the donor's favor, that is, it is concerned with the status of the recipient official *vis-a-vis* the donor, and not with whether such authority is actually exercised in a particular, identifiable matter. Like many conflict of interest rules, this regulation does *not* require actual corruption, loss by the Government, or wrongful official acts, but rather is preventative and prophylactic in nature, and thus is, as the Supreme Court noted concerning another conflict of interest law, "directed not only at dishonor, but also at conduct that tempts dishonor."<sup>39</sup> Under the relevant legal and administrative interpretations of, and the plain meaning of the language employed in the gifts/"award" limitations, therefore, an entity such as a cancer research and treatment facility which has a continuing grant and certification relationship with a federal agency such as the National Cancer Institute, clearly has interests that may be substantially affected by the actual, statutory operational, administrative and supervisory duties, responsibilities and authorities of the Director of that agency, and may thus not be a source of cash "awards" to that Director.

### ***Summary/Conclusion***

1. A federal official in the executive branch may not, under federal ethics regulations, receive a cash "award" or "prize," even a "*bona fide* award," from a donor which has interests that may be substantially affected by the performance or nonperformance of the official's governmental duties.<sup>40</sup>
2. An entity is not a "disinterested" nor "detached" source, and specifically *has* interests that "may be" substantially affected by the performance or nonperformance of the official duties of a federal officer when that officer is "in a position to act favorably to the giver's interests," that is, when he has the "capacity to exercise governmental power or influence in the donor's favor."<sup>41</sup>
3. The Director of a federal agency has the official authority, responsibility and duty to direct, oversee, manage and supervise the agency decisions regarding the making of

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<sup>39</sup> *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1960). The language of the regulatory limitation prohibiting an "award" when the donor entity has interests that "may be" influenced by the official duties of the recipient indicates a focus on potential performance or influence. The Supreme Court noted in another ethics context, that the Government "appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing ..." *Crandon v. United States*, 494 U.S. 152, 164 (1990).

<sup>40</sup> 5 U.S.C. § 7353(a)(2); 5 C.F.R. §§ 2635.202, 2635.203(d), 2635.204(d).

<sup>41</sup> *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405-411 (1999); 8 Op. O.L.C. 143, 144 (1984); OGE Advisory Opinions Nos. 83 x 11 (July 26, 1983), and 92 x 7 (February 26, 1992). There need not be a particular identifiable matter before or "on the desk of" the official for the regulation to apply, and if there *is* such an official matter immediately before the officer while he is receiving things of value, gifts and cash from that entity, then other, more serious *criminal* violations may be implicated.

grants and the continued certification of certain grantee entities, may not divest himself of such authority and responsibility by way of delegation, and thus, obviously, has significant federal authority, power, capacity and official responsibilities that may substantially affect the interests of such a grantee of that agency.<sup>42</sup>

4. The federal gift restrictions, therefore, prohibit the Director of a federal agency such as the National Cancer Institute from personally enriching himself by accepting large cash “awards” or “prizes” from grantees of his own agency.

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<sup>42</sup> 42 U.S.C. §§ 285a-1, 285a-2. *NLRB v. Duval Jewelry Company*, 357 U.S. 1, 7-8 (1958); *Skokomish Indian Tribe v. General Services Administration*, 587 F.2d 428 (9<sup>th</sup> Cir. 1978). An official need not have “personal and substantial” participation in a particular matter for the regulation to apply (Compare to 18 U.S.C. § 208).