

August 8, 2002

MEMORANDUM

TO: Heads of Operating and Staff Divisions

FROM: The General Counsel

SUBJECT: Agency Gift Acceptance Authorities and the Co-Sponsorship of Events
with Outside Non-Federal Entities

To accomplish its mission, the Department necessarily must engage the assistance of a variety of non-Federal entities, such as State and local governments, non-profit organizations, industry associations, and commercial vendors. The Department has at its disposal several funding mechanisms to achieve program objectives through the efforts of these non-Federal entities, principally contracts, grants, and cooperative agreements.¹ Agencies also are increasingly seeking the assistance of outside organizations in the joint development of conferences, seminars, symposiums, educational programs, or public information campaigns by using a “co-sponsorship” agreement. Partnering with outside groups frequently is the only effective way to reach many of the populations that the Department wishes to serve and often provides a credibility for Department activities that could not be achieved if the Department attempted to go it alone. In practical terms, co-sponsorships also defray the costs of activities that might otherwise be charged to appropriated funds. As with most interactions with the private sector, care must be exercised to address several legal, ethical, and public perception issues.

A fundamental principle of appropriations law is that, absent Congressional consent, an agency may expend for program purposes only the amount which has been appropriated and no more. If an outside organization donates its assistance to the Government in carrying out Federal functions, the level of effort for that function or activity is increased beyond that which is statutorily authorized by the enacted spending limit. Accordingly, gifts of funds and services by outside entities to the Department may constitute an illegal “augmentation of appropriations.” This rule precludes circumvention of Congress’ “power of the purse.”

¹ Procurement contracts are utilized when property or services are acquired by purchase or lease for the direct benefit or use of the Government. 31 U.S.C. § 6303. When “the principal purpose of the relationship [between the Government and the non-Federal entity] is to transfer a thing of value . . . to the recipient to carry out a public purpose of support or stimulation authorized by law . . . and substantial involvement is not expected” between the agency and recipient, a grant is the appropriate vehicle. 31 U.S.C. § 6304. A “cooperative agreement” involves a similar transfer of funds, but more extensive Federal involvement is contemplated. 31 U.S.C. § 6305.

On a number of occasions, Congress has consented to augmentation by means of statutes that provide “agency gift acceptance authority.” An example with Government-wide application is the authority in 31 U.S.C. § 1353 for an agency to accept cash or in-kind travel reimbursement from non-Federal sources. Most agency gift acceptance authorities, however, are component or program specific.² Moreover, absent an express exception, gift acceptance statutes generally have been interpreted as prohibiting the solicitation of gifts. In addition, gifts from regulated entities raise ethical concerns. These limitations and others pose significant impediments to many cooperative endeavors with outside organizations.

To facilitate public-private partnerships in a manner that ensures compliance with legal and ethical requirements, the HHS Designated Agency Ethics Official within the Office of the General Counsel issued a “Co-Sponsorship Guidance” memorandum and model agreement for co-sponsored events. The latest iteration of that document is attached for dissemination within your operating or staff division.

The analysis in that document avoids the augmentation problem by conceptualizing joint events as not involving any gift to the agency. If the event is characterized by true mutuality of effort and interest on the part of each participant, then the respective obligations of both parties provide a kind of “consideration” or “bargained-for exchange” that brings the transaction out of a purely donative sphere. Moreover, because each party is performing, on a parallel track, its own obligations geared to the success of the event, the Government is not contracting for goods or services for its direct use or benefit. These concepts are particularly important for those components, such as the Centers for Medicare and Medicaid Services or the Administration for Children and Families, that lack agency gift acceptance authorities and would not otherwise be able to conduct joint events with outside entities.

The guidance document also evaluates the ethics issues raised by any interaction with potential partners who are regulated by, conduct business with, or receive grants from the Department. Please ensure that your subordinates are thoroughly familiar with the “Co-Sponsorship Guidance.” If you have any questions, please direct your inquiries to the Associate General Counsel in charge of the OGC Division that provides counsel to your office or component.

Alex M. Azar II

Attachments

² The statutory citations that delineate the various gift acceptance authorities held by HHS officials are listed in an attachment to this memorandum.

DEPARTMENT OF HEALTH AND HUMAN SERVICES GIFT ACCEPTANCE AUTHORITIES

8 U.S.C. § 1522(a)(4)(A) - Director of the Office of Refugee Resettlement may accept gifts, bequests, or grants of money, property or services to be used in carrying out programs for domestic resettlement of and assistance to refugees.

21 U.S.C. § 379b(c) - Secretary may accept, on behalf of the Food and Drug Administration (FDA), gifts of real or personal property or services to be used in carrying out the responsibility to build a consolidated FDA administrative and laboratory facility.

25 U.S.C. § 451 (pursuant to the Transfer Act, 42 U.S.C. § 2001(a)) - Surgeon General may accept real and personal property on behalf of the Indian Health Service to benefit Indian health care.

25 U.S.C. § 1634 - Secretary may accept renovations and modernizations of Indian Health Service facilities by tribes under certain conditions.

29 U.S.C. § 671 - Director of National Institute of Occupational Safety and Health may accept gifts of money, personal or real property made unconditionally to benefit the Institute; may also accept gifts made conditionally, including on condition that the Institute use other Institute funds to supplement the conditional gift.

42 U.S.C. § 238 - Secretary may accept unconditional gifts and may, at the recommendation of the Surgeon General, accept conditional gifts to benefit the Public Health Service.

42 U.S.C. § 284(b)(1)(H) - Secretary, acting through an Institute Director at the National Institutes of Health (NIH), may accept unconditional gifts to benefit that Institute.

42 U.S.C. § 285o-4(b) - Director of the National Institute on Drug Abuse (part of NIH) may accept gifts for the benefit of the Medication Development Program.

42 U.S.C. § 286(f) - Secretary may accept gifts to the National Library of Medicine (part of NIH). Implementing regulations at 42 C.F.R. § 4.4(d)(6).

42 U.S.C. § 289f - Secretary may accept conditional gifts to NIH or other national research institutes for the acquisition of land, or for the erection, furnishing or maintenance of facilities at the institutes.

42 U.S.C. § 290(b)(g)(12) - National Foundation for Biomedical Research (a nonprofit corporation established to provide endowments for positions at NIH to conduct biomedical research) may accept any gifts of real or personal property made to the Foundation. Although the Foundation is not part of HHS, the Director of NIH has been designated by statute to serve on the Board of Directors of the Foundation.

42 U.S.C. § 401(i) - Managing Trustee of the Medicare Trust Funds may accept unconditional money gifts and bequests for benefit of the Trust Funds or any activity financed through the Trust Funds.

42 U.S.C. § 1313(e)(1) - Secretary may accept, on behalf of the United States, gifts (in cash or in kind) for use in carrying out programs to provide temporary assistance to citizens of the United States and to their dependents returned from foreign countries because of the citizen's destitution, illness or because of war, threat of war, invasion, or similar crisis.

42 U.S.C. § 3001 note - Secretary may accept gifts (in cash or in kind, including voluntary and uncompensated services) to be used in carrying out the duties of the White House Conference on Aging.

42 U.S.C. § 3506 - HHS-wide authority to accept travel reimbursement from outside sources, relating to the performance of advisory services.

Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for Fiscal Year Ending September 30, 1995, P.L. 103-330, Title VI - Food and Drug Administration may accept donated land in Montgomery and/or Prince George's Counties, Maryland.

Older Americans Act Amendments of 2000, P.L. No. 106-501, § 204 - authority for the Assistant Secretary for Aging to accept and use gifts and donations.

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Subject Matter: Co-Sponsorship