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Letter Ruling 19-03 (Fellowship Expenses Paid by a Non-Profit Entity)

Summary: Under the facts and circumstances of this case, it would not necessarily constitute a violation of Article XXIX for covered individuals to receive a fellowship defraying the costs of registration, lodging, and meals related to attending the Colorado Health Foundation’s annual symposium.

I. Background

Requester is the Colorado Health Foundation,¹ a non-profit corporation operating as a private foundation under sections 501(c)(3) and 509(a) of the Internal Revenue Code. Requester seeks a letter ruling determining whether covered individuals in state government may accept fellowships covering the registration fees, lodging for two nights, and meals² associated with attending Requester’s annual symposium.

Requester’s mission is to improve the health of all Coloradoans through grants to and collaborative initiatives with health-related nonprofit organizations and public agencies, including state and local governments, throughout the state; the provision of technical and research assistance; and the presentation of educational programs and events.

Requester’s sole source of funding currently consists entirely of income that is generated from private passive investments managed by for-profit third-party investment managers. Currently, Requester maintains a portfolio of passive investments in 73 separately managed funds. The portfolio is overseen by Requester's Chief Investment Officer, the Investment Committee of the Requester's board of directors, and an investment consultant. Requester's investment portfolio includes global public equities, alternative investments, government and agency obligations, mutual funds, and money market funds. Requester does not attempt to influence the independent

¹ The redaction requirements of § 24-18.5-101(4)(b)(IV) have been negated by the existence of a parallel decision in Advisory Opinion 19-06, in which the identities of overlapping parties in interest, including Requester, are fully disclosed.

² For the 2019 symposium, the applicable registration fee was \$300; lodging was approximately \$125 per night for two nights; and meals included buffet breakfasts, lunches, and heavy appetizers in the evenings.

investment decisions of any of the funds in its investment portfolio. Requester receives no direct income, donations, or funding from for-profit entities or from associations operating for the benefit of any for-profit entities. Requester is not affiliated with any for-profit entity or any entity engaged in lobbying activities. As a private foundation, Requester is prohibited from undertaking any type of lobbying activities. Requester also receives cost-covering registration fees for sponsoring the symposium and periodic small distributions from a single charitable trust.

Participation in the symposium is limited primarily to health care professionals, designated representatives of state and local government agencies and bodies, representatives of relevant non-profit organizations, academics, and graduate students. Requester provides a limited number of fellowships each year for representatives of state and local governmental bodies, the nonprofit sector, and graduate students.

Fellowships for public officials and employees are specifically awarded to individuals in their capacity as designated representatives of a state or local governmental agency or body in Colorado. While some individuals—typically students and non-profit professionals—are eligible to submit an application to Requester for a fellowship award, the application process is not required for members of the General Assembly, designees of the Office of the Governor, or designees of state agencies. Fellowships include the cost of registration, lodging, and meals, as described above. Requester estimates the current value of a fellowship as approximately \$1200. Fellowships awarded to members of the General Assembly, designees of the Office of the Governor, and designees of state agencies require the awarded individual to fulfill an official role at the symposium such as serving as a speaker in conference sessions, facilitating structured discussions about conference topics, or moderating panels of speakers.

II. Jurisdiction

The IEC has jurisdiction over members of the Colorado General Assembly, government employees, and public officers. *See generally* Colo. Const. art. XXIX §§ 2, 3, 4, 5, and 6.

Any person who is not a public officer, member of the general assembly, local government official, or government employee may submit a request to the commission for a letter ruling concerning whether potential conduct of the person making the request satisfies the requirements of article XXIX. § 24-18.5-101(4)(b)(III), C.R.S.

III. Applicable Law

Section 3(2) of Article XXIX of the Colorado Constitution provides:

No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) [currently adjusted to \$65] in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel,

entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

Section 3(3) of Article XXIX of the Colorado Constitution provides, in pertinent part:

The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:

* * *

(e) Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program; [or]

(f) Reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities[.]

IV. Discussion³

Absent the applicability of a specific exemption, the reimbursement of costs or award of a fellowship for symposium registration, lodging, and meal expenses would constitute a prohibited gift to a covered individual under Colo. Const. art. XXIX § 3(2). Under the facts of this request, two possible exemptions apply.

If the gift or thing of value is “[a]dmission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program”, then the gift ban does not apply. The Commission has previously determined that a person serving as a *listed* speaker on the scheduled program may avail himself or herself of the exemption in Colo. Const. art. XXIX § 3(3)(e).⁴

The request and the information from Requester indicate that covered individuals who are awarded fellowships must fulfill an “official role” at the symposium such as serving as a speaker in conference sessions, facilitating structured discussions about conference topics, or moderating panels of speakers. While some of these “official roles” will not qualify under the § 3(3)(e) exemption, serving as a listed speaker on the scheduled program does qualify. However, the only exempted items under § 3(3)(e) are costs for admission, food, and beverages. The lodging expenses would not qualify as an exempted item. A separate analysis under a different exemption, § 3(3)(f), is necessary.

The § 3(3)(f) exemption includes an allowance for *reasonable expenses* paid by a nonprofit

³ This opinion should be read in conjunction with Advisory Opinion 19-06.

⁴ See, e.g., Advisory Opinion 12-04 (citing Letter Ruling 09-06 and Advisory Opinions 10-01 and 11-03)

organization for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or *represent the state or local government*, provided that the non-profit organization *receives less than five percent (5%) of its funding from for-profit organizations or entities*. [Emphasis added.]

The Commission has previously determined that registration, lodging, and meal expenses may constitute reasonable expenses within the meaning of Article XXIX. The specific expenses contemplated by the Requesters do not appear to be excessive and the Commission finds they are reasonable under the circumstances.

It is not known whether any particular fellowship recipient will deliver a speech, make a presentation, or participate on a panel. If an individual were to engage in one of these activities, the § 3(3)(f) exemption would apply. Otherwise, the individual must represent state government for the exemption to apply. The symposium invitation indicates that covered individuals would be granted a “policy fellowship”, which requires service “in an official role.” The only specific “service” described in the invitation is attendance at a reception. Attending a reception, by itself, does not qualify as representing state government. However, if covered individuals clearly attend the symposium as government representatives, and consistently participate in the event in that capacity, they have satisfied the § 3(3)(f) exemption. Requester has explained that fellowship recipients are “required to fulfill an official role at the Symposium,” whether that role includes “being a speaker in conference sessions, facilitating structured discussions among Symposium attendees... and moderating panels of speakers.”

The Commission now turns its attention to whether Requester, a non-profit organization, “receives less than five percent (5%) of its funding from for-profit organizations or entities.” Since 2018, Requester’s primary source of funding has been the income from its investment portfolio, which currently consists of 73 separately managed for-profit funds. Requester also receives a small portion of its funding from a charitable trust. The issue presented here is whether passive investments in for-profit investment funds qualify as “funding from for-profit organizations or entities.” The Commission finds that, with respect to the facts in this case, they do not.

At a review and comment hearing before the directors of the Colorado Legislative Council and the Office of Legislative Legal Services, held on May 4, 2006, Martha Tierney, testifying in favor of Amendment 41, stated that “[w]e added in the five percent requirement because we had concerns that this paragraph could be abused and we weren't [inaudible] for profit.” Based on this statement, it is reasonable to believe that the exemption in § 3(3)(f) is designed to ensure the exemption is afforded to a bona fide nonprofit organization that is not controlled by for-profit interests.

The Commission has previously considered the application of § 3(3)(f). In Advisory Opinion 09-05, the Commission found that a government employee could accept a \$10,200.00 fellowship to attend a leadership program, funded by the Gates Family Foundation. In reaching its decision, the Commission observed, “Gates is funded entirely from its own endowment, and does not accept contributions from for-profit sources. The Commission therefore believes that this request falls squarely under [§ 3(3)(f)], and acceptance of the fellowship would be permissible.”

Id. at p. 5. The IEC did not inquire into the makeup of the Gates endowment's investments, to determine whether they included investments in for-profit entities.

Subsequently, in Advisory Opinion 14-17, the IEC found that a local government official could accept lodging and meals and attend a conference sponsored by the El Pomar Foundation, a private foundation like Requester. The IEC stated: "[t]he Commission finds that the El Pomar Foundation qualifies as a tax exempt nonprofit under section 501(c)(3) of the Internal Revenue Code. The Commission, therefore, believes that this request meets the exception criteria under exception (f), and acceptance of the travel costs would be permissible." Id. at p. 4. As in the Gates case, the IEC did not inquire into the makeup of El Pomar's investments.

Requesters present the question of whether passive investment income must derive from non-profit sources, given that § 3(3)(f)'s five percent provision excludes a nonprofit that "receives" more than five percent of its funding from "for-profit organizations or entities." This language plainly indicates active donation or contribution, rather than collection of passive investment income. The provision also expressly refers to reception from "organizations or entities," rather than investments. The Commission finds, therefore, that at least in some circumstances, collection of passive investment income does not make the § 3(3)(f) exemption inapplicable.

In the case at hand, the danger of abuse of § 3(3)(f) appears to be low. Because Requester currently derives its income from 73 separately managed funds, no single for-profit organization or entity provides substantial, active funding, and a fellowship recipient would not receive funding from individual, identifiable for-profit sources.⁵

Because future changes in circumstances or implementation may change the analytical framework under Article XXIX, the Commission encourages Requester to periodically evaluate the situation as pertinent to this request (*e.g.*, changes to the Requester's financing structure or the roles of the fellows typically in attendance). To deal with any material changes, the Requester may, if it wishes, provide annual or biennial reports to the Commission or submit a request for a new Letter Ruling.

V. Conclusion

Under the facts and circumstances of this case, and consistent with the discussion above, it would not necessarily constitute a violation of Article XXIX for covered individuals to receive a fellowship defraying the costs of registration, lodging, and meals related to attending the Colorado Health Foundation's annual symposium.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings related to their individual circumstances.

⁵ The Commission recognizes that this may not be the case for every private foundation.

The Independent Ethics Commission

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