Office of Government Ethics
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Letter to an Attorney for a Private Corporation dated November 1, 1982

On September 7, 1982 you requested an opinion from [an agency] concerning the propriety under 18 U.S.C. § 209 of certain payments you wished to make to [an individual] for purposes of offsetting his expenses in moving to Washington. At that time [the individual] was a manager in [part of your corporation's business in the midwest] but was scheduled to begin work at [the agency] [in the fall of] 1982 as a participant in the Government's one-year Presidential Executive Exchange Program ("Exchange Program"). Because of this Office's role in ensuring consistent interpretations of the criminal conflict of interest provisions, [the agency] contacted us with regard to your request. We subsequently agreed with [the agency] to respond to your September 7 request.

18 U.S.C. § 209(a) prohibits an executive branch employee from accepting and any other person (including a company) from making any supplementation to the employee's salary as compensation for his Government services. However, section 209(b) allows the employee to continue to participate in a bona fide employee welfare or benefit plan maintained by a former employer. And, section 209(e) allows the "payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency . . . ."**1**

Subsection (e) of this statute was passed in late 1979 to alter a prior Department of Justice interpretation of section 209 which would prohibit a private company employer from paying the expenses of moving to and from Washington for any employee who was chosen to participate in the Exchange Program or the White House Fellows Program. The Director of the Exchange Program successfully argued to Congress in 1979 that such an interpretation would greatly hamper the Program as very few private sector employees of the caliber the Program wished to attract would be willing to interrupt their careers and to incur such expenses.

[Your corporation] has a corporate moving expense payment plan

which it had intended to offer [the individual] for his move to Washington. Included in the allowed relocation expenses were the following items: the cost of traveling to the new location for the purpose of arranging living quarters and for transporting the family to the new location; the cost of moving household goods; costs associated with selling a home in the old location and buying one in the new location; Federal income tax allowance on reimbursed expenses; reimbursement for miscellaneous relocation expenses through a transfer allowance; and mortgage interest differential allowance. The items which [the agency] found to be of most concern were the moving allowance and the mortgage differential payment.

The crucial test set forth in section 209(e) that any payment made to or accepted by a participant in one of the allowed programs is that the payment must be made for "actual relocation expenses incident to participation." Printed in the Congressional Record at the time of the introduction of the amendment was a letter from the Director of the Executive Exchange Program to Senator Joseph R. Biden, Jr., outlining the type of expenses this amendment was and was not intended to cover. The letter stated in part:

> [T]he intent of the drafters is that such payments might include reimbursement of broker's fees and other costs of selling or renting a home in the city of private employment and buying or renting a home in the Washington area; moving expenses for household goods; travel expenses for the participant and his family to Washington; house hunting trips; and temporary housing, provided that such expenses were directly related to the move, and were incurred prior to the first day of government service. Expenses not directly related to the move, or incurred after the beginning date of government service, or payments which resulted in a gain or profit are not intended to be covered by the legislation. Such payments might include moving allowances in lieu of reimbursement of actual expenses [and] use of corporate real or personal property at less than fair market rental; . . .**2** (Emphasis added.)

In order to answer your question, we sought further information concerning [the individual's] decision to purchase a home in Washington for a one-year assignment. You indicated to us that both [the individual] and [the Corporation] mutually

anticipated that he would be assigned to the Maryland office should he return to [the Corporation] upon completion of his one year in the Exchange Program. At the time [the Corporation] approached [the individual] to determine if he would be interested in being nominated as a candidate for the Exchange Program, this [Maryland] assignment was discussed with him. The transfer has not been finalized because [the Corporation] does not have employment contracts with its employees and cannot require [the individual] to return to the company after Government service for any position. The present assumption, of course, is that he will return. The timing of the sale and purchase of a home in the Washington area was the result of the most practical plan for his future company position rather than for the Exchange Program.

Part of the test of 18 U.S.C. § 209(e) is not only that the payment be made for "actual relocation expenses" but that the expenses must be incurred "incident to participation in the program." In [the individual's] case we have a situation where his move was incident to the program but for the most part the type of expenses he incurred in his move were incident to an anticipated move within the company. If this Office were to view his move as an intra company move, he could, under 18 U.S.C. § 209(b), continue to participate in [the Corporation's] bona fide employee benefit plans and accept the normal company moving expense payments. If this Office were to view this as a move simply for the Exchange Program, then indeed there is a significant question about the propriety of accepting the transfer allowance and the mortgage interest differential.**3**

In [this individual's] case, we believe that his move can and should be characterized as an intra company move. By making this determination, we do not believe we are violating the spirit of 18 U.S.C. § 209 or the goals of the Exchange Program in bringing executives to Washington for a year with the intent of having them return to the area of the country from which they came. The Exchange Program is not a training program in which a company sends an employee to learn about Washington for a year in order to stay on as the company's Washington representative. This is clearly not the case with [this individual] as the [Corporation's] facility in [Maryland] is not its Washington Government affairs office. Rather the facility is involved in the business of providing information services (computer time sharing).

We appreciate [the Corporation's] sensitivity to the questions which arise under its plan given the legislative history of 18 U.S.C. § 209(e). While [the Corporation's] transfer allowance does appear to be a good faith attempt on its part to cover the actual, but too minor and too difficult to itemize, expenses that occur incident to a move, there is a real question as to whether the legislative history binds all parties to an actual itemization of all expenses occurring**4** before the participant begins the Exchange Program. Equally at issue is whether the mortgage interest differential payment is "an actual expense incident to a move" as if the difference had been in the form of a loan origination or loan discount fee (points) rather than interest rate and thus be payable at closing or at the time of loan commitment. Or, is it use of corporate personal property at less than fair market value or an outright gift? [The Corporation's] plan as you described it would not allow one of its employees to make money on the mortgage interest differential simply by selling and buying houses, but that may not be enough to answer the question. Clearly, a participant in the Exchange Program can not simply accept his or her company's bona fide moving plan payment without an additional determination under 18 U.S.C. § 209(e) of the payments making up that plan.

If you have any questions concerning this letter, please feel free to contact this Office. For your information, a representative of the Office of Legal Counsel of the Department of Justice has reviewed this letter and has concurred in the views expressed herein.

Sincerely,

David R. Scott
Acting Director

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1 An eligible program under 18 U.S.C § 209(e) must be "established by statue or Executive order of the President, offers appointment not to exceed three hundred and sixty-five days, and permits no extentions in excess of ninety additional days." The President's Executive Exchange Program is clearly one of those programs, originally established by President Johnson in 1969 (E.O. 11451) and renewed and modified by President Carter in 1979 (E.O. 12136).

2 Reprinted at 125 Cong. Rec. S19431 (Dec. 20, 1979).

3 We purposefully do not decide those questions in this letter because we dispose of your questions on the particular facts involved in this case.

4 We do believe there is at least one instance in which a participant could accept a portion or all of a moving allowance offered by a company in addition to the actual expenses of moving the participant's family and household goods to the Washington area. The participant could make a good faith itemization of those "actual relocation expenses" incurred before beginning Government service (even if paid later) and be reimbursed by his or her company for that amount. The agency to which the individual was assigned would review the type of expensed being claimed to determine whether they were appropriate under 18 U.S.C § 209(e). The amount of reimbursement would then be the amount of the good faith itemization or the company's normal moving allowance, whichever was less.