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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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Director

SUBJECT: Recurring Book Deals Issues for Incoming and Outgoing Government Employees

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance on recurring book deals issues relevant to incoming and outgoing employees that OGE did not directly address in OGE DAEOgram [DO-08-006](#).<sup>1</sup> In that 2008 opinion, OGE provided extensive guidance on the issue of whether an employee may enter into an agreement to write a book for compensation. This Advisory shares guidance provided by OGE since that time relating to the ability of employees, during government service, to: (1) receive compensation for updating a textbook or other book that was initially written prior to government service; (2) engage in promotional activities as part of a book deal; and (3) try to sell a book idea or “shop a book around.”

Two primary authorities limit payments to employees for writing a book. Section 2635.807 of the Standards of Ethical Conduct for Employees of the Executive Branch prohibits any employee from receiving compensation for teaching, speaking, or writing that is related to the employee’s official duties. The Ethics in Government Act at 5 U.S.C. app. § 501(a)(1) and Exec. Order No. 12,674, sec. 102 limit outside earned income for Presidential appointees to full-time noncareer positions (PA)<sup>2</sup> and covered noncareer (CNC) employees,<sup>3</sup> irrespective of the subject matter of the writing.<sup>4</sup> Timing is critical; these restrictions generally apply<sup>5</sup> when the

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<sup>1</sup> OGE also issued this Advisory as OGE Informal Advisory Opinion 08x3 (Mar. 6, 2008).

<sup>2</sup> Generally, a PA employee means any employee who is appointed by the President to a full-time position. *See* 5 C.F.R. § 2635.804(c)(2) (implementing Exec. Order No. 12,674, sec. 102 (Apr. 12, 1989), *as modified by* Exec. Order No. 12,731 (Oct. 17, 1990)).

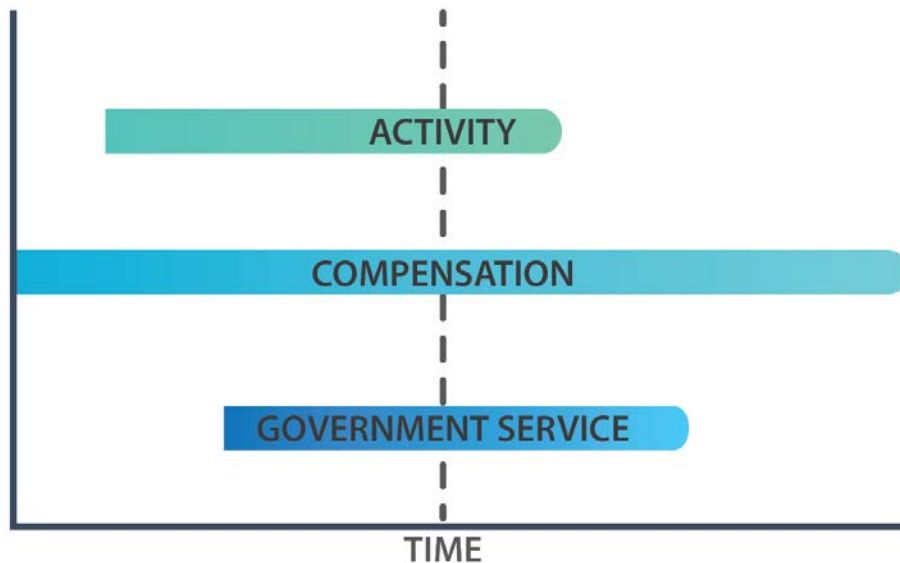
<sup>3</sup> 5 C.F.R. § 2636.303(a) (containing a comprehensive definition of a CNC employee).

<sup>4</sup> *See* 5 U.S.C. app. § 501(a)(1) (15% limitation for PA and CNC employees); *see also* Exec. Order No. 12,674, sec. 102 (outside earned income ban for PA employees). These outside earned income limitations and the limitations found in section 2635.807 may apply in the alternative in a particular case. In such case, the more restrictive rule will govern. For a more detailed discussion of the application of these rules to PA and CNC employees, see [DO-08-006](#), pt. II.

<sup>5</sup> For full-time noncareer and covered noncareer employees, even if the writing is not attributable to the time of the employee’s government service, the earned income restrictions apply. *See infra* Section II.



writing and the receipt of compensation are both attributable to the time of the employee’s government service, as illustrated in this graphic:



For incoming or outgoing employees in particular, it can be difficult to answer the threshold question of whether the compensation rules apply. Even when the compensation restrictions are inapplicable, ethics officials must still consider other laws and ethics rules that may apply to the activity.<sup>6</sup> Because of the complexity of these recurring book deals questions, agency ethics officials should counsel employees on the application of the relevant rules before employees engage in any activities related to a book deal.

### **I. Receiving Compensation When an Employee Updates a Book That Was Written Prior to Government Service**

Employees who have written a book prior to coming into government frequently will continue to receive royalties during government service, and may also agree to periodically update the book—particularly in cases of textbooks. Although royalties are “compensation” under section 2635.807,<sup>7</sup> an employee may continue to receive royalties for a book related to official duties that was completed before starting government service because the “receipt” of compensation is attributable to the time the writing occurs<sup>8</sup>—in this case, before government

<sup>6</sup> Other considerations may include: Supplemental Agency Regulations; 18 U.S.C. § 208 (Financial Conflicts); 5 C.F.R. § 2635.502 (Covered Relationship - Publisher); 18 U.S.C. § 209 (Supplementation of Salary); 5 C.F.R. § 2635.807(a)(2)(i)(A) (Writing as Part of Official Duty); 5 C.F.R. § 2635.702 (Public Office for Private Gain); 5 C.F.R. § 2635.703 (Use of Nonpublic Information); 5 C.F.R. § 2635.807(a)(2)(i)(D) (Draws Substantially on nonpublic information); 5 C.F.R. § 2635.704 (Use of Government Property); 5 C.F.R. § 2635.705 (Use of Official Time); 5 C.F.R. § 2635.807(b) (Reference to Official Position); and 5 C.F.R. § 2635.802 (Conflicting Outside Employment & Activities). For a discussion of these related ethics considerations, see DO-08-006.

<sup>7</sup> Under 5 C.F.R. § 2635.807(a)(2)(iii), “[c]ompensation includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee’s . . . writing activities.”

<sup>8</sup> 5 C.F.R. § 2635.807(a)(2)(iv) describes the term “receive” to mean that there is actual or constructive receipt of the compensation so that the employee can exercise dominion and control over the compensation and direct its subsequent use. In addition, section 2636.303(c) specifically states that compensation “is received while an individual is an employee if it is for conduct by him that occurs while an employee, even though actual payment

service. However, if the employee has an agreement to update the book during government service, the receipt of future royalties or other payments for the updated edition will likely implicate the compensation restrictions.

Updating or modifying the contents of a book is generally considered writing.<sup>9</sup> Therefore, if the book is related to the employee's official duties,<sup>10</sup> an employee may not receive compensation for updates or modifications to the book made during government service. Under section 2635.807, such compensation includes future royalties, which are attributable to the time of the writing.<sup>11</sup> As a result, any compensation, including royalties earned through the sale of the edition of the book that was updated during government service, will be prohibited under section 2635.807. Because section 2635.807 applies only to writing related to an employee's official duties, it would not restrict royalties earned through the sale a book the employee updates during government service on a topic unrelated to the employee's official duties.

In addition to the compensation restrictions of section 2635.807 that are applicable to all employees, PA and CNC employees are also subject to outside earned income limitations.<sup>12</sup> Accordingly, a PA and CNC employee's receipt of compensation for updating a book unrelated to official duties may still be restricted, depending on the type of compensation offered. If the PA or CNC employee is only receiving royalties or travel expenses, then the receipt is not prohibited by the outside earned income limitations—even when the updates are done during government service. This is because royalties and travel expenses are not considered outside earned income, even though they would be considered compensation under section 2635.807.<sup>13</sup> At the same time, other forms of compensation for the textbook updates, such as an advance paid to make an update, may implicate these outside earned income limitations.<sup>14</sup>

To illustrate, a State Department Ambassador who plans to update her economics textbook, which is not related to official duties, would not be restricted in such activities by section 2635.807, but must ensure that the updates comply with the outside earned income limitations because the Ambassador is a PA and CNC employee. Therefore, she may not receive an advance for the textbook updates written during government service (which is considered outside earned income), but she could receive royalties or travel expenses.

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may be deferred until after Federal employment has terminated." OGE interprets this definition of "receive" to apply equally to section 2635.807.

<sup>9</sup> OGE has drawn a distinction between substantive writing and editing, both of which qualify as writing, versus proofreading and copy editing, which do not. Any activity, such as substantive editing or writing that changes or modifies the content of a written product or publication is considered writing under the rule. Proofreading and copy editing such as changing formatting, correcting spelling, grammar, and punctuation generally do not significantly change the meaning of the content of a writing or publication and therefore do not qualify as writing under section 2635.807. *See* DO-08-006, pt. I, at 17; *see also id.* pt. II, at 21.

<sup>10</sup> *See* 5 C.F.R. § 2635.807(a)(2)(i).

<sup>11</sup> For CNC employees, "compensation" under 2635.807 also includes travel expenses. *See* DO-08-006, pt. II, at 22 & n.27.

<sup>12</sup> *See supra* notes 2 and 3. Regular employees and special Government employees (SGEs) are not subject to such additional outside earned income limitations.

<sup>13</sup> 5 C.F.R. § 2636.303(b)(5), (6).

<sup>14</sup> *Id.*

By contrast, if the economics textbook was related to the Ambassador's official duties, section 2635.807 would restrict the Ambassador's ability to receive compensation for any updates she makes to her book. Restricted compensation in this scenario would include not only an advance, but also travel expenses and future royalties, which are considered compensation under section 2635.807. Whether or not the textbook is related to official duties, the Ambassador should be counseled on the other ethics rules that may apply to this activity, such as the rules regarding misuse of position.<sup>15</sup>

## **II. Engaging in Promotional Activities as Part of the Book Deal**

Promotional activities, such as attending a book signing, giving a TV interview, or appearing at a publisher's event, often go hand in hand with book deals. If these promotional activities occur during government service, receipt of payment for travel expenses<sup>16</sup> or speaker's fees for these promotional events often constitutes "compensation" and may implicate the compensation restrictions.<sup>17</sup> But even in cases when there are no payments for travel expenses or speaker's fees, an employee's participation in promotional activities themselves could still, under some circumstances, implicate the compensation limitations. Specifically, if a material term of an employee's book contract calls for the employee to participate in promotional events involving teaching, speaking, or writing and those promotional events occur during government service, the employee "receives" consideration for those activities in the form of payments under the contract. As such, if the book is related to official duties, section 2635.807 would be implicated if the contract provides for "compensation" as defined by that section.<sup>18</sup>

For PA and CNC employees, the outside earned income limitations are more expansive, and would be implicated by a contract that provides for payments that qualify as "compensation" under those rules, even if the book is not related to official duties and the writing itself does not occur during government service.

To illustrate, a Securities and Exchange Commission employee who writes a book on the regulation of the securities industry in the United States will be unable to engage in promotional

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<sup>15</sup> 5 C.F.R. pt. 2635, subpt. G; *see also supra* note 6.

<sup>16</sup> CNC employees may not accept travel expenses for speaking engagements promoting a book related to their official duties. However, all other employees may accept travel expenses for speaking engagements promoting a book written during government service that is related to their official duties because travel expenses are excluded from the definition of compensation under section 2635.807. 5 C.F.R. § 2635.807(a)(2)(iii)(D). PA employees, as well as CNC employees when the book is not related to their official duties, may accept the expenses consistent with the outside earned income ban and the 15% limitation on outside earned income, which both exempt travel, meals, and lodging expenses from the definition of "compensation." 5 C.F.R. § 2636.303(b)(6).

<sup>17</sup> *See* DO-08-006, pt. II, at 22-23.

<sup>18</sup> Regardless of whether the compensation limitations apply to promotional activities, employees must abide by other ethics rules, such as the rules regarding use of public office for private gain (5 C.F.R. § 2635.702). For example, except as otherwise provided in section 2635.807(b), an employee may not use or permit the use of their Government position or title or any authority associated with their public office in a manner that could reasonably be construed to imply that their agency or the Government sanctions or endorses their speaking or writing activities. 5 C.F.R. § 2635.702(b).

activities involving speaking, teaching, or writing<sup>19</sup> if the book contract requires such activities and provides for royalties, which qualify as “compensation” under section 2635.807. Regardless of when the book is written or whether the book is related to official duties, a PA or CNC employee could not publicize a book during government service if the contract requires those activities and the employee received an advance, which qualifies as “compensation” under the earned income restrictions.<sup>20</sup>

These limitations come into play when the contract requires promotional activities and provides for “compensation.” Accordingly, if an employee is asked to give an interview about the book and the contract does not contemplate this activity, or does not provide for “compensation” as defined in the applicable restriction, then the interview may be permissible. For this reason, it is important to review employees’ book deals to determine whether the contracts specifically call for a promotional tour or related activities, and the nature of the payments provided for in the contract.

### **III. Trying to Sell a Book Idea or “Shop a Book Around”**

Outgoing employees often seek to “pitch” their book ideas to potential publishers, which is permissible with certain limitations. Before an employee or the employee’s agent<sup>21</sup> enters into any formal negotiations with the publishers, the first issue that must be addressed is whether the employee will engage in writing during government service. If so, the compensation restrictions may apply,<sup>22</sup> because compensation is considered to be received while an individual is an employee if it is for conduct by the individual during government service.<sup>23</sup>

The question of whether there is a “writing” for these purposes is not always clear. On the one hand, completing a manuscript is a writing, as is using another person as a “ghostwriter” to draft a manuscript that will be officially credited to the employee.<sup>24</sup> Keeping diaries and notes during government service to be used later as a basis for a book also constitutes a writing.<sup>25</sup> This

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<sup>19</sup> Section 2635.807 does not restrict promotional activities contemplated in a book contract if the book is not related to official duties, or if the contract does not require any teaching, speaking, or writing during government service. PA and CNC employees in these scenarios would, of course, have to abide by the relevant earned income limitations, regardless of the subject matter of the book or timing of writing.

<sup>20</sup> If the contract of a PA or CNC employee calls for only royalties and travel expenses, then the outside earned income limitations would not restrict publicity required under the contract, because these payments do not qualify as “compensation” under those limitations. *See* DO-08-006, pt. II, at 17, 23.

<sup>21</sup> The compensation restrictions are still applicable to an employee who has an agent acting on their behalf when negotiating or entering into an agreement with a publisher to sell the rights to a book. An employee who uses an agent also will have a covered relationship with that agent under 5 C.F.R. § 2635.502, which may necessitate certain recusals.

<sup>22</sup> If the book will be related to official duties, then section 2635.807 prohibits compensation for the employee’s writing of the book while in government. If the book is not related to official duties, then PA and CNC employees must abide by the outside earned income ban and/or the 15% limitation on outside earned income. *See* DO-08-006, pt. II, at 11.

<sup>23</sup> *See supra* note 7.

<sup>24</sup> An employee may not encourage, direct, coerce, or request a subordinate to use official time to ghostwrite a book. *See* 5 C.F.R. § 2635.705(b). Additionally, an employee who uses a “ghostwriter” will have a covered relationship with that ghostwriter under 5 C.F.R. § 2635.502, which may necessitate certain recusals.

<sup>25</sup> *See* DO-08-006, pt. I, at 17; *see also id.* pt. II, at 21.

means, for example, that an employee may not enter into an agreement during government service to write a book for compensation based on the diary of the employee's participation in agency meetings.<sup>26</sup>

On the other hand, it is probably permissible to sign a contract with a publisher<sup>27</sup> based on a prepared short summary for a potential book so long as there are no other writings upon which the book will be based.<sup>28</sup> The short summary may take various forms such as an outline, summarized prose description of the content, or a PowerPoint presentation. If, however, the summary includes proposed text, such as a chapter of the book, the proposal will constitute a writing implicating the compensation restrictions if the employee subsequently signs a contract during government service.

If the employee does not enter into an agreement for their book idea while in government service, then the compensation restrictions do not apply. As a result, it is permissible under the compensation restrictions to prepare a draft of a proposed book "on speculation," meaning the book is not written pursuant to a publishing agreement, and to keep diaries and notes during government service to be used later as a basis for a book. The employee may also shop the draft written "on speculation" to publishers and subsequently base a book on diaries and notes without implicating the compensation restrictions, so long as the employee does not enter into an agreement for that book during government service. However, other ethics rules may apply to these activities, such as the rules regarding use of public office for private gain, the use of nonpublic information, and the use of official time. For example, an employee may not ask a subordinate to perform tasks on official time relating to a proposed book, such as researching, typing, or editing, in connection with this non-Government activity.<sup>29</sup> Likewise, an employee may not impermissibly use nonpublic information in connection with writing.<sup>30</sup>

#### **IV. Conclusion**

Book deals questions can be very nuanced and fact-specific, and the application of the relevant rules to these questions can be very complex. As such, OGE encourages ethics officials to counsel employees before the employees engage in any activities related to a book deal, including those discussed in this Legal Advisory. OGE also encourages agency ethics officials with questions about book deals to contact their OGE Desk Officers early in the process for support and guidance.

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<sup>26</sup> See *supra* note 25.

<sup>27</sup> An employee who enters into a contract with a publisher will have a covered relationship with that publisher under 5 C.F.R. § 2635.502, which may necessitate certain recusals.

<sup>28</sup> However, compensation for producing the outline itself, although not a "writing," still counts toward the 15% limitation and outside earned income ban for CNC and PA employees respectively.

<sup>29</sup> See 5 C.F.R. §§ 2635.702, .703, .705.

<sup>30</sup> See 5 C.F.R. §§ 2635.703, .807(a)(2)(i)(D).