

Office of Government Ethics

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**Memorandum dated December 22, 1999,
from Stephen D. Potts, Director,
to Designated Agency Ethics Officials,
Regarding 18 U.S.C. § 203**

The purpose of this DAE0gram is to clarify and update previous guidance from the Office of Government Ethics (OGE) concerning the application of 18 U.S.C. § 203 to certain types of outside business and employment activities. Specifically, this DAE0gram is intended to emphasize that the prohibition on receipt of compensation for representational services is limited to compensation in exchange for the provision of representational services to a third party. In the absence of such circumstances, section 203 will not be deemed applicable merely because an employee's compensation from outside sources may be dependent on the success or profitability of certain business or other dealings with the Federal Government.

REPRESENTATIONAL SERVICES UNDER 18 U.S.C. § 203

Section 203, among other things, prohibits an employee from accepting or soliciting "any compensation for any representational services" in connection with a particular matter in which the United States is a party or has a direct and substantial interest. "Representational services" means communications to or appearances before specified Federal entities, with the intent to influence the Government on behalf of a third party. For purposes of the present discussion, it is particularly important that section 203 applies equally to representational services rendered by the employee personally and to representational services rendered by another person, provided that the employee shares in the compensation for those services.

The question often has arisen whether section 203 is implicated merely because an employee's outside compensation results from successful negotiations or other representations before the Government by persons or organizations with which the employee is associated. To illustrate, an employee could be co-owner of a small enterprise that seeks Federal oil and gas leases, and the employee's income might be tied to the

acquisition and maintenance of those leases; even if the employee does not personally represent the company before the Government, the employee clearly benefits from the success of other company representatives in dealing with the Government. Another example would be an employee who is paid by a nonprofit organization to perform certain research, where the compensation is derived from a Federal grant to support such research; even if the employee does not personally represent the organization in its grant discussions with the Government, the employee's compensation is a result of the representational activities of others in obtaining and maintaining the funding from which the researcher is paid. Yet another possible scenario would be an employee who has an arrangement for compensated outside employment that is expressly conditioned on the employer's ability to obtain approval from the Government to market a particular product; the employee's compensation in such a case would be dependent on the success of the employer's representations in seeking Government approval.

EARLIER OGE OPINIONS

During the 1980s, OGE issued a series of opinions addressing similar issues. See OGE Informal Advisory Letters 83 x 19; 85 x 12; 86 x 9; 89 x 7. In these opinions, OGE took the approach that section 203 generally prohibits compensation that is "contingent" on obtaining certain Government action, such as "getting or performing" a Government contract. OGE 85 x 12. In such cases, OGE reasoned, any compensation "would be based, directly or indirectly," upon the representations of others in obtaining the Government action that makes the compensation possible. OGE 86 x 9. Because an organization's success in dealing with the Government depends on certain representational activities, OGE concluded that a Federal employee who serves an outside organization "cannot receive compensation that is tied to the profitability of [the organization's] activities with the Federal Government." *Id.*¹

¹ OGE did recognize that employees could receive some kinds of compensation from persons or organizations doing business with the Government, provided that "the compensation is not contingent on" any Government action; ordinarily, this meant that the individual would have to receive a fixed rate of compensation, such as a salary or hourly wage, that is not dependent on any Federal funding or other action. OGE 89 x 7.
(continued...)

This reading of section 203 is consistent with one reasonable interpretation of the statutory phrase, "compensation *for* representational services." By focusing on the causal relationship between the compensation and the representational activities that made the compensation possible, OGE construed "for" in the sense of "because of," "in consequence of," or "growing out of," all of which are recognized definitions. *Black's Law Dictionary* 644 (1990).

COMPENSATION FOR PROVIDING REPRESENTATIONAL SERVICES

OGE nevertheless recognizes that "compensation for representational services" is open to an alternative interpretation. The preposition "for" can also mean "in consideration for" or "in exchange for," "as where property is agreed to be given 'for' other property or 'for' services." *Id.* Used in this sense, compensation "for" representational services would mean compensation that is given in exchange for the provision of representational services (even if those services are rendered by another person). As one court has summarized section 203, "the statute precludes federal employees from receiving any compensation from private parties *for providing services* in connection with any matter in which the United States has an interest." *United States v. Wallach*, 935 F.2d 445, 471 (2d Cir. 1991)(emphasis added). An example would be a partner in a consulting or law firm who shares in fees generated by other partners who represent clients before Federal agencies. Under this interpretation, it would not be enough to show merely that certain compensation was made possible by someone's successful representations in obtaining Government funding or other action; rather, the very purpose of the compensation would have to be to compensate the employee for the provision of representational services to a third party, whether rendered personally or by another.

¹(...continued)

We also recognized that section 203 would not prohibit the receipt of compensation where the business activity would not entail any representations before the Government, such as the provision of word processing services to the Government as a subcontractor pursuant to a contract negotiated by a prime Government contractor. *See id.*

After further experience in applying section 203 to various fact patterns, as well as communications with the Department of Justice, we have concluded that the latter interpretation is actually more consistent with the underlying purpose of section 203.² In enacting section 203 and various predecessor statutes, "Congress was primarily concerned with Government officials' being paid to bring their influence to bear on federal agencies." *United States v. Myers*, 692 F.2d 823, 855 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983). The risk of such improper influence, whether "actual or supposed," H.R. Rep. No. 748, 87th Cong., 1st Sess. 21 (1961), is clearly present when an employee seeks or receives compensation in exchange for representational assistance to a third party in dealing with the Government. Even if the actual representation before the Government is conducted by someone else--such as a partner or associate--the employee is still in a position to attract clients with implicit or explicit promises of inside connections and information. However, where the compensation is not actually paid in exchange for the provision of representational services to a third party, but merely accrues as a result of someone else's success in obtaining Government funding or other favorable action for some business project, there is a diminished risk that the employee would be getting paid because of some actual or supposed influence with the Government.

Therefore, OGE is clarifying that the prohibition on receipt of "compensation for any representational services," in 18 U.S.C. § 203, is limited to compensation in exchange for the provision of representational services to a third party, rendered either by the employee or an associate. An employee is prohibited from receiving compensation tied to the profitability or success of an organization's dealings with the Government only where the compensation is derived from representational services provided to third parties. Where an organization does not provide representational services to third parties, but simply deals with the Government in order to obtain Federal funding or approval for its own business purposes, section 203

² Subsequent to the OGE advisory letters cited above, the Office of Legal Counsel, Department of Justice, has written at least one unpublished opinion related to this subject. Moreover, Congress subsequently amended section 203 to make explicit that the statute applies only to compensation for "representational services." Ethics Reform Act of 1989, Pub. L. No. 101-194, § 402 (1989).

does not prohibit an employee from receiving compensation resulting therefrom. Where an organization or associate of a Federal employee does provide representational services to third parties, any compensation derived by the employee from his or her association must not be tied to those representational services; in such cases, depending on the facts, it still may be possible to structure the employee's compensation so that he or she does not share in any profits derived from representational services. See 4B Op. O.L.C. 603, 604 (1980); OGE 86 x 9, at 639-40.

OTHER LIMITATIONS ON OUTSIDE INCOME

Employees should be advised, however, that there may be other applicable limitations on their ability to receive outside income or benefits in connection with certain Government contracts, grants, and other particular matters. For example, an employee may not receive any compensation or any interest in a "claim" against the United States, "in consideration of assistance in the prosecution of such claim," even if the employee does not actually represent the claimant before the Government but only renders assistance. 18 U.S.C. § 205(a)(1).³ Furthermore, the Federal Acquisition Regulation generally prohibits agencies from awarding a contract "to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees," unless the agency has a compelling reason to grant an exception to this policy. 48 C.F.R. § 3.601(a). Subpart G of 5 C.F.R. part 2635 also prohibits abuse of an employee's official position for private gain, including misuse of certain nonpublic information about the awarding of Federal contracts. The Procurement Integrity Act likewise prohibits the disclosure of certain Federal procurement information, as well as the receipt of compensation for employment with Federal contractors under certain circumstances. See 41 U.S.C. § 423. With respect to certain noncareer employees, there are special limitations on outside earned income, employment, and affiliation.⁴ We note

³ Of course, another provision in section 205 prohibits employees from personally representing a third party before the Government in connection with any particular matter, whether or not for compensation. See 18 U.S.C. § 205(a)(2).

⁴ See Executive Order 12674, § 102 (1989), as amended by Executive Order 12731 (1990) (certain Presidential appointees to

finally that some agencies have issued supplemental standards of conduct regulations, pursuant to 5 C.F.R. § 2635.105, that contain additional restrictions on outside activities related to Government property, contracts, grants and other matters.⁵

full-time noncareer positions prohibited from receiving any outside earned income); 5 C.F.R. § 2636.301 (covered noncareer employees subject to various limitations on outside earned income, employment, and affiliation).

⁵ *E.g.*, 5 C.F.R. § 6701.103 (General Services Administration (GSA) employees may not purchase Government property sold by GSA); 5 C.F.R. § 6901.103(c) (National Aeronautics and Space Administration employees (NASA) may not engage in outside employment with NASA contractor, subcontractor, or grantee in connection with work performed by entity for NASA).