

Office of Government Ethics

91 x 21 -- 07/02/91

Letter to an Attorney dated July 2, 1991

This is in response to your letter of May 30, 1991, concerning your law firm's plan to defer the employment of up to 15 of the 34 law school graduates who recently accepted employment with your firm. Those individuals who agree to defer their employment with [the law firm] would each receive \$21,000, payable in three \$7,000 increments. You explain that [the law firm] is placing no restrictions on what these individuals may do during the deferral year. They will not be expected to perform services for the firm during that period and are free, in fact, never to come to work for the firm at all. Since you expect that some of the graduates may choose to accept Federal employment during the deferral year, you wish to confirm that this arrangement would not be in violation of the Federal conflict of interest laws.

Those of the graduates who accept employment with the Federal Government during the deferral year will have "an arrangement concerning prospective employment" with [the firm] for purposes of 18 U.S.C. § 208. This will preclude them from participating as Federal employees in any particular matter in which the firm has a financial interest. You point out that the firm does not regularly appear before any Federal agency. Consequently, a graduate is unlikely to be called upon to participate in a Government matter in which the firm is representing a client. In any event, provided that it would not substantially impair his ability to perform the duties of his Government position, a graduate would be recused from participating in any matter affecting the financial interests of the firm.

Section 209 of title 18, United States Code, prohibits any outside "contribution to or supplementation of salary, as compensation for . . . services as an officer or employee of the executive branch of the United States Government" In *Crandon v. U.S.*, 110 S.Ct. 997 (1990), a majority of the Supreme Court determined that "[t]he text of 209(a) thus indicates that employment status is an element of the offense." Since you do not indicate whether it is anticipated that some or all of the \$21,000 deferral payment would be received at a time when a

graduate is a Federal employee, we shall assume for purposes of this opinion that at least part of the deferral payment would be paid and received during that period.

Section 209 has four elements. It "prohibits (1) an officer or employee of the executive branch from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States." *United States v. Raborn*, 575 F.2d 688, 691-92 (9th Cir. 1978). The key focus is usually on the fourth element. In determining whether compensation is "for services as an employee of the United States," the answer will depend largely upon the subjective intent of the parties and the inferences that can reasonably be drawn from the circumstances surrounding a proposed arrangement. In the case of the arrangement described in your letter, the circumstances would support the conclusion that a payment is not being made to compensate a graduate for service as a Federal employee. A graduate who agrees to the deferral of his employment with [the law firm] will be entitled to the \$21,000 payment regardless of whether he accepts employment with the Federal Government during the deferral year.

We trust this information will be of assistance.

Sincerely,

Stephen D. Potts
Director