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Office of Government Ethics
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MEMORANDUM

TO: Designated Agency Ethics Official

FROM: Amy L. Comstock
Director

SUBJECT: 18 U.S.C. § 209 Guidance

Attached is a summary of 18 U.S.C. § 209, which prohibits the supplementation of a Government employee's salary by outside sources. The Office of Government Ethics (OGE) is currently studying possible revisions of the statutes found in Chapter 11 of Title 18, and, in light of that review, has decided not to issue regulations addressing Section 209 at this time. However, much of the content of any such regulation would have been based on existing case law, Office of Legal Counsel opinions, and OGE Informal Advisory Opinions. This summary has been prepared based on that material, and is designed to assist in the interpretation and application of Section 209. For questions about this guidance, please feel free to contact R. Andrew Falcon, Associate General Counsel, at (202) 208-8000, ext. 1280.

Attachment

Summary of the Restriction on Supplementation of Salary
18 U.S.C. § 209

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I. Prohibition

Section 209 of title 18 of the United States Code was enacted in 1962 as part of a general revision of the criminal statutes dealing with bribery, graft, and conflicts of interest. It is the successor to 18 U.S.C. § 1914, which prohibited Government employees from receiving any salary from a private source in connection with their Government service, and any non-Governmental person or organization from contributing to, or supplementing, an employee's salary. The prohibition, which is found at 18 U.S.C. § 209(a), states:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection --

Shall be subject to the penalties set forth in section 216 of this title.

Section 209(a) has four elements. It prohibits: (1) receipt of salary or contribution to or supplementation of salary, (2) as compensation, (3) for services as an employee of the United States, (4) from any source other than the United States. The payor

offense is defined by reference to the payee offense, that is, making a contribution to or supplementation of salary that would violate the payee offense if received by an employee.

Section 209 is intended to prevent the divided loyalty of a Government employee who is paid an economic benefit by a non-Governmental source to compensate the employee for his official duties. It is designed to prevent even the appearance of wrongdoing and may apply to conduct that has caused no actual injury to the United States. In order to apply, the statute requires only that the payment compensate the employee for his services to the Government.

The statute applies even if the payor has no dealings or relations with the employee's agency and is not attempting to influence the employee. See OGE Informal Advisory Letter 83 x 15 dated October 19, 1983. It prohibits payments to even those employees who are unable to benefit their payors through their official duties. Id. It applies even in the absence of a specific quid pro quo, and to payments which lack an identifiable potential for corruption. These situations give rise to the original policy concerns that led to the enactment of section 209:

First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers.

Crandon v. United States, 494 U.S. 152, 165 (1990) (quoting Association of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 211 (1960)). See also 8 Op. Off. Legal Counsel 143, 145 (1984).

Each of the four elements of 18 U.S.C. § 209 is analyzed below.

A. Receipt of salary, or any contribution to or supplementation of salary

Salary, or any contribution to or supplementation of salary, can be any thing of monetary value received by an employee. This includes both cash and in-kind payments to employees, and includes both lump-sum payments and periodic payments. See U.S. v. Oberhardt, 887 F.2d 790 (7th Cir. 1989) (one-time payment of \$200); U.S. v. Pezzello, 474 F. Supp. 462 (N.D. Tex. 1979) (one-time payment of \$1,000); U.S. v. Gerdel, 103 F. Supp. 635, 638 (E.D. Mo. 1952) (one-time payment of \$25).

Example 1: An employee in a field office of the Equal Employment Opportunity Commission (EEOC) is assigned by his supervisor to present a speech to a law firm about how an EEOC field office processes complaints. The law firm pays the employee \$500 for his time. The employee has received a supplementation to his salary. (Payment of the honorarium would also be prohibited by 5 C.F.R. § 2635.807 since the speech relates to the employee's official duties.)

Example 2: A professor at a University accepts a position with the Office of Personnel Management and is granted an unpaid leave of absence from the University. Absent any other benefits, the unpaid leave status is not a supplementation to his salary because it does not have an ascertainable monetary value. (However, under

18 U.S.C. § 208, he may have to be recused from any particular matter that would have a direct and predictable effect on the financial interests of the University.)

As noted above, there is no violation of section 209 if compensation is paid before the payee becomes a Government employee. See Crandon v. United States, supra, 494 U.S. 152, 159. In Crandon, the Court determined that a severance payment made before the petitioners entered Government service was outside the scope of section 209 because "employment status is an element of the offense [under section 209]." Id. While acknowledging that such payments give rise to a possible appearance of impropriety, the Court held that, "since the prohibited conduct is merely the receipt or the payment of the salary supplement, it follows that a violation of § 209(a) either is, or is not, committed at the time the payment is made." Id. See also OGE Informal Advisory Letters 91 x 2 dated January 4, 1991, and 91 x 21 dated July 2, 1991.

Example 3: Company B makes a lump-sum payment of \$183,000 to one of its employees who has accepted a position with the Department of the Navy. The payment is intended to compensate the Company B employee for the reduced pay he will receive by leaving Company B to work for the Navy. If the compensation is paid before the recipient begins his employment with the Navy, it is not made in violation of section 209(a). (However, the payment would also require analysis under the Standards in 5 C.F.R. part 2635. For example, it may be considered an extraordinary payment under 5 C.F.R. § 2635.503.)

B. Compensation

The language "as compensation for" requires a connection between public employment and the private payment. There can be no violation of section 209 from the "mere coincidence of Government employment and receipt of compensation from a private employer." 41 Op. Att'y Gen. 217, 220 (1955). Specifically, the payment must be compensation for undertaking or performing Government service. To make out an offense under section 209, there must be a direct linkage between the thing of value paid to the employee and the official services rendered by the employee. See OGE Informal Advisory Letter 81 x 31 dated October 2, 1981 (quoting Manning, supra, at 163).

Example 4: The duties of an employee of the National Science Foundation (NSF) include developing and fostering effective liaison with researchers and administrators of universities. The employee is asked to speak as an official representative of NSF at a University. The University offers the employee a \$2000 honorarium for his speech. The payment of the honorarium by the University, and the acceptance of the honorarium by the employee, would violate section 209.¹ (Payment of the honorarium would also require analysis under the Standards in 5 C.F.R. part 2635. For example, if the speech relates to the employee's official duties, the honorarium may be prohibited by 5 C.F.R. § 2635.807.)

Compensation paid to an employee by the United States Government does not violate section 209, even if there is a contribution to the employee's salary that can be traced back to a

¹ This example is based on the fact pattern in United States v. Williams, Civ. No. 98-862 (E.D. Va., filed June 17, 1998).

private entity. As long as the payment to the employee comes from the Government, "in reality the contribution is to the Government itself, and is in furtherance, not in prejudice, of its interests." 33 Op. Att'y Gen. 273, 275 (1922).

For example, under the Federal Technology Transfer Act (FTTA), 15 U.S.C. §§ 1501-1534, which provides incentives for the transfer of new technologies developed in Federal laboratories to private industry, Government agencies are required to pay the employee-inventor at least 15% of the royalties the agency receives under any licensing agreement. See 15 U.S.C. § 3710c(a)(1)(A)(i). "Since an employee receives the [FTTA] section 7 payments from the federal agency holding the rights to the invention, the payments are not subject to section 209(a)'s prohibition." Letter from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, to Stephen Potts, Director, Office of Government Ethics (Sept. 3, 1993).²

Example 5: In cooperation with a private company, an employee of the Department of Energy (DOE) develops, in a DOE laboratory, a machine that detects bomb residue on people's clothing. The employee assigns her rights in the invention to the United States. DOE pays the employee some of the royalties that DOE receives from licensing the invention, pursuant to the Federal Technology Transfer Act of 1986, 15 U.S.C. §§ 1501-1534. Since the compensation is paid by the licensee to DOE and

² OLC has also said that section 209 does not preclude royalty payments to employee-inventors from outside sources where the Federal Government has waived any interest in commercializing an invention and permitted the employees personally to pursue any patent rights. See letter from Randolph Moss, Assistant Attorney General, Office of Legal Counsel, to Gary Davis, Acting Director, Office of Government Ethics (Sept. 7, 2000).

then from DOE to the employee, the employee's acceptance of the royalty payments would not violate section 209. A payment to an employee from the Government of the United States does not violate section 209.

C. Services as Government employee

Compensation paid to a Government employee violates section 209 only if it is "for the services [he] rendered to the Government [Section 209] does not, however, prohibit payment for services rendered exclusively to private persons or organizations and which have no connection with the services rendered to the Government." 41 Op. Att'y Gen. 217, 220 (1955) (dealing with prior version of the statute). In other words, a violation of section 209 requires that compensation be paid for "the services an employee provides, or is expected to provide, to the Government." See generally, United States v. Muntain, 610 F.2d 964, 969-970 (D.C. Cir. 1979) (payment of Muntain's travel expenses did not violate section 209 because it was "for services having nothing to do with . . . any responsibilities Muntain may have had to the Government as an employee of the United States").

Example 6: An employee of the Environmental Protection Agency (EPA) begins to write a handbook as part of his official duties. While writing the handbook, the employee enters into a contract with a publishing company to publish the handbook after he resigns from the EPA. The contract provides that the employee will receive a \$5,000 signing bonus after leaving the EPA. The agreement to receive the \$5,000, made while the employee is an employee of the Government, constitutes compensation. (This arrangement would also require analysis under the Standards in 5 C.F.R. part 2635, including section 2635.807 since the handbook relates to the employee's official duties.)

Example 7: An employee of the Department of Defense discovers a computer glitch that could have severely hampered a U.S. missile guidance system. The manufacturers of the system, who would have been blamed for the error, take out full page advertisements in five major newspapers praising the employee for finding the error. The advertisements are not compensation to the employee because the employee has not received anything of monetary value.

1. Nature of Services

Services as an employee may be thought of as the duties and responsibilities assigned by competent authority for performance by the employee.³ If an employee is compensated by a non-Government source for services other than those he provides to the Government, there can be no violation of section 209.⁴

Section 209 is often implicated when the payment is for services that are the same or similar to those the employee provides to the Government. See 41 Op. Att'y Gen. 217, 220 (1955); OGE Informal Advisory Letter 86 x 8 dated August 7, 1986. For example, a violation of section 209 would occur if an employee accepted fees for articles or speeches prepared as part of the employee's official duties. See 2 Op. Off. Legal Counsel 361, 362 (1977).

³ See the definition of an employee's "position" in 5 C.F.R. § 511.101(e).

⁴ However, such payments could violate the outside earned income limitations applicable to certain employees. See 5 U.S.C. app. 501(a); Exec. Order No. 12,731 § 102.

On the other hand, if an employee receives compensation for rendering a service to the payor different in kind from the one rendered to the Government, it is unlikely that the compensation is also for the employee's services to the Government. See, e.g., OGE Informal Advisory Opinion 83 x 4 issued March 25, 1983 (no section 209 violation where "any monies received by [the employee] would be explicitly in return for his efforts to produce a diet book having nothing to do with his official duties and responsibilities").

Example 8: An employee of the National Institutes of Health (NIH) is asked by a market research firm to provide information, during non-duty hours, about NIH procurement procedures related to medical instruments. As part of the employee's duties for NIH, he provides the same procurement information to the public and to companies doing business with NIH. By providing the procurement information to the market research firm, the employee would be performing the same function for the firm that he is required to perform for NIH. The employee would violate section 209 if he accepts compensation for providing the information to the firm.

Example 9: A staff attorney in the Antitrust Division of the Department of Justice (DOJ) writes a magazine article about civil rights law. The magazine pays authors of such articles \$1,000. The employee could accept the compensation from the magazine without violating section 209 if writing the article is outside the scope of her duties for DOJ. (Payment for the article would also require analysis under the Standards in 5 C.F.R. part 2635. For example, if the article relates to the employee's official duties, the payment may be prohibited by 5 C.F.R. § 2635.807.)

Where a payment is for an employee's past services to a previous employer and is made without regard to the employee's Government duties, section 209 is not violated. See OGE Informal

Advisory Letter 87 x 11 dated September 9, 1987; 5 Op. Off. Legal Counsel 150 (1981). The benefit must be "granted solely in consideration of past services to the private employer without taking account of the anticipated future status or activity of the employee." Letter from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, to Bruce Hasenkamp, Director, President's Commission on White House Fellowships 2 (Dec. 17, 1976). The legislative history also indicates Congress' intent that, for "services carefully designated as past, substantial severance payments may be made with the payments themselves sometimes spread forward in installments over the period of the appointee's Government service." 107 Cong. Rec. 14780 (1961) (statement of Rep. Lindsay).

Example 10: An attorney resigns as a partner in a law firm to accept a position with the Department of Transportation (DOT). After he begins working for DOT, the attorney receives payment from the law firm in settlement of fees for services he performed while employed by the firm. The attorney does not violate section 209 if he accepts compensation solely in recognition of his past services to the firm. (However, the payment would also require analysis under 18 U.S.C. § 203.)

2. Intent of the Parties

One of the most difficult questions to resolve for this element of section 209 is whether the compensation is, in fact, for Government service. Certain situations present obvious signs it is. For example, the payment of the salary differential of a person who leaves private sector employment for a position in the

Government would clearly indicate intent to provide extra compensation for Government service.

In many situations, however, it is necessary to examine whether either or both parties intended the compensation to pay for the employee's official duties. See 41 Op. Att'y Gen. 217, 220-21 (1955). "Intent to compensate for performance of Government duties is highly probative" in determining whether this element is met. OGE Informal Advisory Letter 88 x 12 dated July 27, 1988. It is necessary to ascertain "not only the intent with which the payment is made but also the intent of the employee in receiving the payment." 41 Op. Att'y Gen. 217, 220-21 (1955).

a. Express Intent

The express intent of the payor, if any, is a factor that must be considered. See Letter from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Larry Parkinson, General Counsel, Federal Bureau of Investigation 3 (Oct. 28, 1997). Where the payor states that he intends to compensate the employee for his services to the Government, the requisite intent is obvious.

Example 11: An employee of the Federal Emergency Management Agency has recently completed a clean-up after a tornado in Southern Georgia. A local business owner gives the employee a check for \$500 saying, "you really did a terrific job cleaning up the tornado damage and this town is very grateful for your hard work. You deserve more than the Government pays you." Because of the business owner's statement, a person could reasonably conclude that the employee is being compensated for his Government services, in violation of section 209.

b. Ability to Influence

Intent to compensate may also be determined by examining whether the employee is in a position to influence the Government on behalf of the payor. See 41 Op. Att'y Gen. 217, 221 (1955); OGE Informal Advisory Letter 85 x 19 dated December 12, 1985; Letter from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Larry Parkinson, General Counsel, Federal Bureau of Investigation 3 (Oct. 28, 1997). If the employee is able to benefit the payor through his work for the Government, it may appear that either the payor or the employee, or both, intend the payment to be compensation for services to the Government.

Example 12: The responsibilities of an employee of the National Endowment for the Arts (NEA) include developing standards for the NEA's approval of grant applications. A private nonprofit art museum, which applies for grants from the NEA, offers the employee a 50% discount in the museum's gift shop if the employee will come to the museum to answer questions about the grant review process. The employee's ability to influence the NEA's review of the museum's grant application may indicate that the gift shop discount is intended to compensate the employee for her services to the Government, in violation of section 209. (Acceptance of the discount would also require analysis under the Standards in 5 C.F.R. part 2635, including Subpart H.)

c. Pattern of Dealings

Even absent an ability to influence the Government on the payor's behalf, intent to compensate for Government services may exist if there is a substantial relationship or pattern of dealings between the employee's agency and the payor. See OGE Informal Advisory Letter 85 x 19 (quoting BAYLESS MANNING, FEDERAL CONFLICT OF

INTEREST LAWS 165 (1964)); Letter from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Larry Parkinson, General Counsel, Federal Bureau of Investigation 3 (Oct. 28, 1997).

Example 13: A radio station offers to pay an employee of the Federal Communications Commission's (FCC) Office of Public Affairs to speak on a Sunday morning broadcast about the process of licensing radio stations. The fact that the radio station is regulated by the FCC could indicate that the radio station and the employee intend the payment to be compensation for the employee's services to the FCC, in violation of section 209. (Acceptance of the payment would also require analysis under the Standards in 5 C.F.R. part 2635, including Subpart H.)

d. Official Position

Another indicator of intent to compensate under section 209 is whether the compensation is given to the employee because of his official position. If the motivation behind the payment is that the employee performs a particular job for the Government, the payment may be intended to compensate the employee for the responsibilities associated with that job. Like gifts given because of an employee's official position under subpart B of the Standards, payments to employees based on their positions with the Government are more likely to carry with them the possibility of undue influence.

Example 14: A philanthropist offers the United States Representative to the United Nations an apartment in New York City at no cost to enable him to attend meetings of the United Nations. The fact that the apartment is offered to only the Representative may indicate an intent to compensate for the services of a Representative.

(Acceptance of the free housing would also require analysis under the Standards in 5 C.F.R. part 2635.)

e. Employee Payor

The fact that compensation is paid to an employee by another employee may indicate that the payment was not intended as compensation for Government services but was, instead, a gift. This is not to say, however, that every payment from an employee is outside the scope of section 209. See, e.g., OGE Informal Advisory Letter 83 x 15 dated Oct. 19, 1983. This factor for analyzing intent to compensate under section 209 differs from the prohibition on gifts between employees at 5 U.S.C. § 7351 in that there is no distinction between higher-paid or lower-paid employees. Thus, an analysis of the intent to compensate should include an inquiry as to whether any employee paid the compensation to any other employee. If, however, the payment is specifically permissible under the exceptions at 5 C.F.R. § 2635.304, it should not violate section 209.

Example 15: In recognition of National Secretaries Day, a Department of Agriculture employee is invited by her supervisor to attend a theater performance. The supervisor pays for the employee's ticket. These circumstances would indicate that the payment was not intended to compensate the subordinate for her Government services.

Example 16: A partner in a law firm is appointed to a supervisory non-career position within the Federal government. She wishes to hire her law firm secretary to work for her in her new position. Because the Federal salary is lower than the secretary's law firm salary, the supervisor would like to make up the difference out of her own pocket. Even though the proposed supplementation

would be from another employee, it is clearly intended to compensate the secretary for duties as an employee of the Government, and is prohibited by § 209.

f. Similar Payments to Others

Where the payor gives the same or similar compensation to a significant number of non-Government employees, it is less likely that the compensation is for Government service, and section 209 is therefore less likely to apply. See letter from Randolph Moss, Assistant Attorney General, Office of Legal Counsel, to Gary Davis, Acting Director, Office of Government Ethics 4 (Sept. 7, 2000).

Example 17: A church provides grants to its congregants whose household income is below a certain amount in order to enable the congregants to send their children to colleges affiliated with the church's religious denomination. One of the congregants who receives a grant is a GS-6 clerk at the Department of Defense. Since the program is available to qualified congregants who work for any employer, it could reasonably be concluded that the grants are not intended to compensate for Government services. (Acceptance of these benefits would also require analysis under Subpart B of 5 C.F.R. part 2635.)

Although nexus to the employee's Federal employment is a factor to consider, it is not necessarily dispositive. OLC has stated that an intent to compensate cannot be inferred simply because "the class of potential recipients is defined in part by their nexus" to a particular Government agency. Letter from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Larry Parkinson, General Counsel, Federal Bureau of Investigation 3 (Oct. 28, 1997).

g. Payor Motivated by Sympathy

Compensation is unlikely to be for Government service if it can be shown that the payor is motivated by a desire other than to compensate the employee for his Government service, such as sympathy and respect or medical condition. Letter from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Larry Parkinson, General Counsel, Federal Bureau of Investigation (Oct. 28, 1997). This opinion, upon which the next example is based, concerned a program which fulfilled the wishes of terminally ill children of Federal Bureau of Investigation employees. The opinion noted that, despite the nexus between the benefits and Federal employment, the children's terminal illnesses are in no way related to their parents' service to the Government. Id. at 5. According to OLC, "the benefits appear to be motivated by sympathy, rather than by a desire to compensate the employees for their government service" and, thus, do not violate section 209. Id. at 4.

Example 18: A nonprofit organization comprised of former Special Agents of the Federal Bureau of Investigation (FBI) sponsors the "Make a Dream Come True Program" to fulfill the wishes of the terminally ill children of former and current FBI employees. An FBI employee could conclude that the program is motivated by sympathy for his sick child and not intended to compensate him for his Government service. (Acceptance of these benefits would also require analysis under Subpart B of 5 C.F.R. part 2635, including any exceptions which may apply.)

h. Bona Fide Public Service Awards

An intent to compensate for Government services cannot be inferred from a "bona fide award for public service or other meritorious achievement." OGE Informal Advisory Letters 83 x 10 dated July 21, 1983, and 92 x 7 dated February 26, 1992. Likewise, OLC has recognized "implicit exceptions" under section 209 for commemorative awards "motivated by a disinterested desire to honor distinguished public service." 8 Op. Off. Legal Counsel 143, 144 (1984).

Example 19: A nonprofit organization presents its annual award consisting of \$5,000 and a medallion for "Greatest Public Service Performed by an Elected or Appointed Official" to an employee of the Bureau of Prisons. The organization applied long-standing written criteria in judging all of the candidates. The organization has no relationship with the Bureau of Prisons. Because it is a bona fide award for public service, it is not intended to compensate the employee for his services to the Bureau of Prisons and would not violate section 209.⁵

3. Employee

Section 209 only applies if it is a Government employee who receives the prohibited payment. By its terms, section 209(a) applies to an officer or employee of the executive branch of the United States or of any independent agency of the United States.⁶

⁵ The example is based on the facts in OGE Informal Advisory Letter 83 x 10.

⁶ Although section 209 is also applicable to employees of the District of Columbia, OGE's authority to provide interpretive guidance is limited to employees of the executive branch of the United States. See 5 U.S.C. app. 402(a).

In the context of section 209, the term employee has been interpreted to include employees of Government-owned corporations. See United States v. Morse, 292 F. 273, 277 (S.D. N.Y. 1922), aff'd on other grounds, 267 U.S. 80 (1925). The definition of employee in 18 U.S.C. § 202, which applies to all of the criminal conflict of interest statutes, including section 209, excludes the President, Vice President, and enlisted members of the Armed Forces.

D. Any person other than the Government

A payment will not violate section 209 unless it is paid by a person other than the United States. "Person" also includes any kind of organization, whether profit or nonprofit. See H.R. Rep. No. 748 at 25 (1961). "Person" includes trade associations, 40 Op. Att'y Gen. 265 (1943), and colleges, 39 Op. Att'y Gen. 501 (1940). The Supreme Court has held that non-Government corporations are also persons for purposes of section 209. See Int'l Ry. v. Davidson, 257 U.S. 506 (1922).

II. Exceptions

There are six statutory exceptions to the basic prohibition against the supplementation of a Government employee's salary. Five of the exceptions are listed in section 209(b)-(f). Although not listed among the exceptions to section 209, payments from States, counties, and municipalities are exempted from the salary

supplementation prohibition in section 209(a), and are discussed here as analogous to an exception.

A. Payments from State or local governments

Section 209(a) permits employees to accept "compensation contributed out of the treasury of any State, county, or municipality." Although originally enacted to preserve agricultural extension programs, this exception is applicable to all payments from State and local governments. See 54 Cong. Rec. 4011 (1917). Thus, for example, a salary supplementation may fall within this exception as being contributed from the treasury of a state if a state university is bearing the cost. See, OGE Informal Advisory Letter 93 x 29 dated October 21, 1993.

B. Employee pension or benefit plans

Section 209(b) allows an employee to continue to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer. This exception was intended to "permit persons entering Federal service to continue established security arrangements that are often essential to long-range financial planning for the family." 2 Op. Off. Legal Counsel 267, 269 (1978). Thus, while supplemental compensation from an outside source is forbidden, the sacrifice of conventional fringe benefits (earned from services provided to a previous employer) is not required. Section 209(b) permits, among other

things, the continuation of annuity credits, insurance plans, and medical and dental benefit programs. See OGE Informal Advisory Letter 81 x 17 dated May 15, 1981.

To qualify for the exception, the benefit plan must be bona fide. The ad hoc payment of benefits does not constitute a bona fide plan under the terms of the statute. Since section 209(b) permits an employee to continue to participate in his former employer's benefit plan, the employee must have been a participant in the plan before beginning Government service.

Example 20: Company B has a "Loyal Employee Severance Package" for all of its employees who have worked for Company B for twenty or more years. The package provides that Company B will pay the moving expenses of qualified employees who retire from Company B and relocate to a different city. After having worked for Company B for twenty-three years, Loyal Larry is retiring to accept a position with the Maritime Administration. The payment of Loyal Larry's moving expenses by Company B is part of a bona fide employee benefit plan maintained by Company B and, therefore, does not violate section 209. (Payments from former employers may also require analysis under the "extraordinary payment" provision in 5 C.F.R. § 2635.503.)

C. Special Government employees and uncompensated employees

Section 209(c) exempts special Government employees as well as uncompensated employees from the purview of section 209(a). This exception was seen as necessary to avoid the burden on intermittent workers who would have to "make bookkeeping entries showing that [they were] not paid 'for' the day [they were] in Washington." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, CONFLICT OF INTEREST AND FEDERAL SERVICE 174 (1960).

Congress also determined that it would have been unfair to expect that uncompensated Government employees forego any remuneration whatsoever. Id. at 216. Section 209(c) permits compensation for both of these types of employees that would otherwise be prohibited by section 209(a). The exception is often used by intermittent consultants and advisers who work for the Government in addition to holding full-time positions in the private sector.

Example 21: The President sends a Special Envoy to a country in turmoil. The individual selected by the President is designated an SGE because he is not expected to serve more than 130 of the next 365 days. The individual is employed by a bank which agrees to pay his bank salary during his absence from the bank. The payment of the individual's bank salary does not violate section 209 because he is an SGE. (However, under 18 U.S.C. § 208, he may have to be recused from participating personally and substantially in any particular matter that would have a direct and predictable effect on the financial interests of the bank.)

D. Government Employees Training Act

Section 209(d) provides an exception for "contributions, awards, or other expenses in accordance with the terms of the Government Employees Training Act" (GETA). The GETA, at 5 U.S.C. § 4111, permits employees to accept "contributions and awards incident to training in non-Government facilities, and payment of travel, subsistence, and other expenses incident to attendance at meetings . . . if the contributions, awards, and payments are made by [a tax-exempt organization]." This exception enables an

employee to accept grants and awards from private sources which advance the employee's training for Government service.⁷

E. Executive exchange or fellowship programs

Section 209(e) was intended to overturn an opinion by the Department of Justice that prohibited private employers from paying the moving expenses of employees chosen to participate in the now terminated Executive Exchange Program or the White House Fellows Program. For the exception to apply, the program must have been established by statute or Executive order of the President, offer appointments not to exceed three hundred and sixty-five days, not permit extensions in excess of ninety additional days for domestic assignments or three hundred and sixty-five additional days for overseas assignments.

Example 22: An employee of Company Q takes a leave of absence to serve for one year as a White House Fellow, a program established by Executive Order 11183. During her fellowship, she lives in Washington, DC, while her husband remains in their residence in New Jersey. Company Q may pay the employee's actual moving expenses. However, Company Q may not reimburse the employee for the cost of her temporary residence in Washington, DC, or any trips she takes to New Jersey because they are personal living expenses, not actual relocation expenses. (In addition, under 18 U.S.C. § 208, the employee may have to be recused from any particular matter that would have a direct and predictable effect on the financial interests of Company Q.)

F. Persons injured during the commission of certain offenses

Section 209(f) provides that "[a]n employee injured during the commission of an offense described in 18 U.S.C. 351 or 1751 may

⁷ Implementing regulations for the Government Employees Training Act are contained in subpart E of 5 C.F.R. part 410.

accept contributions or payments from an organization which is [exempt from taxation]." This exception was enacted following the March 30, 1981 assassination attempt on President Ronald Reagan in which the President's Press Secretary, James Brady, and a Secret Service Agent were injured. See 128 Cong. Rec. 6322-23, 6381-82 (1982). Section 209(f) was enacted to permit acceptance of such payments from tax-exempt organizations to employees injured during the commission of an assassination, attempted assassination, kidnaping, attempted kidnaping, or assault on certain specified officials.⁸ See 18 U.S.C. § 1751; 18 U.S.C. § 351.

Example 23: An employee of the Central Intelligence Agency (CIA) accompanies the Director of the CIA on official travel. The employee is injured during an attempted kidnaping of the Director of the CIA. The Heroes Fund, a tax-exempt organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a), would like to give the injured employee money to help defray his medical expenses. Since the employee was injured during the commission of an offense described in 18 U.S.C. § 351(c), his acceptance of payments from the Heroes Fund would not violate section 209.

III. Relationship to Standards of Conduct and Other Rules

The Standards of Ethical Conduct for Executive Branch Employees, 5 C.F.R. part 2635, address gifts from outside sources

⁸ Those officials are the President, the President-elect, the Vice President, the Vice President-elect, a Member of Congress, a Member-of-Congress-elect, a Cabinet Secretary, a person nominated to be a Cabinet Secretary, the official ranking just below a Cabinet Secretary, the Director (or person nominated to be the Director) or Deputy Director of Central Intelligence, a "major" Presidential or Vice Presidential candidate, a U.S. Supreme Court Justice, or a person nominated to be a Justice.

and gifts between employees. Gifts and other items of value may be accepted in conformity with the Standards, at 5 C.F.R. §§ 2635.203(b), 2635.204, or 2635.304. These items fall outside the scope of section 209 because they are merely gratuitous and are not intended to compensate for Government services. For example, the items excluded from the definition of "gift," such as coffee, donuts, greeting cards, plaques, and trophies, seem so trivial in monetary value as to be considered social amenities rather than compensation for services. See 5 C.F.R. § 2635.203(b)(1); § 2635.203(b)(2).

Example 24: A Department of Labor employee speaks to a group of small business owners about a new minimum wage law. After the employee's talk, the leader of the group says, "we can't offer you much for coming to talk to us but we'd like you to share in the coffee and donuts." The employee may enjoy the coffee and donuts without violating section 209. Acceptance of such items is specifically permitted under 5 C.F.R. § 2635.203(b)(1).

Example 25: An employee of the Department of Housing and Urban Development (HUD) goes on an inspection tour of a HUD property as part of his official duties. The construction company working at the site gives the employee a hard hat with the company's logo to wear during the inspection and to keep after the tour. The hard hat is valued at \$15. The employee's acceptance of the hat does not violate section 209. Acceptance of gifts valued at \$20 or less is specifically permitted under 5 C.F.R. § 2635.204(a).

Example 26: An employee of the Office of Government Ethics completes the drafting of a regulation under a tight time limit. One of the employee's friends offers to take her out to dinner at an expensive restaurant to reward her for working several late nights to finish the regulation. The employee may accept the meal under section 209. It is motivated by her friendship with the payor and, as such, is specifically permitted under 5 C.F.R. § 2635.204(b).

These examples trace particular provisions in the Standards to illustrate that there must be a specific exclusion from the definition of "gift" in 5 C.F.R. § 2635.203(b) or a specific exception in 5 C.F.R. § 2635.204 or § 2635.304, in order that the gift also be permissible under section 209.

Although an item acceptable under the Standards will not violate section 209, the converse may not be true. Something which is acceptable under section 209 may nonetheless be prohibited under the gift rules, despite the fact that it does not rise to the level of compensation for Government services. Similarly, a payment that is permissible under section 209 may still implicate some other prohibition. Thus, for example, an employee who receives a payment acceptable under section 209 may need to recuse himself, under 18 U.S.C. § 208 or 5 C.F.R. § 2635.502, from participating in particular matters affecting the payor. Certain non-career employees and presidential appointees are subject to limitations on their receipt of outside earned income. See 5 C.F.R. part 2636. There are also rules restricting employees from receiving compensation for teaching, speaking, and writing that relate to their official duties. See 5 C.F.R. § 2635.807.