



NATIONAL GOVERNMENT ETHICS  
**SUMMIT**  
MARCH 8-10 2016

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**Receipt of Payments Prior to—and During—Government Service:  
5 C.F.R. § 2635.503 and 18 U.S.C. § 209**

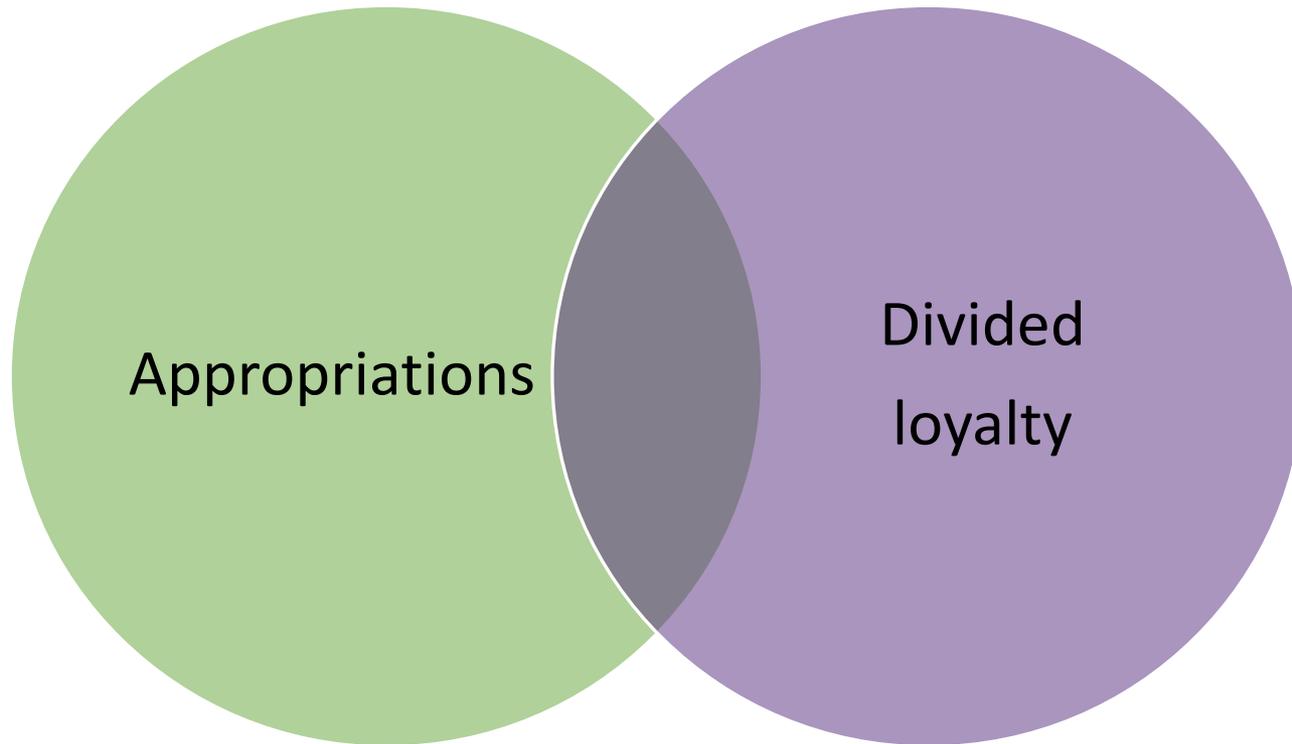
# 18 U.S.C. § 209

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Supplementation of  
Salary

# Purposes

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“Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job.

**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.”

Ass’n of the Bar of the City of N.Y., Conflict of Interest and Federal Service  
211 (1960)

# Legislative History

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1917

1948

1962

## 5 U.S.C. § 66

Prohibits “Government official or employee” from receiving “any salary in connection with his services as such an official or employee from any source other than the Government of the United States”

## 18 U.S.C. § 1914

Criminal code consolidated and revised in Title 18, with minor amendments made to the statute

## 18 U.S.C. § 209

Replaces § 1914 as part of Title 18 reorganization and passage of our current criminal conflicts of interest laws at 18 U.S.C. §§ 201–209.

“In connection with” → “as compensation for”

# Prohibition

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Payee

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 . . . from any source other than the Government of the United States . . . ; or

Payor

Whoever, whether an individual, partnership, association, corporation, or other organization pays, 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.

18 U.S.C. § 209(a)

# Elements:

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18 U.S.C. § 209 prohibits:

- (1) An officer or employee of the executive branch,
- (2) from any source other than the United States,
- (3) from receiving salary or any contribution to or supplementation of salary
- (4) as compensation for services as an employee of the United States.



Let's break it down...

# (1) An officer or employee of the executive branch

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- Must be an employee at the time the payment is made
  - *Crandon v. United States*, 494 U.S. 152 (1990)
  - See OGE Informal Advisory Opinion 91 x 2
- Includes Government-owned corporations
  - *United States v. Morse*, 292 F. 273 (S.D.N.Y. 1922)
- What about appointees who have not begun service?
  - 26 Op. O.L.C. 32 (2002)
    - Conflicts of interest rules apply when the appointee begins the duties of his or her office, which is the same determination as the time when the official begins to accrue his or her salary.
    - Based on the definitions of “officer” and “employee” in Title 5 of the United States Code.
  - OGE Informal Advisory Opinion 02 x 3

# (2) From any source other than the United States

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- Source = any person or organization
  - for-profit and non-profit organizations
  - trade associations
  - corporations
- Compensation paid to an employee by the U.S. Government does not violate 209 even if the funds can be traced back to a private entity
  - Ex. Federal Technology Transfer Act (15 U.S.C. §§ 3701-3717)
    - Government agencies are required to pay an employee/inventor a certain percentage of royalties that the agency receives from any licensing agreement for an invention.
    - Because these payments are paid to the employee by the Government, there is no violation of 209, even if the funds originated from others.
    - 17 Op. O.L.C. 46 (1993)

# (3) From receiving salary or any contribution to or supplementation of salary

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- Anything of monetary value
  - Cash or in-kind payments
- Coverage extends to lump sum and periodic payments
  - *United States v. Project on Gov't Oversight*, 616 F.3d 544 (D.C. Cir. 2010)

# (4) As compensation for services as an employee of the United States

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## INTENT OF THE PARTIES

- *United States v. Project on Gov't Oversight*, 616 F.3d 544 (D.C. Cir. 2010)
- Need a direct linkage between the thing of value paid and the official services rendered by the employee
  - OGE Informal Advisory Opinion 81 x 31
  - 24 Op. O.L.C. 170 (2000)

# Determining Intent

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- Nature of the “services”
  - Are the services the same or similar to the duties and responsibilities that the employee provides to the Government?
    - *United States v. Martinez*, 76 F.3d 1145 (10th Cir. 1996)
    - OGE Informal Advisory Opinion 86 x 8
    - 2 Op. O.L.C. 361 (1977)
  - Are they distinct?
    - *United States v. Muntain*, 610 F.2d 964 (D.C. Cir. 1979)
    - OGE Informal Advisory Opinion 83 x 4
    - Consider outside earned income limitations (5 U.S.C. app. § 501(a))
  - Is the compensation for past services from a previous employer?
    - OGE Informal Advisory Opinion 87 x 11

# Determining Intent

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Relevant factors to consider:

- Whether the expressed intent of the payor is to compensate for government service
  - *United States v. Oberhardt*, 887 F.2d 790 (7th Cir. 1989)
- Whether the employee is in a position to influence the Government on behalf of the payor
  - *United States v. Kim Oahn Thathitran (aka Jennifer Kim Tran)* (2010 OGE Prosecution Survey: LA-11-08)
- Whether the compensation is given to the employee because of his official position
  - *United States v. Patricia Raikes* (2005 OGE Prosecution Survey: DO-06-022)
- Whether there is a substantial relationship or pattern of dealings between the employee's agency and the payor
  - E.g., contracting officer/contractor situations

# Determining Intent

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Relevant factors to consider:

- Whether the payor is another Government employee
- Whether circumstances indicate that payment is motivated by a desire other than to compensate the employee for Government service
  - E.g., medical needs; sympathy and respect; a familial relationship
- Whether similar payments would also be made to non-Government employees
  - E.g., receipt of severance payments; vesting of stock options; payment of a partnership share
- *Bona fide* public service awards
  - 8 Op. O.L.C. 143 (1984)

# Key Concerns

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1. Payment
2. To a government employee
3. From someone who has business before the employee's agency and
4. The payment was not made as part of some established policy

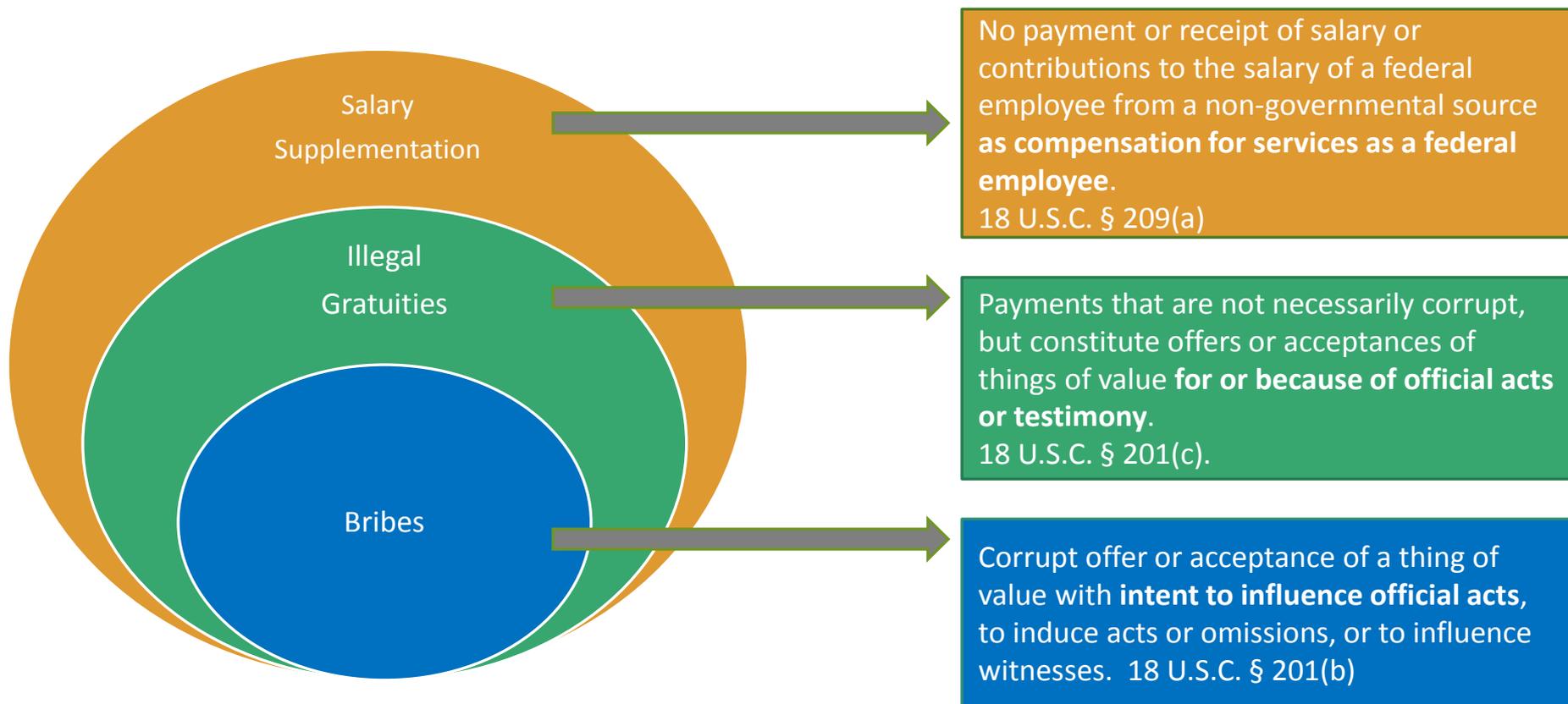
# Exceptions

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- (a) Payments from state or local governments
- (b) Employee pension or benefit plans
- (c) Special Government Employees (SGEs) or uncompensated employees
- (d) Contributions under the Government Employees Training Act (5 U.S.C. § 4111)
- (e) Executive exchange or fellowship programs
- (f) Persons injured during the commission of certain offenses
- (g) Private sector employees assigned to an agency as part of the IT Exchange Program (5 U.S.C. § 3701, *et seq.*)
- (h) Pay to members of the reserve components of the armed forces called to active duty that would have been paid in absence of call to active duty

# How is Salary Supplementation different than Bribery or Illegal Gratuities?

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# Guidance

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United States  
Office of Government Ethics  
1201 New York Avenue, NW., Suite 500  
Washington, DC 20005-3917

July 1, 2002  
DO-02-016

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](#)

- DO-02-016 / Informal Advisory Opinion 02 x 4 remain OGE's most thorough guidance on this statute
- Other OGE Legal Advisories
- Department of Justice OLC opinions
- Judicial opinions
- OGE Desk Officers

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QUESTIONS?



# 5 C.F.R. § 2635.503

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“Extraordinary Payments”



# Purpose

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“Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job.

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.”

Ass’n of the Bar of the City of N.Y., Conflict of Interest and Federal Service 211 (1960)

# Regulatory History

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An extraordinary payment from a former employer received prior to beginning Federal service raises a legitimate concern, and thus an appearance, that the employee may not act impartially in particular matters to which the former employer is a party or represents a party. The disqualification requirement that would be imposed by § 2635.503 is intended to address those appearance issues.  
56 FR 33778

# Elements: Who is covered by 2635.503?

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*Any individual who, prior to entering government,—*

1. Receives any item or thing of value worth more than \$10,000;
2. That is being provided on the basis of a determination made *after* it became known to a former employer that the individual was being considered for or had accepted a Government position; and
3. Other than pursuant to the former employer's established compensation, partnership, or benefits programs.

# Elements Con't: “Established” Program

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3. Other than pursuant to the former employer’s established compensation, partnership, or benefits programs
- “Established” means—
    - The program is in writing; or
    - There is a history of similar payments made to others not entering government.

# Prohibition: What is the Coverage?

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An employee covered by 2635.503 shall not:

- Participate in a particular matter in which the former employer is a party or represents a party; and
- The disqualification runs for two years from the date the payment is received by the employee.

# Exception– Agency Determination

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The requirement to recuse may be waived if:

- The head of an agency makes a finding
- In writing
- That the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially

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QUESTIONS?



# Time for Some Hypotheticals...

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Hypo 1:

- Covered by .503?
  - Why?
- Should you advise the employee to reject the payment?
  - Why?
- Do you think this is a 209 violation?
  - Why?

# Elements: Who is covered by 2635.503?

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3. Other than pursuant to the former employer's established compensation, partnership, or benefits programs.

# Determining Intent

---

Relevant factors to consider:

- Whether the expressed intent of the payor is to compensate for government service
- Whether the employee is in a position to influence the Government on behalf of the payor
- Whether there is a substantial relationship or pattern of dealings between the employee's agency and the payor
- Whether the compensation is given to the employee because of his official position
- Whether the payor is another Government employee
- Whether circumstances indicate that payment is motivated by a desire other than to compensate the employee for Government service
  - E.g., medical needs; sympathy and respect; a familial relationship
- Whether similar payments would also be made to non-Government employees
- *Bona fide* public service awards

# Time for Some Hypotheticals...

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Hypo 2:

- Covered by .503?
  - Why?
- Should you advise the employee to reject the payment?
  - Why?
- Do you think this is a 209 violation?
  - Why?

# Time for Some Hypotheticals...

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Hypo 3:

- Should you advise the employee to reject the payment?
  - Why?
- Do you think this is a 209 violation?
  - Why?

# Time for Some Hypotheticals...

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Hypo 4, Situation 1:

- Should you advise the employee to reject the payment?
  - Why?
- Do you think this is a 209 violation?
  - Why?

# Time for Some Hypotheticals...

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Hypo 4, Situation 2:

- Should you advise the employee to reject the payment?
  - Why?
- Do you think this is a 209 violation?
  - Why?

# THANK YOU

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