

Book Deal DAEogram

Table of Contents

Part II: Covered Noncareer Employees and Presidential Appointees

INTRODUCTION.....	1
I. What Category of Employee is Seeking Compensation for Writing a Book?.....	2
A. Covered Noncareer (CNC) Employees.....	3
B. Presidential Appointees (PA) to a Full-Time Noncareer Position.....	4
C. Distinguishing Between CNC and PA Employees.....	5
II. What is the Book About?.....	5
A. General subject matter area, industry, or economic sector primarily affected by the programs and operations of agency.....	6
B. Matters to which a CNC or PA employee is or has been assigned.....	7
C. Ongoing announced policy, program or operation of agency.....	7
III. When is the Writing Performed and When is the Compensation Received?.....	9
A. Introduction.....	9
B. When does the writing occur?.....	10
C. When is the compensation received?.....	11
D. How to Calculate the 15% Limitation.....	12
Table 1: Timing of Writing and Receipt of Compensation.....	15
Table 2: Timing of Contract, Writing and Compensation.....	16
IV. What is the Type of Compensation?.....	17
A. Royalties vs. Advance Payments.....	17
B. How to Apply the Distinction Between Royalties and Advances.....	18
V. Who is Offering the Compensation and Why?.....	19
VI. What Other Ethics Rules and Considerations May Apply?.....	20
A. Compensation for Writing Related Activities.....	21
(i) Editing Proofreading, & Diaries: What is Considered "Writing?".....	21
(ii) Travel Expenses & Speaking Fees.....	22
B. Supplemental Agency Regulations.....	23
C. Financial Conflicts of Interest.....	24
D. Impartiality/Catch-All.....	24
E. Supplementation of Salary/Writing as Part of Official Duties.....	24
F. Misuse of Position.....	25
(i) Use of Nonpublic Information.....	25
(ii) Appearance of Governmental Sanction/Reference to Official Position.....	26
Conclusion.....	27
Overview: Determining Whether a CNC employee or a PA Employee May Receive Compensation for Writing a Book.....	28

PART II:
BOOK DEALS INVOLVING COVERED NONCAREER EMPLOYEES
AND PRESIDENTIAL APPOINTEES TO FULL-TIME
NONCAREER POSITIONS

INTRODUCTION

This summary provides a template for analyzing whether covered noncareer (CNC) employees and Presidential appointees to full-time noncareer positions (PA) may accept compensation for writing a book during Government service. Analyzing this question can be unusually complex because a number of different, but similar, rules apply to these employees.¹ Three primary rules may come into play.

First, the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) limit payment to these employees depending on the subject matter of the book, who would make the payment, or why the payment would be made. See 5 C.F.R. § 2635.807.

Second, both CNC and PA employees are subject to a ban on receiving, in a calendar year, outside earned income that exceeds 15% of the annual rate of basic pay for level II of the Executive Schedule. See 5 U.S.C. app. § 501(a)(1) (15% limitation).

Finally, PA employees may not receive any earned income for activities performed during Government service. See Executive Order 12674, section 102 (outside earned income ban). For all practical purposes, this broad outside earned income ban completely subsumes the 15% limitation described above, as applied to PA employees.

It is important to remember that these three provisions may apply in the alternative in a particular case. For example, even if a PA employee's writing satisfies the requirements of section 2635.807 and the 15% limitation, he still would not be allowed to receive compensation if acceptance would violate the outside earned income ban.

¹ For example, the term "compensation" is defined differently in the applicable rules. In one of the rules, book royalties are treated as compensation; in the other two rules, royalties are excluded from the definition of compensation. These distinctions will be discussed further in this summary.

To help analyze whether an employee may receive compensation for writing a book, an ethics official should answer the following six questions:

- What category of employee is seeking compensation for writing a book?
- What is the book about?
- When is the writing performed and when is the compensation received?
- What is the type of payment or compensation?
- Who is offering the compensation and why?
- What other ethics rules and considerations may apply?

The answers to these questions will help you decide whether accepting the compensation is permissible, and whether any other ethics rules will limit the employee's activities related to the writing.

I. What Category of Employee is Seeking Compensation for Writing a Book?

When you are analyzing a book deal question, you should always first consider the type or status of the employee who is writing the book. There are a number of different ethics rules that apply to book deals, and how those rules apply may vary based on the category of employee involved. Once you have determined the category in which the employee falls, you can immediately move on to the remaining five questions.

As noted earlier, this summary addresses how the ethics rules apply to compensation for writing received by covered noncareer employees and Presidential appointees to full-time noncareer positions. The following discussion explains how to identify whether an employee falls into one of these categories. Please keep in mind that status as an employee is not affected by leave status. 5 C.F.R. § 2635.102(h).²

²Also, an employee includes officers but not enlisted members of the uniformed services. 5 C.F.R. § 2635.102(h).

A. Covered Noncareer (CNC) Employees

There are several ways in which an employee may qualify as a CNC employee under 5 C.F.R. § 2636.303(a).³ Generally, there are three primary points to remember about a CNC employee:

- a CNC's appointment must be one of several types of noncareer appointments. 5 C.F.R. § 2636.303(a)(1)-(4). Typically, when a position is identified as "noncareer" it refers to a political appointment where the appointee can be removed at the will of the appointing official(s);
- a CNC employee must be in a position that meets certain grade and pay requirements. CNCs must be in a position classified above GS-15 in the General Schedule or, for positions not under the General Schedule, in a position for which the rate of basic pay is at least 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule.⁴ 5 C.F.R. § 2636.303(a); see 5 U.S.C. app. §§ 501(a), 502(a); and
- a special Government employee cannot be a CNC employee. 5 C.F.R. § 2636.303(a); see 5 U.S.C. app. § 505(2) (excluding SGEs from the class of covered employees).

Under this definition, an employee whose position is classified at GS-15 or lower, including one appointed to a Schedule C position pursuant to 5 C.F.R. § 213.3301, can never be a CNC employee. For example, a GS-15 Schedule C employee who makes \$116,500 a year fails to meet the threshold to qualify as a CNC employee because his position is not classified above GS-15. Therefore, although the Schedule C employee is a noncareer employee, he is not "covered noncareer" under this definition.

³ 5 C.F.R. § 2636.303(a) contains a comprehensive definition of "covered noncareer employee," as well as a brief list of exclusions from the definition.

⁴ For calendar year 2008 the minimum rate of basic pay payable for GS-15 is \$95,390 and 120 percent of this basic rate of pay is \$114,468.

Typical examples of CNC employees are full-time employees who are noncareer members of the Senior Executive Service (SES) or most Presidential appointees subject to Senate confirmation.⁵

B. Presidential Appointees (PA) to a Full-Time Noncareer Position

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 section 102 of Executive Order 12674.⁶ There are three primary points to remember about a PA employee:

- the employee must be appointed by the President;
- the employee must be a full-time employee to be covered. Therefore, special Government employees and other employees who work more than SGEs but less than full-time are not PAs subject to this rule. See OGE Informal Advisory Opinion 05 x 07 (November 1, 2005); and
- the employee must not be excluded from coverage. (e.g. Presidential appointees in the White House whose basic rate of pay is below GS-9 are excluded).

⁵ Sometimes it can be difficult to determine whether an employee is a CNC employee, a PA employee, or both. For example, it may be difficult to determine whether an employee is a CNC employee when he has been appointed under an agency-specific statute. According to 5 C.F.R. § 2636.303(a)(3), an employee will be a CNC employee if, after meeting the other non-appointment criteria, he is appointed "under an agency-specific statute that establishes appointment criteria essentially the same as those set forth in [5 C.F.R.] section 213.3301 . . . for Schedule C appointments." For additional discussion and analysis on determining whether an agency-specific appointment authority qualifies a position as a CNC position under 5 C.F.R. § 2636.303(a)(3), see OGE Informal Advisory Letters; 05 x 02(2) (April 18, 2005); 05 x 07 (November 1, 2005); and OGE Informal Advisory Opinion 04 x 10 (July 20, 2004).

⁶ 5 C.F.R. § 2635.804(c)(2) contains a comprehensive definition of a Presidential appointee to a full-time noncareer position as well as a brief list of exclusions from the definition.

A typical example of a PA employee is the Director of the Office of Government Ethics whose position is classified as level III of the Executive Schedule pursuant to 5 U.S.C. § 5314.

C. Distinguishing Between CNC and PA Employees

An employee can be both a CNC and a PA employee at the same time.⁷ Once you have determined that an employee is a PA employee, even if he is also a CNC employee, the stricter complete ban on outside earned income always applies, superseding the 15% limitation on outside earned income applicable to CNC employees.

For instance, the Deputy General Counsel for the Department of Defense qualifies as both a CNC employee and a PA employee because he is appointed by the President to a position classified as level V of the Executive Schedule pursuant to 5 U.S.C. § 5316. This appointment satisfies the requirement in 5 C.F.R. § 2636.303(a)(1) for a CNC employee as well as requirements under 5 C.F.R. § 2635.804(c)(2) for a PA employee. Because this employee is subject to the outside earned income ban, no analysis under the 15% limitation is necessary.

In contrast, once you have determined that an employee holds a CNC position you cannot assume that employee will also be a PA employee because many CNC employees are not appointed by the President. For example, a Deputy General Counsel appointed to his position by the General Counsel of an agency as a noncareer member of the Senior Executive Service is a CNC, but not a PA employee. His appointment satisfies the required elements in 5 C.F.R. § 2636.303 (assuming he meets the minimum pay threshold), but his appointment does not satisfy 5 C.F.R. § 2635.804(c)(2) because he is not appointed by the President.

II. What is the Book About?

Once you have decided that the employee in question is a CNC employee, a PA employee, or both, the next important question is whether the subject matter of the book is related to the employee's official duties. Both CNC and PA employees are prohibited from receiving compensation for writing a book that is related to their official duties. See 5 C.F.R. § 2635.807.

⁷ A PA employee usually also is a CNC employee unless he fails to meet the minimum salary requirement for a CNC employee.

CNC and PA employees generally are prohibited from accepting compensation for writing a book that deals in significant part with any of the following three subject matter categories:

- the subject deals in significant part with the general subject matter area, industry, or economic sector primarily affected by the programs and operations of the employee's agency. 5 C.F.R. § 2635.807(a)(2)(i)(E)(3); or
- the subject deals in significant part with any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period, 5 C.F.R. § 2635.807(a)(2)(i)(E)(1); or
- the subject deals in significant part with any ongoing or announced policy, program or operation of the employee's agency.⁸ 5 C.F.R. § 2635.807(a)(2)(i)(E)(2).

Under section 2635.807(a)(2)(i)(E)(2), an employee is not prohibited from receiving compensation for writing a book that only incidentally discusses his agency's programs. For example, a CNC employee who works at NASA may receive compensation for writing a book on the subject of engineering advances in modes of transportation containing a single chapter discussing NASA's space shuttle program, provided that the information described is available to the public. This type of book does not deal in significant part with NASA's space shuttle program.

- A. *General subject matter area, industry, or economic sector primarily affected by the programs and operations of agency*

This provision of section 2635.807 is very broad and more restrictive than the other provisions cited above. See 5 C.F.R. § 2635.807(a)(2)(i)(E)(3). For example, a CNC employee of the

⁸ For the purposes of the Standards of Conduct, agency programs or operations refer to any program or function carried out or performed by an agency, whether pursuant to statute, Executive order, or regulation. 5 C.F.R. § 2635.102(d).

National Labor Relations Board who is subject to this provision may not write a book and receive compensation if the book concerns, in significant part, the general topic of the United States labor movement. The receipt of compensation is impermissible because the topic concerns the general subject matter area primarily affected by the employee's agency. As a result, this employee will be prohibited from receiving compensation for this book, even though the writing does not specifically involve operations, policies or programs of his agency. For a further discussion and analysis of whether receipt of compensation is prohibited based on the topic of the writing under 5 C.F.R. § 2635.807(a)(2)(i)(E)(3), see OGE Informal Advisory Opinion 85 x 18 (October 28, 1985) and OGE Informal Advisory Letter 89 x 17 (September 26, 1989).

B. Matters to which a CNC or PA employee is or has been assigned

The second provision above applies to *any matter* to which the employee is assigned or has been assigned during the past year.⁹ This prohibition also applies to high ranking CNC and PA employees who are responsible for making their own assignments.¹⁰ Under this second restriction, for example, an employee of the National Aeronautics and Space Administration (NASA) who is assigned to create a research program related to extraterrestrial intelligence could not receive compensation for writing a book on NASA's research program. See also 5 C.F.R. § 2635.807(a)(2)(i) (Example 8).

C. Ongoing announced policy, program or operation of agency

An employee may receive compensation for writings discussing a general area of expertise that do not inherently implicate agency programs. See 5 C.F.R. § 2635.807(a)(2)(i)(E)(2) (Examples 3 and 4); OGE Informal Advisory Letter 01 x 07 (August 10, 2001).

⁹ The term "matter" is virtually all-encompassing with respect to the work of the Government and covers even the consideration or the adoption of broad policy options that are directed to the interests of a large and diverse group of persons. See DAEOgram DO-06-029, <http://www.usoge.gov/pages/daeograms/2006daeolist.html>.

¹⁰ See 5 C.F.R. § 2635.402(c)(1) (stating that an employee responsible for making his own assignments must take the necessary steps to ensure that he does not participate in matters from which he is disqualified).

Applying this general principle, a CNC employee who works at the Securities and Exchange Commission (SEC) may receive compensation for writing an economics textbook, under this subsection, because the topic of economics is not an agency program or operation.¹¹ However, if the book specifically focuses on the SEC's regulatory scheme for registered mutual funds, the employee could not accept compensation for writing it because it would deal in significant part with an ongoing or announced policy, program or operation of the employee's agency.¹²

For further guidance concerning whether or not the subject matter of an employee's writing is related to his official duties based upon the subject matter of the book, see examples 3, 4 & 6 in 5 C.F.R. § 2635.807(a)(2)(i) of the Standards of Conduct. Also, for additional discussion and analysis regarding whether a particular topic may be related in significant part to an ongoing or announced policy, program or operation of the employee's agency, see 5 C.F.R. § 2635.807(a)(2)(i)(E)(2) (Example 2); OGE Informal Advisory Opinions 01 x 07 (August 10, 2001) and 01 x 10 (November 13, 2001).

As described above, you will have to decide whether the employee is barred from receiving compensation for the book because the subject matter is related to his official duties. If you conclude that the subject matter falls within one of the categories described in section 2635.807(a)(2)(i)(E)(1)-(3) the employee may be barred from receiving compensation, depending on when the book

¹¹ This CNC employee at the SEC may also receive compensation for this textbook under 5 C.F.R. § 2635.807(a)(2)(i)(E)(3) (prohibiting a CNC employee from receiving compensation for writing that deals in significant part with the general subject matter area, industry, or economic sector primarily affected by his agency). The employee may receive the compensation under this provision because the academic field of economics does not qualify as the general subject matter of the SEC.

¹² "Agency programs or operations" include substantive core programs and operations that fulfill an agency's mission. The term does not include work that all agencies perform that is not related to an agency's core mission. Examples of such work include fulfilling Freedom of Information Act requests or dealing with personnel disputes. See 5 C.F.R. § 2635.807(a)(2)(i) (Example 5).

is written and published, and the form of compensation¹³ he would receive. And in any event, even if the employee decides to proceed with writing the book without any compensation, you will still need to address the considerations discussed in Section VI.

III. When is the Writing Performed and When is the Compensation Received?

A. Introduction

Timing issues make the analyses of book deals particularly difficult. The combination of when the writing occurs and when the compensation is paid will dictate different conclusions about whether the compensation is permissible. The most common scenario where section 2635.807, the 15% limitation, and the outside earned income ban apply is when a PA or CNC employee writes the book and receives the compensation during Government service. However, permutations in the timing of the writing and the payment of the compensation do occur, and must be analyzed accordingly.

There are several rules of thumb that can help make the timing issues a little less complex.

- First, ethics rules do not restrict receipt of compensation unless the writing occurs during Government service;
- Second, while ethics rules generally only restrict receipt of compensation during Government service, in certain cases payments made before or after Government service for writing that occurs during Government service also may be restricted; and
- Finally, where receipt of compensation is permitted, you still must make a special calculation under the 15% earned income limitation to determine how much compensation can be received in any one calendar year.

¹³ Because the definition of "compensation" as it applies to the outside earned income ban and the 15% limitation specifically excludes royalties, it will still be necessary to do an analysis under section 2635.807 when a CNC or PA employee has a contract to write a book that includes the receipt of royalties. 5 C.F.R. § 2635.804(c)(1). A further discussion of the distinct treatment of advances and royalties is contained in section IV of this summary.

This section discusses these rules of thumb for each of the three applicable ethics provisions (i.e. section 2635.807, the 15% limitation, the outside earned income ban). The section also contains two tables that provide a summary of how the possible combinations of the timing of the writing and the receipt of compensation affect whether compensation is permitted under the three applicable provisions.

B. When does the writing occur?

Section 2635.807, the 15% limitation, and the outside earned income ban apply to an individual while he serves as a Government employee. Therefore, each provision restricts compensation only for writing that occurs while an individual is in Government service. If the writing is done either before or after Government service, none of these provisions will apply.

For example, none of the provisions will bar a PA or CNC employee who writes a book before entering Government from receiving compensation for the book while he is an employee.¹⁴ Similarly, a former PA or CNC employee, after leaving Government service, may enter into an agreement with a publisher and receive compensation for writing a book, even if the book is about his Government service.

Some writing that occurs during Government service will not implicate the rules because no compensation is received for the writing. For example, a PA or CNC employee who writes a book on any topic solely on speculation (i.e. with no agreement to publish the book) during Government service will not violate any of the three provisions. This is because the employee has not received, or even agreed to receive, compensation for his writing. Similarly, an employee who keeps a diary or notes or other similar materials for use in writing a book after his Government service has terminated will not violate any of the three provisions, provided he does not, during Government service, receive compensation or have an agreement to receive compensation.¹⁵

¹⁴ An employee may receive compensation, such as royalties, for a book completed prior to entering Government service even if the book is about his agency's programs. However, there may be limitations on the promotional activities he could undertake while an employee. See Section VI infra.

¹⁵ See Section VI, infra, for a discussion of the rules relating to diaries and notes kept during Government service.

C. When is the compensation received?

Generally, section 2635.807, the 15% limitation, and the outside earned income ban will not apply to a PA or a CNC employee unless the compensation is received during Government service. As described above, for example, an employee who writes a book on speculation during Government service will not violate any of the three provisions if he enters an agreement after Government service to publish the book.

Nevertheless, there are several situations where the three rules will apply even if compensation is paid before or after Government service.

First, an employee cannot simply defer the receipt of payment for a book written while an employee, to a time after he terminates Government service. When an employee signs a contract to receive a future payment or receives other consideration for a book written while an employee, he has "received" compensation while a Government employee.¹⁶

Second, a PA or CNC employee who has received compensation, prior to entering the Government, for writing a book during Government service, may not be able to write the book while an employee. In this case, the employee would still "receive" the compensation while he is an employee because receiving the compensation is contingent on undertaking the writing during Government service. This situation sometimes occurs when an individual has entered a book contract and then is selected for a Government position before he has written the book. Similarly, the issue may arise when an employee has published a book prior to entering the Government on a topic that is "related to" his Government duties or to agency programs, and then is asked by the publisher to update or edit the book while he is serving in the

¹⁶ 5 C.F.R. § 2635.807(a)(2)(iv) and 5 C.F.R. § 2636.303(c) both describe 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 may be deferred until after Federal employment has terminated." OGE interprets this definition of "receive" to apply equally to section 2635.807.

Government.¹⁷ To comply with the applicable rules, a PA or CNC employee in these situations would have to defer the actual writing or editing until after he terminates Government service.

Third, an employee who enters a contract to write a book during Government service and defers payment for the book until Government service is terminated, still would be subject to the restrictions on compensation if he keeps a diary, notes or other similar materials upon which the book will be based. In such a case, the employee's receipt of compensation for the book would also be, in part, for writing the preparatory materials generated during Government service.

Finally, a PA or CNC employee cannot circumvent the restrictions of section 2635.807, the 15% limitation, and the outside earned income ban by having the compensation paid to another person, including a charitable organization. In such cases, the compensation is still considered to have been "received" by the employee.¹⁸

D. How to Calculate the 15% Limitation

A CNC employee may not, in any calendar year, have outside earned income attributable to that year which exceeds 15% of the annual rate of basic pay for Level II of the Executive Schedule.¹⁹ 5 U.S.C. app. § 501(a)(1). Regardless of when the compensation is actually paid, a CNC employee may not receive income in excess of the 15% limitation for services provided in a calendar year.²⁰

¹⁷ See Section VI, *infra*, for a further discussion of the rules related to editing and proofreading.

¹⁸ Both 5 C.F.R. § 2635.807(a)(2)(iv) and 5 C.F.R. § 2636.303(c) state that an employee "receives" compensation if it is paid (1) to another person on the basis of designation, recommendation, or other specification by the employee, or (2) with the employee's knowledge and acquiescence to his parent, sibling, spouse, child or dependent relative.

¹⁹ As of January 1, 2008, the rate of basic pay for Level II of the Executive Schedule was \$172,200. Fifteen percent of that amount is \$25,830.

²⁰ The 15% limitation is determined on a *pro rata* basis for an individual who becomes a CNC employee during a given calendar year. See 5 C.F.R. § 2636.304(b). In other words, a CNC employee may not receive more than 15% of the annual rate of basic pay for Level II of the Executive Schedule in effect on January 1 of the calendar

(continued)

For example, a CNC employee who signs a contract to write a book in 2008 that calls for a \$60,000 cash advance and 5% of the royalties from books sold, would be allowed to keep the royalties (regardless of the amount) because royalties are not considered "earned income." However, the CNC employee would be able to accept only \$25,830 of the advance because he is limited to receiving 15% of Level II of the Executive Schedule for writing in that calendar year.²¹

On the other hand, if the book contract makes clear that an advance is for writing that will occur in stages over more than one calendar year, a CNC employee may be able to accept a larger advance. For example, suppose a CNC employee entered a book deal to receive a \$60,000 advance payable in three installments (i.e. when the first draft of the manuscript was submitted; when the second draft was submitted; and when the final product was published), he could not receive two installments of \$20,000 (for a total of \$40,000) for two drafts completed in a single calendar year, because the two installments exceed the 15% limitation. Nor could he simply defer payment of the amount of the installments that exceeds the 15% limitation to the next calendar year. The 15% limitation applies to compensation attributable to the year in which the services were provided. However, in this scenario, the CNC employee could write the first draft in Year 1 and receive \$20,000; write the second draft in Year 2 and receive another \$20,000; and complete the book in Year 3 and receive the final \$20,000 installment.

year he becomes a CNC employee, divided by 365 days and multiplied by the number of days in which he serves as a CNC employee.

²¹ The 15% limitation applies to the aggregate of all outside earned income attributable to a calendar year and not just to income earned for writing. Therefore, an employee may only accept the full \$25,830 for writing attributable to a calendar year in which he has not received any other earned income attributable to that year.

One final important thing to remember about the 15% limitation is that most PA employees cannot receive any outside earned income during Government service, so the rules on how to apportion payments received for writing will not apply to them. In addition, a CNC employee who writes on a topic "related" to his duties as defined in section 2635.807, may not receive any earned income or compensation for the writing. Therefore, these rules on how to apportion payments for writing will apply to a CNC employee only if the writing is not related to his duties.

Table 1: Timing of Writing and Receipt of Compensation

If the writing occurs:	And if the compensation is received:	Then, under the Standards of Conduct § 2635.807 : PA & CNC Employees	Then, under the Outside Earned Income Ban: PA Employees	Then, under the 15% Outside Earned Income Limitation: CNC Employees
Before Gov't Service	Before Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit
Before Gov't Service	During Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit
Before Gov't Service	After Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit
During Gov't Service	Before Gov't Service*	1. Compensation barred if "related to official duties" 2. Compensation permitted if not "related to official duties"	1. Advance barred 2. Royalties permitted	1. Advance counts toward limit 2. Royalties do not count toward limit
During Gov't Service	During Gov't Service	1. Compensation barred if "related to official duties" 2. Compensation permitted if not "related to official duties"	1. Advance barred 2. Royalties permitted	1. Advance counts toward limit 2. Royalties do not count toward limit
During Gov't Service	After Gov't Service**	1. Compensation barred if "related to official duties" 2. Compensation permitted if not "related to official duties"	1. Advance barred 2. Royalties permitted	1. Advance counts toward limit 2. Royalties do not count toward limit
After Gov't Service	Before Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit
After Gov't Service	During Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit
After Gov't Service	After Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit

* The rules restricting receipt of compensation by Government employees for writing do apply to a book advance made prior to Government employment, if the payment is for a book to be written during Government employment. This is the case because the payment is conditioned on the performance of work during Government service.

** The rules do not apply, however, if the employee writes the book "on speculation". (See discussion in section III B, supra.)

Table 2: Timing of Contract, Writing and Compensation

If the employee signs the contract:	The writing AND compensation occur:	Then, under the Standards of Conduct § 2635.807 : PA & CNC Employees	Then, under the Outside Earned Income Ban: PA Employees	Then, under the 15% Outside Earned Income Limitation: CNC Employees
Before Gov't Service	After Gov't Service	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit
During Gov't Service	After Gov't Service***	Compensation permitted	Compensation permitted	Compensation doesn't count toward limit

*** A book based on a diary or notes kept while in Government service, however, is considered writing during Government service if the keeping of the diary or taking of the notes are done pursuant to an agreement to receive compensation for these services. (See discussion in section VI A, infra.)

IV. What is the Type of Compensation?

A. *Royalties vs. Advance Payments*

For book deals, the two most common types of payment are (1) royalties--a percentage of the proceeds from the sale of each book paid to the author from the publisher, and (2) an advance--an up front cash payment from the publisher to the author that is earned back through future sales.

Determining whether the employee will receive royalties and/or an advance for writing a book is important because royalties and advances from book deals are not treated the same under all ethics rules for CNC and PA employees. Under section 2635.807 of the Standards of Conduct both royalties and advances are treated as compensation.²² However, under the 15% limitation and the outside earned income ban, only advances are considered "compensation" and "earned income". Royalties are not considered "compensation" nor "earned income" under the 15% limitation or the outside earned income ban.²³

This distinction between royalties and an advance for the 15% limitation and the outside earned income ban is based on the concept that royalties are not "earned" income. More specifically, an employee with a royalty interest in a manuscript is deemed to retain a mere property right in the residual income stream, making it more akin to investment income than to earned income. Therefore, the income an author receives from book royalties does not fall within the concept of "earned income."²⁴

²² 5 C.F.R. § 2635.807(a)(2)(iii) ("compensation includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's . . . writing activities.")

²³ Specifically, outside earned income and compensation under the 15% limitation and the outside earned income ban mean wages, salaries, honoraria, commissions, professional fees and any other form of compensation for services other than salary, benefits and allowances paid by the United States Government. These terms do not include, among other things, copyright royalties and their functional equivalent. See 5 C.F.R. § 2636.303(b)(5); 5 C.F.R. § 2635.804(c)(1).

²⁴ See OGE Informal Advisory Opinions 82 x 18 (December 3, 1982), 83 x 4 (March 25, 1983), 89 x 17 (September 26, 1989), and 95 x 9 (July 21, 1995).

B. How to Apply the Distinction Between Royalties and Advances

The following examples illustrate how the distinction between advances and royalties affects the results in particular cases. Because royalties and advance payments are both considered compensation under section 2635.807, neither a CNC employee nor a PA employee at the National Institutes of Health (NIH) may receive a cash advance or royalties as compensation for writing a book during Government service that is related to his official duties. However, because book royalties are excluded from the definition of "earned income," a CNC employee as well as a PA employee may receive an unlimited amount of royalties for a book written during Government service, provided that the writing is not related to his official duties and all other ethics requirements have been satisfied.

In contrast, because an advance is considered "earned income," a PA employee may not accept any advance for writing a book during his Presidential appointment. For example, the General Counsel for the Department of Veterans Affairs, a PA employee appointed under 5 C.F.R. § 5315, may receive all royalties generated from a book written during his appointment concerning global warming. The book is not related to his official duties, and the royalties are not "earned income." He cannot, however, accept any advance for writing the book during his Presidential appointment because the advance is "earned income." A CNC employee may receive an advance worth up to 15% of the basic rate of pay for level II of the Executive Schedule in any calendar year to which the outside earned income from that book is attributable.

Depending on the terms of the contract, a CNC employee might be able to accept advances greater than the 15% limitation when an amount smaller than the 15% limit is attributable to any one calendar year. For instance, if a CNC employee in the Department of Education writes a diet book during Government service, he may accept all of the advance payments if the contract calls for a \$20,000 advance due upon signing the contract in 2008 and a \$20,000 advance payment in 2009 when the manuscript is completed. Because the payments are tied to bona fide events called for in the contract and these terms fall within the normal practice of the publishing industry for this type of book, the payments are "received" in the respective years in which they are paid and when the writing occurs. However, if this employee receives a one time \$40,000 advance in 2008 for the diet book that is not explicitly tied to bona fide benchmarks in the contract, the advance is attributable to 2008. Therefore, under the 15% limitation, the employee may only receive up to \$25,830 (i.e. 15% of the rate of basic pay for an EL-II in 2008) of the \$40,000 advance.

As mentioned above, the 15% limitation and the outside earned income ban also apply to agreements between a publisher and an employee to pay the employee in the future for writing that occurs during his Government appointment. See OGE Informal Advisory Opinion 82 x 18 (December 3, 1982). As an example, the Chief Financial Officer (CFO) at the Department of Health and Human Services is a PA employee who writes a book about collecting baseball cards. He cannot receive a \$20,000 payment after his Presidential appointment, if it was previously agreed that the publishing company would pay for writing that took place during his Presidential appointment (The CFO is able to receive an unlimited amount of royalties since the topic is not "related" to his duties). Finally, he will be unable to direct an advance of \$20,000 to the Major League Baseball Hall of Fame for writing that will occur during his Government appointment.²⁵

V. Who is Offering the Compensation and Why?

If, after answering the four previous questions, you have determined that an employee's receipt of compensation for writing is not prohibited, you should then consider the next questions: Who is offering the compensation and why? The analysis of these questions will be the same for CNC and PA employees.

A CNC or a PA employee is prohibited from receiving compensation for writing (including royalties) if he is asked to write a book, (1) by someone who will be substantially affected by the performance of his duties or (2) if the offer is extended primarily because of his official position rather than his expertise in the subject of the book.²⁶

²⁵ The 15% limitation and the ban apply, respectively, to both a CNC employee and a PA employee who "receives" an advance by directing that the payment for his book be made to a third party. 5 C.F.R. § 2636.303(c); See, OGE Informal Advisory Letter 89 x 17 (September 26, 1989).

²⁶ Specifically, section 2635.807 states that an employee may not receive compensation if, (1) the invitation or offer of compensation was extended by a person or entity who may be substantially affected by the performance of the employee's official duties; 5 C.F.R. § 2635.807(a)(2)(i)(C), or (2) the circumstances indicate that the invitation to write the book was extended to the employee primarily because of his official position, rather than his expertise in the subject; 5 C.F.R. § 2635.807(a)(2)(i)(B).

The first provision deals with the possibility that the public may question the integrity of a Government official who is being compensated for writing a book, based upon who made the offer. Normally the source of the offer to publish a book will be a publishing company, and the duties of most Government employees will not substantially affect a book publisher. Sometimes, however, this restriction may be relevant. For instance, an ethics official may need to consider section 2635.807(a)(2)(i)(C), if an employee at the National Institutes of Health signs a book deal with a publishing company that publishes a medical journal and, as part of his job, reviews articles for publication in the same journal.

The second provision deals with the possibility that the integrity of a Government official writing a book may be questioned based upon why the offer to write the book was made. It will often be difficult to determine the various motives behind an offer to a Government employee to write a book. In fact, it is almost always possible that a Government employee is extended an offer to write a book, at least in part, because of his official position. This can be true especially for CNC and PA employees who may have a higher profile than other Government employees.

Normally, a publishing company will offer a book deal to a Government employee who has a high level of expertise in, or knowledge about, a particular subject matter. Occasionally, a publishing company may ask an employee to write a book about a hobby or demonstrated interest of the employee. Generally, these situations will satisfy the requirements of section 2635.807(a)(2)(i)(B), because the book deal is offered primarily as the result of the employee's expertise or knowledge of a topic through personal experience, and not primarily because of his official position. If you are presented with a situation where an employee is asked to write a book on a topic about which he has no apparent knowledge or expertise, you should consult with OGE.

If after answering the previous questions you have determined that an employee is not barred from receiving compensation for the writing, you must still consider other ethics rules that may apply. These further considerations, outlined in the following section, are necessary because employees must always adhere to these additional requirements, some of which are not found in section 2635.807, the 15% limitation, or the outside earned income ban.

VI. What Other Ethics Rules and Considerations May Apply?

Once you have finished analyzing whether a particular employee may receive compensation for writing a book, you will still need to address a variety of miscellaneous issues, as described below. If you conclude that the employee may not receive compensation after

answering the previous questions, most of the following considerations will be moot because the employee will probably abandon his efforts to write during Government service. However, if you have decided that the employee is not precluded from receiving compensation, or if an employee decides to proceed with the writing without compensation, the following considerations will have to be addressed. Unless otherwise indicated, these restrictions apply in a similar manner to CNC and PA employees.

A. *Compensation for Writing Related Activities*

Employees may want to engage in a variety of activities associated with writing a book, apart from the original drafting of the written text. For example, an employee may edit or proofread a book, may keep diaries or notes during Government service intended for a later writing, or may have an opportunity to travel or speak to promote book sales.

The first section of the following discussion explains when these activities are, or are not, considered "writing" for which compensation is barred under section 2635.807. However, even when compensation is permitted under section 2635.807, a CNC or PA employee's receipt of payment for these activities must also be analyzed to determine whether the payment may be accepted under the 15% limitation or the outside earned income ban.

(i) Editing, Proofreading, & Diaries: What is Considered "Writing?"

OGE has drawn a distinction between substantive writing and editing that 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 change the meaning of the content of a writing or publication and therefore do not qualify as writing under section 2635.807.

Because updating or modifying the content of a book, such as a textbook, is considered writing, a CNC or a PA employee may not receive compensation under section 2635.807 for the update performed during Government service if the book is related to his official duties. Similarly, keeping diaries or notes during Government service to be used later as a basis for a book is considered "writing". Compensation for those activities performed during Government service is prohibited under section 2635.807, if

the diaries or notes are related to an employee's official duties. For example, a CNC employee may not accept compensation from a publishing company, after Government service, for a book based on a diary of his participation in agency meetings if the employee entered into an agreement either before or during his Government service to write a book for compensation based on the diary.

In contrast to section 2635.807, the 15% limitation limits the amount of outside earned income an employee may receive, while the ban prohibits receipt of all outside earned income for any activity performed during Government service including non-substantive proofreading. See 5 C.F.R. § 2635.804(a); 5 C.F.R. § 2636.303(b). For example, a CNC employee at the Securities and Exchange Commission who wishes to provide non-substantive proofreading and formatting services on a book he had previously written may receive, in any calendar year, only up to 15% of the annual rate of basic pay for an EL-II for these services. In addition, the Commissioner of Internal Revenue, a PA employee, may not receive any compensation for proofreading and formatting activities during his Presidential appointment because he is subject to the complete ban on outside earned income.

(ii) Travel Expenses & Speaking Fees

The definition of compensation for CNC employees and most PA employees under section 2635.807 does include, "travel expenses, consisting of transportation, lodgings or meals, incurred in connection with the . . . writing activity," 5 C.F.R. § 2635.807(a)(2)(iii)(D).²⁷ Therefore, a CNC or a PA employee is not

²⁷ See Sanjour v. EPA, 7 F. Supp. 2d. 14 (D.D.C. 1998), *on remand from*, Sanjour v. United States 56 F. 3d 85 (D.C. Cir. 1995). (Holding portion of 5 C.F.R. § 2635.807(a) unconstitutional that prohibits employees "who work below the grade level of the senior executive service" from accepting travel expenses in connection with "teaching, speaking, or writing [that] relates to . . . official duties . . ."); OGE Informal Advisory Opinion 98 x 19 (November 25, 1998) and 5 C.F.R. § 2635.807(a)(2)(iii)(D) (interpreting Sanjour to mean that the enforcement of the ban on travel expenses may only continue against senior executive branch officials who are CNC employees). Some PA employees in the White House appointed by the President do not meet the pay or position threshold to qualify as CNC employees. See 5 C.F.R. § 2636.303(a); 5 C.F.R. § 804(c)(2). Therefore, the definition of compensation under section 2635.807, as applied to these employees, does not include travel expenses.

allowed to accept travel expenses for speaking engagements promoting a book related to his official duties. In contrast, both the 15% limitation and the outside earned income ban exempt travel, meals and lodging expenses from the definition of "compensation."²⁸ As a result, both a CNC as well as a PA employee may accept travel, meals and lodging expenses incurred as actual and necessary expenses in connection with promoting a book unrelated to his official duties. Therefore, the ban does not prohibit a PA employee at the Department of the Interior, who writes a book about collecting baseball cards, from accepting payment of travel expenses from the Major League Baseball Hall of Fame for a speaking engagement promoting his book.

A CNC employee may only accept up to 15% of the annual rate of basic pay for an EL-II for other types of compensation, such as a speaker's fee, in connection with a book reading or presentation promoting a book regardless of whether the book is related to his official duties. A speaker's fee clearly constitutes compensation.²⁹ In contrast, a PA employee may not accept any compensation, such as a speaker's fee, in connection with these same activities regardless of whether the book is related to his official duties. Accordingly, the PA employee from the Department of the Interior described above cannot accept a speaker's fee from the Hall of Fame for his presentation promoting the book.

B. Supplemental Agency Regulations

Many agencies have supplemental regulations that require employees to obtain prior approval to engage in certain outside activities including writing. Some of these agencies' supplemental regulations may contain other provisions related to writing. Therefore, you should consult your agency's supplemental regulations before advising an employee whether he may receive compensation for writing a book.

²⁸ See 5 C.F.R. § 2636.303(b)(6) (exempting from the definition of "outside earned income," actual and necessary expenses paid or reimbursed by another person in connection with the outside activity.) (Example 2)

²⁹ See 5 C.F.R. § 2636.303(b); 5 C.F.R. § 2635.807(a)(2)(iii)(D) (Example 2).

C. Financial Conflicts of Interest

Under 18 U.S.C. § 208, an employee who receives royalties for a published book may not participate personally and substantially in a particular matter that would directly and predictably affect the sales of his book. In addition, if an employee who has a contract with a publisher participates personally and substantially in a particular matter that would directly and predictably affect the publisher's ability and willingness to pay what it promised under the contract, the employee's participation poses a conflict of interest under 18 U.S.C. § 208.

D. Impartiality/Catch-All

Once an employee enters into a book deal that complies with all other ethics provisions, the employee will have to recuse from Government matters involving his book publisher in order to avoid the appearance of loss of impartiality. 5 C.F.R. § 2635.502(a). An employee should not participate in a matter involving specific parties when someone with whom the employee has a "covered relationship" is a party to the matter, or represents a party to the matter, if a reasonable person would question his impartiality in the matter. In general, an employee who enters into a book publishing contract will be considered to have a "covered relationship" with that publisher under 5 C.F.R. § 2635.502(b)(1)(i).³⁰ Under this standard, for example, it is very likely that a reasonable person would question the impartiality of a PA or CNC employee who participates in an agency decision to use his outside publisher as the publisher of official agency reports.

E. Supplementation of Salary/Writing as Part of Official Duties

Unlike the prohibitions previously addressed in this summary, 18 U.S.C. § 209 does not contain prohibitions on receipt of compensation for personal writing; it restricts compensation for official writing. This criminal conflict of interest provision prohibits a CNC or PA employee from receiving a supplementation of his Federal salary as compensation for performing official duties from any source other than the United States. Therefore, if a

³⁰ An employee's book publisher will qualify as a "covered relationship" under 5 C.F.R. § 2635.502(b)(1)(i) because the publisher is "A person . . . with whom the employee has or seeks a business or contractual or other financial relationship that involves other than a routine consumer transaction."

CNC employee at the Internal Revenue Service, as part of his official duties, writes a manual instructing citizens how to fill out their tax returns, he may not accept any payment--whether a fee, an advance, or royalties--from a non-Government source in connection with publication of that book.

Not only does 18 U.S.C. § 209 prohibit a CNC or PA employee from accepting compensation for writing done as part of his official duties, 5 C.F.R. § 2635.807(a)(2)(i)(A) of the Standards of Conduct also prohibits such conduct.³¹ Therefore, under both provisions, a CNC or PA employee who writes a series of speeches, as part of his official duties, may not receive compensation for publishing a book consisting of a compilation of the speeches. See OGE Informal Advisory Letter 95 x 09 (July 21, 1995).

F. Misuse of Position

Subpart G of the Standards of Conduct prohibits an employee from misusing his official position. Specifically, this subpart prohibits:

- the use of public office for private gain,
- the use of official time, including a subordinate's time, to perform non-official duties,
- the use of Government property for unauthorized purposes, and
- the use of nonpublic information to further a private interest. See 5 C.F.R. §§ 2635.702 - 705.

These limitations apply even when an employee may otherwise receive compensation for writing a book unrelated to his official duties. For example, an employee may not write a book while on official duty. Likewise, he may not ask his subordinate to perform tasks on official time, such as typing or editing, in connection with this non-Government activity. 5 C.F.R. § 2635.705(b). Nor may an employee otherwise use Government equipment or supplies for work in connection with a personal writing project. 5 C.F.R. § 2635.704.

(i) Use of Nonpublic Information

³¹ Section 2635.807 incorporates the same prohibition on supplementation of salary contained in 18 U.S.C. § 209 by including in the definition of "related to official duties," those "activit[ies] undertaken as part of the employee's official duties," 5 C.F.R. § 2635.807(a)(2)(i)(A).

The Standards of Conduct contain two provisions relating to the use of nonpublic information³² in connection with writing. First, section 2635.703 prohibits the use of nonpublic information by an employee to further his own private interest or that of another. This prohibition applies regardless of whether compensation is received.

Second, section 2635.807 prohibits an employee from receiving compensation for a writing that is drawn substantially from nonpublic information or ideas. 5 C.F.R. § 2635.807(a)(2)(i)(D). This provision prohibits only the receipt of compensation, but it applies when the information conveyed through the writing is nonpublic information.

(ii) Appearance of Governmental
Sanction/Reference to Official Position

In addition to the prohibitions discussed above, an employee may not use or permit the use of his title or position in a manner suggesting that the Government sanctions or endorses his outside writing. See 5 C.F.R. § 2635.702(b); 5 C.F.R. § 2635.807(b). There is an exception, however, that permits an employee to include a reference to his title or position in connection with non-Government writing as one of several biographical details if that reference is not given more prominence than other significant biographical details. See 5 C.F.R. § 2635.807(b)(1). Thus, an employee may not use only his name and official title on the cover of a book, the book jacket, the title page or other promotional materials for the book because the reference to his official position would not be included with other biographical details.

The limits on use of official title and position also apply to promotional activities such as appearances on various media outlets or on promotional book tours.³³ For instance, a CNC employee at the

³²For the purpose of writing a book, "nonpublic information" referred to in 5 C.F.R. § 2635.807(a)(2)(i)(D), is defined at 5 C.F.R. § 2635.703(b). Nonpublic information is information that an employee gains by reason of Federal employment and knows or should know has not been made available to the general public. It includes information that: (1) is exempt from disclosure by statute, Executive order or regulation, (2) is designated as confidential by an agency, or (3) has not been disseminated to the general public and is not authorized to be made available to the public upon request.

³³ Sometimes a publishing company may ask a high-ranking Government official to participate in promotional book tours in
(continued)

Department of Education who wrote a novel prior to his Government service may not be introduced during a book signing or on TV or radio as the Deputy Assistant Secretary for Educational Affairs. See 5 C.F.R. § 2635.807(b). Such an introduction does not include the other biographical details required under the rule.

CONCLUSION

Once you have analyzed all of the six questions outlined in this summary you should be able to advise a CNC employee or a PA employee who asks you whether he may receive compensation for his writing. You should also be able to confidently advise the employee concerning whether any other ethics rules will limit his activities related to the writing.

The outline at the end of the summary contains the six questions discussed in the summary as well as a list of the citations to the various ethics rules applicable to answering these questions. It is a one page overview you can use as another tool in analyzing book deal questions when making a determination whether or not a CNC or PA employee may receive compensation for writing a book.

connection with a book written prior to Government service. These tours can pose additional concerns about use of public office for private gain. You should consult with OGE before authorizing the participation of high ranking officials in such tours.

Overview: Determining Whether a CNC employee or a PA Employee
May Receive Compensation for Writing a Book

I. Employee Category: CNC or PA

CNC: 5 C.F.R. § 2636.303(a)

PA: 5 C.F.R. § 2635.804(c)(2)

II. § 807 – “Related To Official Duties” What is the Book About? / Subject Matter Prohibitions

CNC & PA:

5 C.F.R. § 2635.807(a)(2)(i)(E)(1) & (2)

(E)(1) Matter in which employee assigned within previous year

(E)(2) Concerning any ongoing or announced policy, program or operation

CNC Only:

(E)(3) General subject matter area, industry, or economic sector

III. When is the Writing Performed and Compensation Received?

CNC & PA: 5 C.F.R. § 2635.807(a)(2)(iii) & (iv) - Standards of Conduct

CNC Only: 5 C.F.R. § 2626.303(b) & (c); § 2636.304(d) – 15% Limitation

PA Only: 5 C.F.R. § 2635.804(a) & § 2626.303(b) – Outside Earned Income Ban

– Under all these provisions receipt of compensation is usually attributable to the time the writing occurs, unless written solely on speculation during Government service

IV. What is the Type of the Compensation?

CNC & PA: 5 C.F.R. § 2635.807(a)(2)(iii) – (Standards of Conduct)- All forms of consideration

CNC & PA: 5 C.F.R. § 2635.804(c)(1) & 5 C.F.R. § 2626.303(b) – (15% Outside Earned Income Limitation and the Outside Earned Income Ban) - Most forms of consideration except royalties and actual and necessary travel expenses

Types of Compensation: Advance; Royalties; Travel Expenses; Speakers Fee, Honoraria & Other Compensation or Consideration

V. Who is Offering the Compensation and Why?

CNC & PA:

5 C.F.R. § 2635.807(a)(2)(i)(B) Invitation extended primarily because of official position

5 C.F.R. § 2635.807(a)(2)(i)(C) Invitation extended by person affected by employee’s duties

VI. Other Considerations

Compensation for Writing Related Activities; 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); 5 C.F.R. § 2635.802 (Conflicting Outside Employment & Activities)