United States
Office of Government Ethics
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August 28, 2007

The Honorable Edward M. Kennedy,
Chairman
The Honorable Michael B. Enzi,
Ranking Member
Committee on Health, Education, Labor and Pensions
United States Senate
644 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy,
Chairman
The Honorable Arlen Specter,
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Kennedy, Enzi, Leahy and Specter:

This responds to your letter of August 2, 2007. You requested an explanation of the basis for a recommendation, made by the Office of Government Ethics (OGE) in a 2006 Report submitted to Congress, that 18 U.S.C. § 209 be amended to permit employee participation in certain private sector incentive programs. See OGE, Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 37-38 (January 2006). Specifically, you inquire whether OGE recommended this amendment based on an understanding that "university-based loan repayment programs are in violation of the law" if the benefits are accepted by students going into service in the Executive Branch. I am pleased to provide the following explanation of the legal issue OGE sought to address in its recommendation, as well as examples of certain types of loan forgiveness benefits that are not likely to implicate section 209.

Section 209(a) generally prohibits an Executive Branch employee from receiving "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." The law plainly prohibits private contributions "made expressly for services rendered to the Government." H.R. Rep. No. 87-748, at 24-25 (1961).[1] Significantly, the law has never been limited to contributions by for-profit or commercial entities, but in fact the original impetus for the predecessor of section 209 was concern about the influence of certain philanthropic foundations over Government employees and the policies they shaped. See, e.g., Beth Nolan, Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials, 87 Nw. L. Rev. 56, 68-69 (1992).

The Report cited in your letter was issued pursuant to section 8403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 (December 17, 2004). As required by this provision, OGE conducted a "comprehensive review" of the criminal conflict of interest laws, "in consultation with the Attorney General of the United States." Section 209 is one of the criminal conflict of interest laws found in chapter 11 of title 18, United States Code.[2] The Report discussed several issues pertaining to section 209 and made two recommendations for amendments. See Report at 34-38.

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[1] Apart from a payor's expressed intent to compensate an employee for Government services, other factors also may indicate that a given payment or other benefit is intended as compensation for Government services, in violation of the statute. See OGE Informal Advisory Memorandum 02 x 4, at 10-17.

[2] Section 8403(d)(2) refers to sections 203, 205, 207, and 208 of title 18, but does not expressly mention section 209. Nevertheless, in order to perform a truly comprehensive study of the criminal conflict of interest statutes, OGE included a discussion of section 209 because this statute as well as sections 203, 205, 207, and 208 are "commonly referred to as the 'criminal conflict of interest statutes.'" Report at 1, n. 3.

The recommendation to which your letter refers is described in the Report as follows: "OGE recommends that Congress amend section 209 to permit the participation of Federal employees in private sector programs that offer inducement such as the repayment or forgiveness of student loans for those who enter Federal service." Id. at 37. The Report proposed certain criteria and procedures for approving acceptable programs, including review of specific programs by both OGE and the Office of Personnel Management. The proposal was intended, among other things, to "assist the recruitment and retention of qualified individuals into Government service," id. at 38, under circumstances that "would diminish the risk of the abuses that section 209 was designed to prevent," id. at 37.

Your letter asks whether OGE proposed this amendment because the agency considered such loan forgiveness programs to be a violation of existing law, notwithstanding the possible benefits to the Government from permitting employees to participate. The short answer is that OGE believed that some, but not necessarily all, student loan forgiveness programs may be inconsistent with the requirements of section 209. OGE believed that a statutory amendment would both resolve any legal doubts about certain programs that specifically target Federal employees, and also establish a standard set of procedures for approving such programs, consistent with Federal personnel recruitment and retention policies.

In view of concerns expressed in your letter, it may be helpful if I start by emphasizing that certain kinds of loan forgiveness programs do not raise concerns even under existing law. First, you indicate that many colleges and universities offer student loan repayment assistance to "graduates who take jobs making less than a certain minimum income." OGE does not believe that a loan assistance program based solely on income criteria would run afoul of section 209, provided that it was administered in a way that did not single out Executive Branch employees for favorable treatment. Benefits under such a program would not be conferred on any recipient specifically "as compensation for his services as an officer or employee of the executive branch of the United States Government," within the meaning of section 209(a).

Similarly, OGE is aware that some educational institutions may provide loan forgiveness benefits to alumni working in "public service" generally. Where such benefits are not limited to those entering Federal service – for example, if public service is broadly defined to include service in state and local government, educational, charitable or public interest organizations – the benefits are not intended specifically to supplement Federal salaries in violation of the statute. See OGE Informal Advisory Letter 85 x 11.[3]

OGE also would note that, under some circumstances, a loan forgiveness benefit may be permissible if it is not conditioned on the recipient's continued employment in the Executive Branch. Any benefit, including loan assistance, that is conferred unconditionally on an individual before he or she actually enters Federal service would fall outside the scope of section 209. See Crandon v. United States, 494 U.S. 152 (1990)(section 209 does not apply to unconditional pre-employment payments). Thus, for example, it may be possible for an educational institution to confer an unconditional benefit of one year's loan forgiveness on a graduating student before that individual is appointed as an Executive Branch employee, provided that the recipient is not thereafter obliged to continue in Federal service for any particular time period or fulfill any other conditions related to Federal employment.[4]

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[3] OGE also is aware of at least one fellowship program under which the educational institution actually pays a stipend and other benefits, in lieu of any Federal compensation at all, to graduates who serve for a year in the Federal Government. Such arrangements do not violate section 209 because the statute "does not apply to an officer or employee of the Government serving without compensation . . . or to any person paying, contributing to, or supplementing his salary as such." 18 U.S.C. § 209(c).

[4] OGE has been advised of at least one instance in which an educational institution, in consultation with an agency ethics office, has considered revising its loan forgiveness program so that benefits would be granted prior to the student entering

OGE has concerns, however, about some other types of arrangements. Most commonly, these concerns have arisen where an educational institution (or other non-Federal entity) has both (1) limited eligibility to those persons entering Federal service and (2) conditioned the benefit on the recipient's continued employment in the Federal Government for a specified time period. Under such programs, recipients may be obligated to repay loan forgiveness benefits in the event that they terminate Federal service prematurely. Under some programs, recipients who are already Federal employees are even eligible to renew their loan assistance benefits for additional periods of Federal service. Typically, the literature explaining such programs expressly states that the purpose of these benefits is to minimize the financial burden of serving in the Federal Government, which may not be as remunerative as other career options available to students.

Given the structure and express purpose of the latter type of programs, it is difficult for OGE to rule out the possibility that such benefits are intended to compensate the recipients for their services as Executive Branch employees. Moreover, on several occasions, OGE has consulted with the Department of Justice, which has expressed similar concerns.

OGE certainly does not question the importance of encouraging qualified students to consider a career in the Executive Branch. However laudable such motives may be, OGE would point out that Congress itself has created express exceptions on several occasions when it wanted to facilitate the recruitment and retention of qualified personnel by permitting non-Federal benefits under specific circumstances. For example, section 209(e) expressly exempts the payment of actual relocation expenses to participants in an executive exchange or fellowship program, subject to certain conditions. Similarly, section 209(g) exempts benefits paid by certain private sector organizations to persons who participate in the Information Technology Exchange Program. The statute also excepts certain awards and other items conferred by nonprofit organizations pursuant to the Government Employees Training Act. See 18

Government and would not be contingent on the individual completing any particular period of Federal service.

U.S.C. § 209(d). The presence of such exceptions indicates that OGE cannot read into the statute a more general exception for public-spirited programs intended to aid Federal recruitment and retention efforts. See, e.g., Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent").

For these reasons, therefore, OGE concluded that it should recommend an express amendment that could clarify the legal status of such programs and provide some measure of accountability and consistency with Federal personnel policy.

If you have any questions about this matter, please contact Susan Propper, Deputy General Counsel, at 202-482-9292.

Sincerely,

Robert I. Cusick
Director