



October 17, 2024
LA-24-12

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Shelley K. Finlayson
Acting Director

SUBJECT: Incoming Employees and Ongoing Interests in Representational Services:
Common 18 U.S.C §§ 203 and 205(a)(1) Issues and Solutions

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to provide guidance for incoming employees to the executive branch who may receive compensation for certain representational services provided prior to or during their Government service. The potential for such problematic payments arises most commonly for individuals who are leaving law firms to accept executive branch employment, and particularly for those who will receive a partnership share based on the firm's profits for the entire year, including the period when the individual is in Government service. However, the guidance below applies equally to other incoming executive branch employees who may expect to receive similar compensation for certain representational services, such as those leaving lobbying, consulting, or accounting firms.¹

This Advisory provides an overview of the elements of 18 U.S.C. § 203 followed by a review of commonly problematic payments under the statute and typical methods used to resolve these issues. The Advisory then provides an overview of the elements of 18 U.S.C. § 205(a)(1), identifies problematic payments, and offers solutions. Finally, attached to the Advisory are three job aids to assist in screening incoming employees for potential issues under these statutes; distinguishing the timing elements of the statutes; and identifying common problematic payments and solutions under 18 U.S.C. § 203.

Because a resolution for problematic payments under 18 U.S.C. §§ 203 and 205(a)(1) typically needs to be identified in advance of the incoming employee beginning Government service, OGE advises agency ethics officials to share the contents of this Advisory and associated

¹ Simply working for an organization that engages in representational services does not automatically raise concerns under 18 U.S.C. §§ 203 and 205(a)(1). Incoming employees leaving such organizations who merely receive a straight salary (i.e., they have no ownership interest, partnership share, bonus calculated as a share of the firm's profits, or outstanding contingency fee interests) are not the subject of this Advisory, as they generally would not be expected to receive problematic payments under 18 U.S.C. §§ 203 and 205(a)(1).



job aids with individuals in their agency who review resumes and can connect incoming employees to ethics officials prior to onboarding when necessary.²

I. Elements of 18 U.S.C. § 203: Compensation for Representational Services when the United States is a Party or has a Direct and Substantial Interest

As described further below, 18 U.S.C. § 203 is focused broadly on payment for representational services in certain particular matters in which the United States is a party or has a direct and substantial interest. Under the statute, an individual may not demand, seek, receive, accept, or agree to receive or accept **any compensation** for either their own representational services, or for those of another, when representational services are:

- rendered while the individual is a Federal employee;
- made on behalf of a third party; and
- for a particular matter before the U.S. Government or any court if the United States is a party or has a direct and substantial interest.³

Although “representational services” might be used to describe any array of activities involving a representative nature, such as legal services, 18 U.S.C. § 203 is only concerned with certain kinds of such services—namely, those involving communications or appearances made with the intent to influence on behalf of a third party conducted before the U.S. Government or any court if the United States is a party or has a direct and substantial interest. To describe the activities that are covered by the statute, this Advisory uses the term of art “representational services.”⁴

A. For Representational Services Rendered While the Individual is a Federal Employee

The restriction at 18 U.S.C. § 203 applies to compensation received for “representational services” *that are provided while the individual is an employee of the Federal Government*, regardless of who provides the services or when the individual receives the compensation.⁵ In other words, the statute prohibits receiving compensation, at any time, for services *performed* during the individual’s Government employment. As a practical matter, given other ethics restrictions—which generally prohibit employees from representing others before the

² See 5 C.F.R. § 2638.105(b). See also *Acceptance of Legal Fees by U.S. Att’y*, 6 Op. O.L.C. 602, 604 (Nov. 4, 1982) (“In our view it would be a good practice to question prospective employees specifically about any interests in contingent fees, whether or not the issue is raised in their reports.”).

³ See U.S. OFF. OF GOV’T ETHICS, CONFLICTS OF INTEREST CONSIDERATIONS: LAW FIRM OR CONSULTING EMPLOYMENT 3 (2024), [https://www.oge.gov/web/OGE.nsf/0/52C4153BD9632593852585B6005A1F8E/\\$FILE/Law%20Firm%20or%20Consulting%20Employment.pdf](https://www.oge.gov/web/OGE.nsf/0/52C4153BD9632593852585B6005A1F8E/$FILE/Law%20Firm%20or%20Consulting%20Employment.pdf).

⁴ OGE Inf. Adv. Op. 99x25, at 1 (Dec. 22, 1999). See also 5 C.F.R. § 2641.201(d)-(g).

⁵ OGE Inf. Adv. Op. 99x24, at 3 (Dec. 14, 1999).

Government⁶—it is usually compensation received for services provided by others during the individual’s Government service that will raise potential 18 U.S.C. § 203 issues.⁷

B. Representational Services Made on Behalf of a Third Party

Within the concept of “representational services” is the requirement that the communication be made on behalf of a third party, which typically involves a client relationship with the third party. Accordingly, communications an employee makes to represent themselves are not prohibited under the statute. However, this ability to represent oneself before the Government does not extend to the representation made on behalf of a distinct legal entity such as a limited liability company (LLC), even when that entity is formed by the employee and only consists of that employee.⁸

Representational services also include the concept of “intent to influence,” which is broadly defined to include communications to the Government where a potential for controversy exists.⁹ However, certain routine or ministerial communications, such as requesting publicly available documents, are not covered.¹⁰

C. Where the United States is a Party or has a Direct and Substantial Interest

Section 203 only applies to representations involving particular matters¹¹ *before the U.S. Government or any court, if the United States is a party or has a direct and substantial interest.* At times, it may be clear that the United States has a direct and substantial interest in a particular matter, based on information that can be easily obtained from the incoming employee or from publicly available information. For example, it would be obvious from the nature of litigation that the Government is a party to its antitrust action against Company Z. Other times, however, identification of a potential United States interest may require coordination with a component of the Government that has jurisdiction, subject matter expertise, or other statutory authority pertaining to the particular matter.¹²

⁶ See 18 U.S.C. § 205(a)(2). Additional authorities that may prohibit employees from representing others before the Government include: the other criminal conflict of interest laws in 18 U.S.C. ch. 11; the Standards of Ethical Conduct for Employees of the Executive Branch (5 C.F.R. part 2635); the limitations on receipt of outside earned income by covered noncareer employees (5 C.F.R. part 2636); and any applicable agency supplemental regulations.

⁷ While the focus of this Advisory is on incoming employees, outgoing employees are equally prohibited from receiving fees derived from representational services provided while they were employed with the Government. See, e.g., OGE Inf. Adv. Op. 99x24.

⁸ See OGE Inf. Adv. Op. 06x13, at 3-4 (Dec. 22, 2006); see also OGE Inf. Adv. Op. 86x9, at 3 (Aug. 8, 1986).

⁹ OGE has previously interpreted “intent to influence” under 18 U.S.C. § 203 consistent with the definition at 5 C.F.R. § 2641.201(e). In general, OGE relies on guidance regarding the post-Government employment restrictions at 18 U.S.C. § 207 and 5 C.F.R. part 2641 to interpret 18 U.S.C. § 203 where the same terms and concepts appear. See OGE Legal Advisory LA-20-08, at 2 n.5 (Oct. 22, 2020).

¹⁰ 5 C.F.R. § 2641.201(e). See also OGE Legal Advisory LA-20-08 (advising that submitting certain applications or forms, even on behalf of another person, does not involve an appreciable element of dispute and therefore does not amount to an intent to influence; however, subsequent actions could involve an intent to influence).

¹¹ The concept of “particular matter” is found in several different criminal statutes, including 18 U.S.C. § 208, 18 U.S.C. § 207, as well as 18 U.S.C. § 203 and 18 U.S.C. § 205. OGE has advised agencies it is appropriate to use the regulations at 5 C.F.R. part 2640 to understand the term “particular matter” as used in 18 U.S.C. § 203. See OGE Inf. Adv. Op. 06x9, at 4-9 (Oct. 4, 2006).

¹² See 5 C.F.R. § 2641.201(j)(2) for relevant factors in determining whether the United States is a party or has a direct and substantial interest.

D. Compensation in Exchange for Representational Services

The prohibition at 18 U.S.C. § 203 only pertains to compensation received “in exchange for” the provision of certain representational services.¹³ Where an organization does *not* provide representational services to third parties, but simply interacts with the Government to obtain Federal funding or approval for its own business purposes, 18 U.S.C. § 203 does not prohibit an employee from receiving the compensation resulting from interactions with the Government.¹⁴

II. Common Problematic Payments Under 18 U.S.C. § 203 and Solutions

This section addresses common compensation arrangements relating to representational services¹⁵ that can raise issues under 18 U.S.C. § 203, and identifies the typical methods used to resolve these issues. In particular, this section discusses: (1) partnership shares, fee sharing, and other profit-sharing arrangements; (2) contingency fee arrangements; and (3) closely held businesses. While recusal is a potential remedy for many ethics issues, ethics officials should note that recusal does not resolve issues under 18 U.S.C. § 203.¹⁶

As a starting point, 18 U.S.C. § 203 concerns can be resolved if, prior to assuming the duties of the Government position, the individual (1) receives all problematic payments or (2) divests or forfeits any interest in problematic payments. Beyond these universal solutions, incoming employees often have other options for resolving issues under 18 U.S.C. § 203, some of which are discussed below. Although these resolutions are not the exclusive means for resolving issues under the statute, OGE’s experience has shown these resolutions are typically the most acceptable to non-Federal employers and incoming employees, while also effectively removing the risk of receiving problematic income.¹⁷

A. Partnership Shares, Fee Sharing, and Profit-Sharing Arrangements

1. What are the issues raised by partnership shares, fee sharing, and profit-sharing arrangements?

Section 203 can be implicated by arrangements in which an employee shares in fees attributable to representational services that occur after they join the Government, even when the employee did not personally participate in the representational services. One common example is

¹³ OGE Inf. Adv. Op. 99x25, at 4-5 (Dec. 22, 1999).

¹⁴ *See id.*

¹⁵ As used in this Advisory, the term “representational services” refers to matters that meet several elements of 18 U.S.C. § 203, specifically: (1) matters involving communications or appearances made with the intent to influence on behalf of a third party, (2) conducted before the U.S. Government or any court, (3) if the United States is a party or has a direct and substantial interest. *See supra* Section I.

¹⁶ OGE Legal Advisory LA-23-15, at 7 n.25 (Dec. 20, 2023).

¹⁷ Although the focus of this Advisory is on prospective employees, note that 18 U.S.C. § 203(a)(2) also includes a payor offense that bars knowingly giving, promising, or offering any compensation for representational services rendered or to be rendered when the person to whom the compensation is given, promised, or offered is or was a Federal employee. As a result, employers should be equally incentivized to come to an agreement with their departing employees.

a partnership share where law firm partners receive a share of all firm profits from the year.¹⁸ Another example is a client referral fee that is based on a percentage of fees collected from the client. Similarly, employee bonuses that are calculated as a share of the firm’s profits—as opposed to, for instance, bonuses based on employee performance—may raise 18 U.S.C. § 203 issues if the firm engages in representational services.¹⁹

Example 1: An incoming employee to the Federal Government, Alex, is an equity partner in a law firm who is entitled to a certain percentage of the firm’s overall annual profits (partnership share). The law firm engages in representational services²⁰ and is compensated for those services. The law firm calculates and pays partnership share income each year in January based on profits for the preceding calendar year. Alex plans to leave their law firm on June 30 and begin Government service on July 1. The law firm’s standard method of calculating partnership share income would raise 18 U.S.C. § 203 concerns because the calculation would include profits from representational services performed during the six-month period after Alex left the firm and began Government service, from July 1 to December 31.

2. *How can issues relating to partnership shares, fee sharing, and profit-sharing arrangements be resolved?*

Incoming employees can resolve 18 U.S.C. § 203 issues arising from partnership shares, fee sharing, and profit-sharing arrangements by proactively fixing their compensation to exclude income from representational services rendered while they are in Government as shown in the following examples.

Example 2: Same facts as Example 1 involving Alex, an equity partner. The law firm agrees to calculate Alex’s partnership share prior to their start of Government service based on projected profits for the year, rather than using profits actually received during the year. The law firm plans to pay Alex the agreed-upon amount regardless of the accuracy of the projection. Because Alex’s partnership share will be calculated not based on services provided after they entered Government service, but instead on an estimate of the law firm’s annual profits made prior to beginning Government service, Alex’s partnership share does not include compensation from representational services provided while they were a Government employee and therefore avoids 18 U.S.C. § 203 issues.²¹

¹⁸ See OGE Inf. Adv. Op. 84x3, at 1-2 (Mar. 19, 1984); OGE Inf. Adv. Op. 99x24, at 3 (Dec. 14, 1999).

¹⁹ See OGE Inf. Adv. Op. 90x3, at 2 (Mar. 1, 1990) (explaining § 203 “would not prohibit you, for instance, from receiving a straight salary from the firm, but it would prohibit you from receiving any partnership distribution or bonus which was calculated in any part based upon the firm’s receipt of such fees”); OGE Inf. Adv. Op. 88x3, at 3 (Mar. 2, 1988); OGE Inf. Adv. Op. 99x24, at 3.

²⁰ See definition of “representational services” *supra* note 15.

²¹ See OGE Inf. Adv. Op. 99x24, at 5 (“Even though [the employees’] compensation has been determined on the basis of total projected firm income, with no set-off for projected fees from covered representational activities, their compensation level is truly fixed.”). Compensation fixed based on estimated billings rather than income actually received, which would be paid regardless of the accuracy of the estimate, is considered fixed for purposes of 18 U.S.C. § 203. *Id.*; see also OGE Inf. Adv. Op. 93x31, at 1 (Oct. 26, 1993) (noting that basing compensation on an estimate of firm billings, and paying the amount regardless of the accuracy of the estimate “would eliminate the central concern with section 203 that [] individuals not share specifically in any fees earned by the firm for representations to the Federal Government”).

Example 3: Same facts as Example 1 involving Alex, an equity partner. In recognition of the fact that Alex will only work half of the year at the law firm, the law firm offers to calculate Alex’s standard partnership share at the end of the year using the profits for the full year, but discount it by 50% to reflect that they only worked at the firm for half the year. The firm’s discount of the partnership share income by 50% **does not** resolve the 18 U.S.C. § 203 issues because the pool from which Alex’s partnership share is calculated will include profits from representational services made for the entire year, including the period while Alex is a Government employee. If, however, the law firm offers to calculate Alex’s partnership share using only the firm’s profits from January 1 to June 30, the half year before Alex became a Government employee, this offer would resolve the 18 U.S.C. § 203 issues because the pool from which Alex’s partnership share is calculated would not include profits from representational services made while Alex is a Government employee.

Example 4: Same facts as Example 1 involving Alex, an equity partner. The law firm agrees to exclude from Alex’s partnership share any profits arising from representational services provided after Alex leaves the firm that would be problematic under 18 U.S.C. § 203. Accordingly, for the period of July 1 to December 31, the law firm excludes any profits from problematic representational services and includes only profits from matters where the U.S. is not a party or does not have a direct and substantial interest in the pool from which Alex’s partnership share is calculated. This manner of calculating Alex’s partnership share resolves the 18 U.S.C. § 203 issues.

Example 5: Same facts as Example 1 & 4 involving Alex, an equity partner. Recognizing that Alex will receive a lesser partnership share because of the exclusion of problematic funds, the law firm offers to calculate Alex’s partnership share income using a “true up” formula that will grant Alex a larger percentage of partnership profits using the end-of-year calculation. This arrangement **does not** resolve issues under 18 U.S.C. § 203 because the law firm is increasing Alex’s partnership share to make up the disparity resulting from the exclusion of problematic funds.²²

B. Contingency Fee Arrangements

1. What are the issues raised by contingency fee interests?

In a contingency fee arrangement, an attorney or firm agrees that the payment and/or the amount of legal fees for a case will be contingent upon the successful outcome of the case.²³ OGE has long advised that 18 U.S.C. § 203 can be implicated by a Government employee having a continuing interest in a contingency fee arrangement where representational services are involved.²⁴ Even when an employee’s own work in the matter ends before beginning Government service, the employee’s continuing interest in the contingency fee arrangement

²² OGE Inf. Adv. Op. 84x3, at 1-2 (Mar. 19, 1984) (“[Y]ou and the other members of your firm must maintain a bookkeeping arrangement which segregates funds they receive for such representations from those in which you are eligible to share. They may not make up any resulting disparity so that you do not suffer any economic loss.”).

²³ See *Contingency Fee*, U.S. OFF. OF GOV’T ETHICS, PUB. FIN. DISCLOSURE GUIDE, https://www.oge.gov/web/278eGuide.nsf/Definitions#Contingency_Fee (last visited Sept. 12, 2024).

²⁴ See OGE Inf. Adv. Op. 99x20, at 1 (Nov. 3, 1999).

remains problematic because the right to payment remains uncertain until the case is resolved,²⁵ and the ability to receive payment and the amount of payment will depend on the resolution of the case as a whole. As such, a pending contingency fee case in which the United States is a party or has a direct and substantial interest will ordinarily raise 18 U.S.C. § 203 concerns for incoming Government employees because such cases typically involve ongoing representational services while the individual is in Government.²⁶

2. *How can issues relating to contingency fees be resolved?*

To avoid issues under 18 U.S.C. § 203, rather than accepting payment on a contingency fee basis, employees can adjust their fee to a sum certain that is not dependent on the outcome of the case.²⁷

Example 6: An incoming employee to the Federal Government, Casey, is an attorney on a pending case involving representational services.²⁸ Casey's law firm agreed to accept the case on a contingency fee basis, so the law firm and the attorneys on the case will receive payment from the client only if they are successful in the matter. The case is ongoing when Casey begins Government service. To avoid issues under 18 U.S.C. § 203, the law firm agrees to pay Casey based on the hours Casey worked on the case instead of the contingency fee. Because Casey's interest in the case has been reduced to a sum certain and is no longer contingent on the outcome of the case, this arrangement resolves the 18 U.S.C. § 203 issues.

Alternatively, an employee can assign their interest in a contingency fee, subject to certain requirements, to avoid issues under 18 U.S.C. § 203. Specifically, such an assignment must: (1) be executed and effective prior to the employee entering Government service; (2) be complete, unconditional, and irrevocable; (3) not be made to the employee's spouse, minor child, legal dependent, or household member; and (4) not permit the employee's involvement, after entering Government service, in determining the amount of the fee.²⁹

C. *Closely Held Businesses*

1. *What are the issues raised by closely held businesses?*

Incoming employees who have an interest in businesses that engage in representational services—including through ownership of an LLC, acting as a partner in a business partnership, being the sole proprietor of a business, or holding an ownership share of a privately held company—may encounter issues under 18 U.S.C. § 203.

²⁵ Contingent cases are not considered resolved until they are fully resolved (e.g., the parties have no remaining administrative remedies or all appeals have been exhausted, among others).

²⁶ OGE Inf. Adv. Op. 99x20, at 1.

²⁷ *Acceptance of Legal Fees by U.S. Att'y*, 6 Op. O.L.C. 602, 603 (Nov. 4, 1982) (explaining that, to avoid the prohibition in 18 U.S.C. § 205 when a Government employee has previously represented a party in a contingency fee case, the Department of Justice “routinely recommends” that attorneys collect a sum certain before entering Government service); see also OGE Inf. Adv. Op. 99x20, at 2.

²⁸ See definition of “representational services” *supra* note 15.

²⁹ OGE Inf. Adv. Op. 99x20, at 2-3.

Example 7: An incoming employee to the Federal Government, Taylor, owns a single-member LLC that provides accounting consultation services. The LLC has a team of accountants that is currently representing several clients before the Internal Revenue Service. Although not personally participating in these representations, Taylor’s ownership of the LLC—which receives income for representational services of the accountants³⁰—is problematic under 18 U.S.C. § 203.

2. *How can issues relating to closely held businesses be resolved?*

To resolve 18 U.S.C. § 203 issues arising from ownership of a business that engages in representational services, employees should divest their interest in the business in advance of assuming the duties of their position. Incoming employees should be advised that to fully resolve 18 U.S.C. § 203 issues, the business sale agreement may not include adjustments based on representational services provided after commencing Government service.³¹

Example 8: Same facts as Example 7 involving Taylor, owner of a single-member LLC. Taylor has decided to sell the LLC to avoid violating 18 U.S.C. § 203. Prior to assuming the duties of their position, Taylor sells the business to an accounting firm. The sale agreement contains an earnout provision that provides Taylor with a certain percentage of the business’s revenue if the business reaches defined profit thresholds in each of the subsequent three years. Although Taylor is selling the LLC, because the earnout provision may allow Taylor to partake in income generated by representational services through the business after Taylor begins Government service, the sale agreement **does not** resolve the 18 U.S.C. § 203 issues.

Example 9: Same facts as Example 7 involving Taylor, owner of a single-member LLC. Taylor has decided to sell the LLC to avoid violating 18 U.S.C. § 203. Prior to assuming the position, Taylor sells the business to an accounting firm for a fixed sale price. **This arrangement resolves** the 18 U.S.C. § 203 issues.³²

III. Compensation for Prosecuting a Claim Against the United States Under 18 U.S.C. § 205(a)(1)

When screening incoming employees with ongoing interests in payments for representational services, agency ethics officials should primarily look to 18 U.S.C. § 203 to determine whether the employees may accept such compensation upon entering Government service. However, some incoming employees who have personally engaged in a narrow subset of work representing clients in prosecuting a claim against the United States will also need to be advised on the claims provision of 18 U.S.C. § 205(a)(1).

³⁰ See definition of “representational services” *supra* note 15.

³¹ See OGE Legal Advisory LA-23-15, at 7 (Dec. 20, 2023).

³² However, if the sale of the business were secured by a note that permitted the business to revert back to Taylor in the event of default, this would not solve the 18 U.S.C. § 203 issues, as Taylor could potentially reacquire the business from which they need to divest. See OGE Legal Advisory LA-23-15, at 7-8.

A. Distinguishing 18 U.S.C. § 205(a)(1) from 18 U.S.C. § 203

Although 18 U.S.C. §§ 205(a)(1) and 203 both restrict compensation for representational services, these statutes contain key differences. One important point of distinction relates to the element of timing. As explained above, 18 U.S.C. § 203 applies to compensation for *representational services that are provided while an individual is a Government employee*. In contrast, the claims provision of 18 U.S.C. § 205(a)(1) applies *when a payment for representing a third party in prosecuting a claim against the United States is made while an individual is a Government employee*.

As a general matter, issues concerning 18 U.S.C. § 205(a)(1) tend to arise less frequently than those under 18 U.S.C. § 203. First, the 18 U.S.C. § 205(a)(1) restriction itself is narrower in scope, applying only to “claims against the United States,” described in more detail below, while 18 U.S.C. § 203 is concerned more broadly with particular matters in which the United States is a party or has a direct and substantial interest. Second, for 18 U.S.C. § 205(a)(1) to apply, the employee had to have *personally assisted* in the prosecution of the claim on behalf of the third party. In contrast, 18 U.S.C. § 203 is also applicable to situations in which the employee receives payments for representational services provided by others. For these reasons, it is OGE’s experience that incoming employees are less likely to have problematic payments under 18 U.S.C. § 205(a)(1) simply because it covers a smaller universe of activity and compensation arrangements.

B. Elements of 18 U.S.C. § 205(a)(1)

While 18 U.S.C. § 205 contains several distinct offenses, for purposes of incoming employees and this Advisory, the focus is on the second clause of 18 U.S.C. § 205(a)(1), which contains the claims provision.³³ Under clause two of 18 U.S.C. § 205(a)(1), an employee is prohibited from:

- receiving any gratuity or any share of or interest;
- in consideration of assistance;
- provided by the employee to a third party;
- in the prosecution of a claim against the United States.

The definition of what qualifies as the prosecution of a claim against the United States is a narrow one. The courts have said these claims are limited to money or property.³⁴ Therefore, a lawsuit to compel an agency to issue or rescind a regulation, or to interpret a statute in a particular way, would not be a “claim against the United States.” However, a challenge to a Federal employment action that includes a request for monetary relief would constitute a “claim against the United States.”³⁵

³³ For more on 18 U.S.C. § 205(a)(2), see OGE Legal Advisory LA-20-08 (Oct. 22, 2020); OGE DAEOgram DO-07-015 (May 17, 2007); and OGE Inf. Adv. Op. 04x12 (Sept. 9, 2004). OGE has very little practical experience applying the restrictions contained in the first clause of 18 U.S.C. § 205(a)(1), which are nearly always subsumed by the restrictions contained in 18 U.S.C. § 205(a)(2).

³⁴ *United States v. Bergson*, 119 F. Supp. 459, 465 (D.D.C. 1954).

³⁵ *Att’y’s Fees for Legal Serv. Performed Prior to Fed. Emp.*, 23 Op. O.L.C. 42, 45-48 (Feb. 11, 1999); *see also Acceptance of Legal Fees by U.S. Att’y*, 6 Op. O.L.C. 602, 603 (Nov. 4, 1982) (discussing what might constitute a claim against the United States).

Example 10: The Department of Energy has identified Ryan as its top candidate for a GS-14 opening in the Office of General Counsel, General Law Division. Ryan is a sole practitioner who specializes in Federal employment law. In the last year, Ryan has been working on an ongoing Federal employment case challenging the separation of their client from the Department of Commerce. Ryan's retainer agreement provides that Ryan will receive attorney's fees that the client might recover from the Government if they prevail on the unlawful separation claim. As a Government employee, Ryan could not accept these attorney's fees given in consideration of assistance in the prosecution of a claim against the United States under 18 U.S.C. § 205(a)(1).

C. Common Problematic Payments and Solutions Under 18 U.S.C. § 205(a)(1)

Incoming employees who expect to receive payment for services they provided in consideration of assistance in the prosecution of a claim against the United States should be advised that these payments need to be reduced to a fixed amount (not a percentage of the recovery) or received in advance of assuming the duties of their Government position. Just like in the context of 18 U.S.C. § 203, recusal is not a potential remedy for 18 U.S.C. § 205(a)(1) concerns. However, unlike 18 U.S.C. § 203, because the claims provision of 18 U.S.C. § 205(a)(1) is focused on the timing of the payment, the employee must either fix or receive the payment before Government service or forfeit the money to avoid criminal liability.

IV. Conclusion

The restrictions on receipt of compensation for representational services can raise complicated issues that typically need to be identified and resolved prior to an individual beginning Government service. As a best practice, ethics officials are encouraged to have an open line of communication with the managers engaged in the hiring process who could flag resumes for follow up with the ethics office. If the agency routinely hires individuals likely to be engaged in professions that may raise issues under 18 U.S.C. §§ 203 or 205(a)(1), it may also be prudent to consider adding cautionary language into the vacancy announcements or conditional offer letters to put potential hires on notice early in the process that certain ongoing compensation arrangements may be problematic and require resolution prior to onboarding.

Agency ethics officials who have questions about this Legal Advisory may contact their OGE Desk Officer.

Attachments



Sample Screening Questions:

Incoming Employees Leaving Firms that Provide Representational Services

Below is a list of sample questions to assist in screening incoming employees for payments that might implicate 18 U.S.C. §§203 and 205(a)(1) to help identify who should receive additional ethics guidance.

Has the incoming employee worked for:

- A law firm?
- A lobbying firm that lobbies the Federal Government?
- A consulting firm or accounting firm? If yes, consider:
 - Does the firm work with the Federal Government on behalf of clients?
 - Does the firm provide the Federal Government with reports involving an appreciable element of dispute or intent to influence the Government?

If yes, consider:

1. Does the incoming employee have any ownership interest in the company/firm?
 - Examples include, but are not limited to, partnership share, partnership units, or a capital account.
2. Is the incoming employee owed client referral fees?
3. Is the incoming employee owed a bonus calculated as a share of the firm's profits?

If the answer to both sets of questions is yes, consider 18 U.S.C. §§ 203 and 205(a)(1).

The following screening questions are intended only for incoming attorneys:

1. Does the incoming attorney have an ongoing contingency fee arrangement? If yes, consider:
 - Is the contingency fee arrangement for representational services provided before the U.S. Government or any court where the United States is a party or has a direct and substantial interest in the particular matter?
 - Whether the United States has a direct and substantial interest is based on a variety of factors and is not limited to those particular matters where a Federal statute is at issue or involving a Federal court.
2. Does the incoming attorney anticipate receiving compensation during their Government service for work performed prior to Government service in assisting in the prosecution of a claim against the United States?
 - The prosecution of a claim against the United States generally includes claims for money or property (e.g., a petition to the Merit Systems Protection Board for attorney's fees).

If the answer to any of the above is yes, consider 18 U.S.C. §§ 203 and 205(a)(1).



Timing of Services & Compensation:
Incoming Employees Leaving Organizations that Engage in
Representational Services

When the representational services are provided	And the compensation is received	Then, under §203
Before Government employment begins	Before Government employment begins	Compensation is permissible
Before Government employment begins	During Government employment	Compensation is permissible
During Government employment <i>personally* or by another individual</i>	During Government employment	Compensation is prohibited
During Government employment <i>personally* or by another individual</i>	After Government employment ends	Compensation is prohibited
After Government employment ends	After Government employment ends	Compensation is permissible
When the employee provides assistance in the prosecution of a claim against the U.S.	And the compensation is received	Then, under §205(a)(1)
Before Government employment begins	Before Government employment begins	Compensation is permissible
Before Government employment begins	During Government employment	Compensation is prohibited
During Government employment**	During Government employment	Compensation is prohibited
After Government employment ends	After Government employment ends	Compensation is permissible

* An employee is prohibited from personally engaging in this type of activity under 18 U.S.C. § 205(a)(2), whether compensated or uncompensated, unless allowed by an exception. Thus, it is services provided by others during the employee's Government service that are most likely to raise potential 18 U.S.C. § 203 issues for incoming employees.

** This type of activity is prohibited under 18 U.S.C. § 205(a)(2), whether compensated or uncompensated, unless allowed by an exception.



Common Problematic Payments & Solutions: 18 U.S.C. § 203

Partnership Shares, Fee Sharing, and Profit-Sharing Arrangements

Arrangements in which an employee shares in fees attributable to representational services, including:

- Fee sharing arrangements (e.g., partnership share)
- Client referral fees
- Bonuses calculated as a share of a firm's profits

OGE 84x3; OGE 85x3; OGE 88x3; OGE 90x3; OGE 99x24

Arrange for payments not to be based on representational services that are provided after assuming duties

Forfeit prior to assuming duties

Transfer interests to another prior to assuming duties

Closely Held Businesses

Business ownership where the business collects fees for representational services

OGE 89x7

Sell prior to assuming duties; sale price cannot be tied to future representational services

Divest prior to assuming duties
OGE LA-23-15

Contingency Fees

Arrangements where an attorney or firm agrees that the payment and/or the amount of legal fees for a case will be contingent upon the successful outcome of the case

Assign interest, subject to certain requirements
OGE 99x20

Adjust fee to sum certain that is not dependent on the outcome of the case
OGE 99x20

Forfeit prior to assuming duties