

**Book Deal DAEOgram  
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**Part I:**  
**BOOK DEALS INVOLVING REGULAR EMPLOYEES**  
**AND SPECIAL GOVERNMENT EMPLOYEES**

**INTRODUCTION**

This summary provides a template for analyzing whether regular employees and special Government employees (SGEs) may accept compensation for writing a book during Government service. The primary authority limiting payment to these employees for writing a book is found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. § 2635.807.

Section 2635.807 prohibits an employee from receiving compensation for teaching, speaking or writing that is related to the employee's official duties. Regular employees are subject to somewhat broad prohibitions under section 2635.807 while SGEs are subject to similar, but less restrictive prohibitions. It is important to note that, although section 2635.807 contains a broad prohibition against the receipt of compensation for writing that relates to an employee's official duties, it does not bar any employee from writing on any subject. It prohibits only the receipt of compensation for that activity.

To analyze whether an employee may receive compensation for writing a book, you 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 the employee may receive compensation for writing, and whether any other ethics rules will limit his 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 depending 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 regular employees and SGEs. The following discussion explains how these two categories are defined for purposes of this summary. Please keep in mind that status as an employee is not affected by leave status or, in the case of an SGE, by the fact that the individual does not perform official duties on any given day. 5 C.F.R. § 2635.102(h). Also, the term "employee" includes officers but not enlisted members of the uniformed services. 5 C.F.R. § 2635.102(h).

*A. Regular Employees*

For the purpose of analyzing book deal compensation issues, "regular employees" are all executive branch employees who are not (1) SGEs under 18 U.S.C. § 202(a), (2) covered noncareer employees under 5 C.F.R. § 2636.303(a), nor (3) employees appointed by the President to a full-time noncareer position described under 5 C.F.R. § 2635.804(c)(2). The most typical example of a regular employee is a full-time career employee who is a GS-15 or below, or a career member of the Senior Executive Service (SES) or SES-type system.

*B. Special Government Employees*

Special Government employees are those executive branch officers or employees specified in 18 U.S.C. § 202(a). See also 5 C.F.R. § 2635.102(l). In general, an SGE is one who is retained to work temporarily for the Government for no more than 130 days in any 365-day period. An SGE might or might not be paid for his work and he can work either full-time or on an intermittent basis. A typical example of an SGE employee is an expert in private industry who is appointed to perform duties as a member of an advisory commission for a Government agency that meets a few times a year.

Once you have determined that the type of employee seeking compensation for a book deal is either a regular employee or an SGE, you must decide which ethics rules and laws apply to him. The

following questions will help you pinpoint the relevant ethics provisions, and explain how they apply.

## II. What is the Book About?

Now that you have decided that the employee in question is a regular employee or an SGE, the next important question is whether the subject matter of the book is related to the employee's official duties. The answer to this question is vital because regular employees as well as SGEs are prohibited from receiving compensation for writing a book that is related to their official duties. Regular employees as well as SGEs generally will be allowed to receive compensation if a book is unrelated to their official duties.

Section 2635.807(a) of the Standards of Conduct describes six ways in which a book may be considered related to a regular employee's or SGE's official duties. See 5 C.F.R. § 2635.807(a)(2)(i)(A)-(E)(1),(2) and (4). If the employee's writing falls within any one of these six categories, then usually the employee may not receive compensation for the writing.

The six restrictions can be divided into two main classifications. First, a book may be related to an employee's official duties based on its subject matter. These criteria will be discussed in this section. Second, the book may be considered related to an employee's official duties based on who is providing the compensation and why. These factors are addressed in Section V of this summary. In an attempt to strike the proper balance between ensuring that individuals are not unnecessarily deterred from Government service, while at the same time promoting the integrity of public service, the definition of "related to" is moderately broad for regular employees, and is narrower for SGEs.

### *A. Regular Employees and Subject Matter Prohibitions*

A regular employee generally is prohibited from accepting compensation for writing a book about matters on which he works, or about agency policies, programs and operations. 5 C.F.R. § 2635.807(a)(2)(i)(E)(1) and (2). Specifically, these two subject matter categories of section 2635.807 state that an employee may not receive compensation if:

- the subject of the activity 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 of the activity deals in significant part with any ongoing or announced policy, program or operation of the employee's agency.<sup>1</sup> 5 C.F.R. § 2635.807(a)(2)(i)(E)(2).

(i) Matters to which a regular employee is or has been assigned

Because the first provision above applies to *any matter* to which the employee is assigned or has been assigned during the past year, the factual analysis under this category is often straightforward.<sup>2</sup> Under this first restriction, for example, a regular employee at 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).

(ii) Ongoing or announced policy, program or operation of agency

Analysis of this second category is not always so straightforward. Employees may not receive compensation for writing about substantive core programs and operations of the agency that fulfill the agency's mission.<sup>3</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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>.

<sup>3</sup> "Agency programs or operations" do not include work that agencies perform that is not related to an agency's core mission. Examples of such work include responding to Freedom of Information Act requests or dealing with personnel disputes. See 5 C.F.R. § 2635.807(a)(2)(i) (Example 5). 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 for determining whether a particular topic may be related to an ongoing or announced policy, program, or operation of the

(continued)

However, 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) (Examples 3 and 4); OGE Informal Advisory Letter 01 x 07. Applying this general principle, a regular employee who works at NASA may receive compensation for writing a textbook on the general subject of aeronautics because the topic of aeronautics is not inherently an agency program or operation. However, if the book specifically focuses on NASA's space shuttle program, 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.

In addition, in order for the book to be within the "agency programs" category of prohibitions, the writing must deal *in significant part* with agency policies, programs or operations. See 5 C.F.R. § 2635.807(a)(2)(i) (Example 2); OGE Informal Advisory Letter 01 x 07. Therefore, the NASA employee described above could receive compensation for writing a book on aeronautics containing a single chapter discussing aspects of the space shuttle program, provided that the information described is available to the public.

*B. Special Government Employees and  
Subject Matter Prohibitions*

Although most of the restrictions listed in section 2635.807 apply in the same manner to regular employees and SGEs, prohibitions based upon the subject matter of the book are less restrictive when applied to SGEs. OGE adopted narrower restrictions for SGEs because of the concern that highly qualified individuals in the private sector would be disqualified from serving on Government boards and panels, particularly on those dealing with scientific or technical subject matter.<sup>4</sup> Therefore, an SGE is the type of employee least likely to be prohibited from receiving compensation for a book solely because of the subject matter of the book.

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employee's agency, see OGE Informal Advisory Opinions 01 x 07 (August 10, 2001) and 01 x 10 (November 13, 2001).

<sup>4</sup> See Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35,5005, 35,038 (1992).

(i) Matters to which an SGE is  
or has been assigned

The section of 2635.807 dealing with SGEs stipulates two ways in which its application differs from its application to regular employees. First, SGEs who work more than 60 days during any year of their appointment are prohibited from accepting compensation for any writing that deals to a significant degree with the matters they are working on for the Government during their current appointment. 5 C.F.R. § 2635.807(a)(2)(i)(E)(4); 5 C.F.R. § 2635.807(a)(2)(i)(E)(1). This means, for example, that an SGE could write and receive compensation for a book if the book was written about a matter to which he was assigned six months ago, provided he is no longer working on the matter and he is currently serving under a new appointment.

Second, SGEs who have served, or expect to serve, 60 or fewer days in each year during their appointment are subject to an even narrower prohibition. For these SGEs, the subject matter limitation applies only with respect to particular matters involving specific parties in which the SGE is personally and substantially involved. 5 C.F.R. § 2635.807(a)(2)(i)(E)(4); 5 C.F.R. § 2635.807(a)(2)(i)(E)(1).<sup>5</sup> Thus, a Commissioner on the Marine Mammal Commission, who served less, or is expected to serve less, than 60 days during each year of his appointment, could accept compensation for writing a book concerning methods to protect whales from the effects of underwater sonar, a project to which he is assigned. The Commissioner may receive the compensation because the particular matter he works on does not involve specific parties. See 5 C.F.R. § 2635.807(a)(2)(i) (Example 7). If, however, the Commissioner served more than 60 days in any one year during his appointment, then he would not be allowed to receive compensation for writing this book. See 5 C.F.R. § 2635.807(a)(2)(i)(E)(4); 5 C.F.R. § 2635.807(a)(2)(i)(E)(1).

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<sup>5</sup> The term "particular matter involving specific parties" is defined at 5 C.F.R. § 2635.807(a)(2)(v) to have the meaning set forth in 5 C.F.R. § 2637.102(a)(7) and more specifically at 5 C.F.R. § 2637.201(c). See also DAEOgram DO-06-029, <http://www.usoge.gov/pages/daeograms/2006daeolist.html> (definition focuses primarily on specific parties). The term "personal and substantial" participation is defined at 5 C.F.R. § 2635.807(a)(2)(vi) to have the meaning set forth in 5 C.F.R. § 2635.402(b)(4).

(ii) Ongoing announced policy, program  
or operation of agency

Special Government employees are not subject to the prohibition on compensation for writing that deals in significant part with any ongoing or announced policy, program or operation of the employee's agency. See 5 C.F.R. § 2635.807(a)(2)(i)(E)(2); 5 C.F.R. § 2635.807(a)(2)(i)(E)(4). In other words, an SGE generally may receive compensation for writing that deals in significant part with an ongoing or announced policy, program or operation of his agency provided he is not assigned to the matter. For example, an SGE working for the National Science Foundation (NSF) may accept compensation for writing a book about an NSF program to study beach erosion, if the employee is not assigned to work on the matter during his current appointment. See 5 C.F.R. § 2635.807(a)(2)(i) (Example 8).

Once you have analyzed the subject matter of the proposed book, you will have to decide whether the employee is barred from receiving compensation because the subject matter is related to his duties, as described above. If you conclude that the subject matter falls within one of the categories described in section 2635.807(a)(2)(i)(E), the employee may be barred from receiving compensation, depending on when he writes the book and the form of compensation he receives, as discussed in Sections III and IV. If the subject matter of the book is not related to his duties under section 2635.807(a)(2)(i)(E), he may be able to receive compensation, depending on the answers to the questions in Section V. And in any event, an employee must always adhere to the requirements in Section VI, whether he receives compensation or not.

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

*A. Introduction*

You must analyze the timing of the writing and the receipt of compensation under section 2635.807 if you have determined that an employee's writing is related to his official duties. If a regular employee writes a book unrelated to his official duties, the timing of the writing and receipt of compensation will not change your decision that the employee may accept compensation. In contrast, if the same employee writes a book related to his official duties before, during or after Government service, the timing of the writing could affect whether he may accept the compensation.



Timing issues can 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 applies is when a regular employee or an SGE 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 a couple 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; and
- 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.

This section of the summary outlines the application of these rules. The section also contains two tables that provide a summary of how the possible combinations of the timing of the writing and receipt of compensation affect whether compensation is barred under section 2635.807.

#### *B. When does the writing occur?*

Section 2635.807 applies to an individual while he serves as a Government employee. Therefore, each provision contained in section 2635.807 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 in section 2635.807 will bar a regular employee or an SGE who writes a book before entering Government from receiving compensation for the book while he is an

employee.<sup>6</sup> Similarly, a former regular employee or an SGE, 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 regular employee or an SGE 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 provisions in section 2635.807. 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 provisions in section 2635.807, provided he does not, during Government service, receive compensation or have an agreement to receive compensation.<sup>7</sup>

*C. When is the compensation received?*

Generally, section 2635.807 will not apply to a regular employee or an SGE 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 provisions if he enters into an agreement after Government service to publish the book.

Nevertheless, there are several situations where section 2635.807 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

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<sup>6</sup> An employee may receive compensation, such as an advance and 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.

<sup>7</sup> See Section VI, infra, for a discussion of the rules relating to diaries and notes kept during Government service.

while an employee, he has "received" compensation while a Government employee.<sup>8</sup>

Second, a regular employee or an SGE 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 subsequently begins 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 and then is asked by the publisher to update or edit the book while he is serving in the Government.<sup>9</sup> To comply with the applicable rules, a regular employee or an SGE 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.

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<sup>8</sup> 5 C.F.R. § 2635.807(a)(2)(iv) describes 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.

<sup>9</sup> See Section VI, infra, for a further discussion of the rules related to editing and proofreading.

Finally, a regular employee or an SGE cannot circumvent the restrictions in section 2635.807 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.<sup>10</sup>

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<sup>10</sup> 5 C.F.R § 2635.807(a)(2)(iv) states that an employee "receives" compensation if it is paid (1) to another person, including a charitable organization, 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.

TABLE 1: Timing of Writing and Receipt of Compensation

<b>If the writing occurs:</b>	<b>And if the compensation is received:</b>	<b>Then, under the Standards of Conduct § 2635.807 :</b>
Before Gov't Service	Before Gov't Service	Compensation permitted
Before Gov't Service	During Gov't Service	Compensation permitted
Before Gov't Service	After Gov't Service	Compensation permitted
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"
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"
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"
After Gov't Service	Before Gov't Service	Compensation permitted
After Gov't Service	During Gov't Service	Compensation permitted
After Gov't Service	After Gov't Service	Compensation permitted

\* Section 2635.807 applies to a book advance made prior to Government employment, if the payment is for a book to be written during Government employment. Because the payment is conditioned on the subsequent performance of work after Government appointment, the receipt is not completed prior to employment.

\*\* Section 2635.807 does not apply, however, if the employee writes the book "on speculation," without any agreement to receive compensation for the writing that occurs during Government service. (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 :
Before Gov't Service	After Gov't Service	Compensation permitted
During Gov't Service	After Gov't Service***	Compensation permitted

\*\*\* Section 2635.807 applies, however, if a book is based on a diary or notes kept while in 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?

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.<sup>11</sup> Both royalties and an advance qualify as "compensation."<sup>12</sup> For example, neither a regular employee nor an SGE employed by 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.<sup>13</sup>

Because the definition of compensation, for a regular employee and an SGE, does not 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),<sup>14</sup> either

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<sup>11</sup> Distinctions between an advance and royalties are generally relevant to the rules for employees appointed by the President to a full-time noncareer position and covered noncareer employees. Such distinctions are not relevant for regular employees and SGEs. See the following 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).

<sup>12</sup> Under 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."

<sup>13</sup> As noted in Section II of this summary, if a book is unrelated to his official duties, a regular employee as well as an SGE will generally be allowed to receive compensation under section 2635.807, regardless of the type of compensation offered.

<sup>14</sup> 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 covered noncareer employees).

of these employees may be allowed to accept certain payments related to speaking engagements about his book. The employee may receive the compensation even if the book is related to his official duties.

For instance, either NIH employee could accept travel expenses provided by a publisher for a book reading or presentation, whether the book was a mystery novel or a discussion of his NIH research. However, because this "travel expense" exclusion from the definition of compensation is narrow, other types of compensation such as a speaker's fee, may not be accepted if the book is related to the employees' duties. See 5 C.F.R. § 2636.303(b); 5 C.F.R. § 2635.807(a)(2)(iii)(D)(Example 1).

#### 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 regular employees and SGEs.

A regular employee or an SGE is prohibited from receiving compensation for writing 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.<sup>15</sup>

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 a regular

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<sup>15</sup> 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).



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.

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.

## **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. Except for 18 U.S.C. § 209 concerning the

supplementation of salary, from which SGEs are exempt, these restrictions apply in a similar manner to regular employees and SGEs.

*A. Compensation for Writing Related Activities: What is Considered "Writing?"*

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, or may keep diaries or notes during Government service intended for a later writing. You will need to analyze when these activities are, or are not, considered "writing" for which compensation is barred under section 2635.807.

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, or 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 regular employee or an SGE 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 regular employee may not receive compensation if he enters into an agreement either before or during his Government service to write a book for compensation based upon a diary of his participation in agency meetings. He may not accept the compensation even if his agreement calls for the payment to be made after he leaves the Government.

Compensation for non-substantive proofreading and formatting is permissible while in Government service, because such activities are not considered "writing." However, if an employee requests permission to make any types of changes to a book that is related to his official duties, you should consult with OGE about how to advise the employee.

## *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.

## *C. Financial Conflicts of Interest*

Under 18 U.S.C. § 208, an employee, including an SGE, 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, his 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).<sup>16</sup> Under this standard, for example, it is very likely that a reasonable person would question the impartiality of a regular employee or an SGE who participates in an agency decision to use his outside publisher as the publisher of official agency reports.

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<sup>16</sup> 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, contractual or other financial relationship that involves other than a routine consumer transaction."

*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 regular employee, but not an SGE, from receiving a supplementation of his Federal salary as compensation for performing official duties from any source other than the United States.<sup>17</sup> Therefore, if a regular 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 regular employee from accepting compensation for writing he did 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.<sup>18</sup> Although SGEs are exempt from 18 U.S.C. § 209, section 2635.807 of the Standards of Conduct does apply to SGEs. Therefore, if a regular employee or an SGE writes a series of speeches for his supervisor, neither employee may receive compensation for writing 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, including an SGE, 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

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<sup>17</sup> SGEs are completely exempt from this prohibition, while regular employees are subject to the prohibition unless they serve the Government without compensation. See 18 U.S.C. § 209(c).

<sup>18</sup> 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).

- 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

The Standards of Conduct contain two provisions relating to the use of nonpublic information<sup>19</sup> 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.

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<sup>19</sup>For 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.

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

In addition to the prohibitions discussed above, an employee, including an SGE, 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, permitting 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 promotional materials mentioned immediately above also apply to promotional activities such as appearances on various media outlets or on promotional book tours.<sup>20</sup> For instance, a regular employee at the Department of Education who wrote a book prior to his Government service may not be introduced during book signings or on TV or radio only by his name and official position. See 5 C.F.R. § 2635.807(b). Such an introduction or reference 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 regular employee or an SGE 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 this 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

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<sup>20</sup> Sometimes a publishing company may ask a Government official to participate in promotional book tours in 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.

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 regular employee or an SGE may receive compensation for writing a book.

Overview: Determining Whether a Regular Employee or an SGE  
May Receive Compensation for Writing a Book

**I. Employee Category: Regular or SGE**

Regular: Not an SGE, CNC or PA employee  
SGE: 18 U.S.C. § 202(a)

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

Regular:  
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

SGE:  
5 C.F.R. § 2635.807(a)(2)(i)(E)(4)

- (E)(1) Applies to SGEs differently from Regular – See 5 C.F.R. § 2635.807(a)(2)(i)(E)(1)
- (E)(2) Does not apply to SGEs

**III. Timing of the Work / Receipt of the Compensation**

Regular & SGE: 5 C.F.R. § 2635.807(a)(2)(iii) & (iv) – Receipt of compensation is usually attributable to the time the writing occurs, unless written solely on speculation during Government service.

Possibilities: Before, during or after Government service

**IV. Type of the Compensation**

Regular & SGE: 5 C.F.R. § 2635.807(a)(2)(iii) – All forms of consideration except travel

Possibilities: Advance; Royalties; Other Compensation or Consideration

**V. § 807 – “Related To Official Duties”  
Who is Offering the Compensation and Why?**

Regular & SGE:  
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 – SGEs Exempt); 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)