

**Department of
Veterans Affairs**

Memorandum

Date: January 31, 2022

From: Program Director, Research Integration and Training, Ethics Specialty Team,
Office of General Counsel (02-EST)

Subj: Guidance Regarding the Without Compensation and State Treasury Exceptions
to 18 U.S.C. § 209

To: Associate Chiefs of Staff for Research and Administrative Officers for Research

1. The Ethics Specialty Team previously shared with the Office of Research & Development updated Department of Justice (“DOJ”) guidance regarding 18 U.S.C. § 209, which is a criminal conflict of interest statute that generally prohibits Federal employees from receiving compensation for Federal work from a non-Federal source. This memorandum explains the updated DOJ guidance and applies to situations where an employee working in VA research seeks to receive compensation for that work directly from a non-Federal entity (e.g., salary payment from a VA-affiliated Nonprofit Education and Research Corporation (“NPC”) or university affiliate). While section 209 generally prohibits the receipt of such payments, there are two exceptions to that prohibition—the **WOC exception** and the **State Treasury exception**—that permit the acceptance of non-Federal compensation and are discussed below.

2. Unless the WOC or State Treasury exception applies, researchers must not accept compensation for VA research work from a non-Federal entity. A bill called the VA Infrastructure Powers Exceptional Research Act of 2021 (“VIPER Act”) was introduced in the U.S. House of Representatives. If enacted, the bill would create a section 209 exemption for payments made to VA researchers by NPCs and university affiliates. Should the VIPER Act become law, we will issue guidance that supersedes this guidance and explains how the VIPER Act applies to VA researchers.

3. The without compensation (“WOC”) exception found in 18 U.S.C. § 209 permits a VA employee to be paid for their Federal work by a non-Federal source if their **only** VA appointment is a WOC appointment. For example, a university or NPC employee who does NOT have a VA paid appointment can hold a VA WOC appointment and may be paid for that work directly by the NPC or university affiliate.

4. If an employee has a compensated VA appointment (whether part-time or full-time), and a second appointment that is WOC, and seeks to be paid for the WOC work directly by a non-Federal entity, the employee cannot be paid directly by the non-Federal entity because the WOC exception does not apply. For example, a VA research investigator with a VA-funded merit award who also holds a grant from the National Institutes of Health (“NIH”) that is performed in a WOC status at VA cannot receive

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salary support from the NPC or university affiliate for the NIH work performed at VA, unless the State Treasury exception (discussed in paragraph 5) applies.

5. There is one possible exception to the scenario presented in paragraph 4, which is where the compensation to a VA in a WOC appointment comes from the state treasury. Under the State Treasury exception, an employee who holds a compensated VA appointment may accept salary payment directly from a state university to perform VA research under a WOC appointment, as long as the Ethics Specialty Team (“EST”) determines that the state university seeking to make the payment, or the university-associated entity seeking to make the payment, is authorized to do so. Once the EST confirms that a state university or entity qualifies for the State Treasury exception, that university or entity will be placed on the list of approved universities and entities, which is available [here](#). Once a university or entity is placed on this list, VA researchers may accept payment directly from the university or entity for time spent working on VA research and facilities need not seek any additional approval in order for an employee to accept compensation from the university or entity. If a university or entity seeks to compensate a researcher directly but is not yet on the list, contact me via email to request that the university or entity be added to the list. Note that the State Treasury exception does not apply to private universities.

6. If research is funded by a Federal entity, such as the Department of Defense (“DoD”) or NIH, and compensation from that funding goes from a state university to a VA researcher in situations where DoD and NIH policy allow, that payment falls within the State Treasury exception.

7. In situations where an employee seeks to be paid directly by a non-Federal source for VA work, but cannot accept payment due to § 209, the facility may consider whether, under applicable pay administration policies (e.g., overtime rules), the facility may pay the compensation to the employee when the facility receives the compensation from the non-Federal source. Such an arrangement would not violate § 209.

8. If you have questions about the WOC or State Treasury exceptions, please review the Frequently Asked Questions located [here](#). You may also submit questions to the appropriate EST attorney (see contact list below) or contact me directly at Christopher.britt@va.gov.



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