



December 21, 2016
LA-16-12

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
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SUBJECT: Publication of the Final Rule Revising Subpart B of the Standards of Conduct,
Gifts From Outside Sources

On November 18, 2016, the U.S. Office of Government Ethics (“OGE”) published a final rule amending 5 C.F.R. part 2635, Subpart B, which contains the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch (“Standards of Conduct”) that govern gifts from outside sources. *See Standards of Ethical Conduct for Employees of the Executive Branch; Amendment to the Standards Governing Solicitation and Acceptance of Gifts from Outside Sources*, 81 Fed. Reg. 81,641-81,657 (Nov. 18, 2016).¹ The final rule will become effective on January 1, 2017. This Legal Advisory highlights some of the major changes to Subpart B made in this rulemaking.²

I. Considerations for Declining Otherwise Permissible Gifts

In evaluating the appropriateness of accepting an offered gift, OGE has been concerned that employees may focus only on whether regulatory exceptions to the gift rule permit them to accept certain gifts and not on whether acceptance of gifts could affect the perceived integrity of the employee or agency programs. To address this concern, OGE has added a new section to 5 C.F.R. part 2635, Subpart B: 5 C.F.R. § 2635.201(b) (“Considerations for declining otherwise permissible gifts”). This new section establishes a values-based standard that employees should consider when deciding whether to accept or decline offered gifts. Because the gift rule at 5 C.F.R. § 2635.202 and the exceptions to that rule at 5 C.F.R. § 2635.204 continue to apply, the incorporation of this new appearance standard represents a blending of rule-based and values-based approaches.

¹ Available at <https://www.gpo.gov/fdsys/pkg/FR-2016-11-18/pdf/2016-27036.pdf>.

² Additional information about other changes and OGE’s reasons for amending the gift rules is provided in both the final rule and the proposed rule. *Id.* (final rule); *Standards of Ethical Conduct for Employees of the Executive Branch; Amendment to the Standards Governing Solicitation and Acceptance of Gifts from Outside Sources*, 80 Fed. Reg. 74,004-74,018 (Nov. 27, 2015) (proposed rule), available at <https://www.gpo.gov/fdsys/pkg/FR-2015-11-27/pdf/2015-29208.pdf>.

Specifically, this new section establishes the following standard: “[E]mployees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality as a result of accepting the gift.” This section fleshes out that standard by providing that, among other relevant factors, employees may consider whether:

- (i) The gift has a high market value;
- (ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;
- (iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties; and
- (iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

81 Fed Reg. at 81,649 (to be codified at 5 C.F.R. § 2635.201(b)(2)).

At the same time, the new section makes clear that an employee who accepts a gift permitted under an applicable exception will not be deemed to have violated the Standards of Conduct. 81 Fed Reg. at 81,649 (to be codified at 5 C.F.R. § 2635.201(b)(3)). While this new section will not subject an employee to disciplinary action, it asks employees to incorporate the Government’s ethical values as embodied in the 14 General Principles of Ethical Conduct, in their decisionmaking. *See* Exec. Order 12674 (Apr. 12, 1989), as amended by Exec. Order 12731 (Oct. 17, 1990); *see also* 5 C.F.R. § 2635.101. As such, this new section provides a framework for ethical decisionmaking when a gift is offered.

II. Changes to the Speaking and Similar Engagements Exception

OGE has also amended the speaking and similar engagements exception, which permits employees assigned to present information in their official capacity to accept an offer of free attendance to an event on the day the employee is presenting. *Compare* 5 C.F.R. § 2635.204(g)(1) (2016) *with* 81 Fed. Reg. at 81,650 (to be codified at 5 C.F.R. § 2635.203(b)(8)). By moving the language of the traditional exception from section 2635.204(g)(1) to the definition in amended section 2635.203, this former exception now constitutes an exclusion from the definition of “gift.” *See* 81 Fed. Reg. at 81,650 (to be codified at 5 C.F.R. § 2635.203(b)(8)). This change is largely non-substantive, inasmuch as OGE has long considered the covered types of presentations to be customary and necessary for the performance of official duties and not a gift to either the employee or the employee’s agency. One substantive change flowing from OGE’s revision of the related definition of “free attendance,” however, is that the amended rule will permit the employee to accept a meal provided for participating presenters if that meal is hosted by the sponsor of the event and occurs on the day the employee is presenting. *See* 81 Fed Reg. at 81,650-81,651 (to be codified at 5 C.F.R. § 2635.203(b)(8); 2635.203(g)).

III. Changes to the Widely Attended Gatherings Exception

OGE has also amended the “Widely Attended Gatherings” (“WAG”) exception to expand the requirement for written authorizations. 81 Fed. Reg. at 81,654 (to be codified at 5 C.F.R. § 2635.204(g)(3)). Prior to these amendments, the gift rules have traditionally required an authorization to be in writing only if the donor has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties. *See* 5 C.F.R. § 2635.204(g)(3)(i) (2016). Under the new rules, every authorization to attend a WAG must be in writing.

An agency designee may issue a written authorization for an employee to attend a WAG after finding that:

- (i) The event is a widely attended gathering, as set forth in paragraph (g)(2) of this section;
- (ii) The employee’s attendance at the event is in the agency’s interest because it will further agency programs or operations;
- (iii) The agency’s interest in the employee’s attendance outweighs the concern that the employee may be, or may appear to be, improperly influenced in the performance of official duties; and
- (iv) If a person other than the sponsor of the event invites or designates the employee as the recipient of the gift of free attendance and bears the cost of that gift, the event is expected to be attended by more than 100 persons and the value of the gift of free attendance does not exceed \$375.

81 Fed. Reg. at 81654 (to be codified at 5 C.F.R. § 2635.204(g)(3)). Although the agency designee has discretion to decide whether to discuss the findings in the written authorization, the agency designee is always responsible for making the required findings prior to issuing the authorization.

The new WAG rule also provides a list of potentially relevant factors for determining whether the agency’s interest in the employee’s attendance outweighs any concerns:

- (i) The importance of the event to the agency;
- (ii) The nature and sensitivity of any pending matter affecting the interests of the person who extended the invitation and the significance of the employee’s role in any such matter;
- (iii) The purpose of the event;
- (iv) The identity of other expected participants;
- (v) Whether acceptance would reasonably create the appearance that the donor is receiving preferential treatment;

- (vi) Whether the Government is also providing persons with views or interests that differ from those of the donor with access to the Government; and
- (vii) The market value of the gift of free attendance.

81 Fed. Reg. at 81654 (to be codified at 5 C.F.R. § 2635.204(g)(4)).

IV. Selected Other Changes

A. Social Invitations

OGE has also amended the gift exception for social invitations from persons other than prohibited sources. 81 Fed. Reg. at 81,655 (to be codified at 5 C.F.R. 2635.204(h)). If either the sponsor or the person extending the invitation is not an individual, the amended regulation will require the employee to obtain a written determination from the agency designee to accept the invitation. In that event, the agency designee will be required to consider the standard and relevant factors set forth in the new section at 5 C.F.R. § 2635.201(b) in order to determine whether a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality. If the agency designee determines that a reasonable person would not question the employee's integrity or impartiality, the designee may issue a written authorization to the employee.

B. Informational Materials

OGE has also added a limited exception for gifts of informational materials. 81 Fed. Reg. at 81,655-81,656 (to be codified at 5 C.F.R. § 2635.204(m)). This exception acknowledges that gifts of informational materials foster information sharing, benefit the agency and the Government, and accommodate the right of citizens to petition their Government. Under this exception, an employee will be able to accept informational materials if they:

- (i) Are educational or instructive in nature;
- (ii) Are not primarily created for entertainment, display, or decoration; and
- (iii) Contain information that relates in whole or in part to the following categories:
 - (A) The employee's official duties or position, profession, or field of study;
 - (B) A general subject matter area, industry, or economic sector affected by or involved in the programs or operations of the agency; or
 - (C) Another topic of interest to the agency or its mission.

An employee may not, however, accept informational materials exceeding an aggregate market value of \$100 in any calendar year from any one source, unless the agency designee makes a written determination that the employee's integrity or impartiality would not be questioned. In making the determination, the agency designee should consider the relevant factors set forth in the new section at 5 C.F.R. § 2635.201(b).

C. Disposition of Prohibited Gifts

OGE also has added a new disposition authority in recognition that it can sometimes be difficult, cost-prohibitive, and time-consuming to return a gift. 81 Fed. Reg. at 81,656 (to be codified at 5 C.F.R. § 2635.206(a)(1)). For tangible items valued at less than \$100, employees will be able to dispose of prohibited gifts by destroying them. Destruction can be accomplished by permanently discarding the item in the trash. Employees are encouraged to document the destruction (e.g., by sending an email to an agency ethics official). For any item approaching \$100 in value, employees may wish to consider alternatives to destruction under section 2635.206 when practicable, such as returning the item to the donor.

V. Questions

Agency ethics officials with questions about the revisions to Subpart B of the Standards of Conduct may contact their OGE Desk Officers.