

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635

RIN 3209-AA04

Widely Attended Gatherings Gifts Exception Under the Standards of Ethical Conduct for Employees of the Executive Branch

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule.

SUMMARY: The Office of Government Ethics proposes to revise the gift exception contained in the Standards of Ethical Conduct for Employees of the Executive Branch to permit employees to accept invitations to certain widely attended gatherings from persons other than the sponsors of those events and to clarify that only those events attended by large number of persons qualify as widely attended gatherings. The Office of Government Ethics also proposes to permit authorization for a guest, other than the employee's spouse, to accompany the employee to a widely attended gathering or to an event at which the employee is assigned to participate as a speaker, panelist or other information presenter at which other guests will be in attendance. These proposed changes would provide more flexibility in attendance at such events while preserving agencies' ability to monitor compliance by their employees.

DATES: Comments by agencies and the public are invited and are due by August 14, 1995.

ADDRESSES: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Mr. Gressman.

FOR FURTHER INFORMATION CONTACT: William E. Gressman, Office of Government Ethics; telephone: 202-523-5757; FAX: 202-523-6325.

SUPPLEMENTARY INFORMATION:

I. Background

On August 7, 1992, the Office of Government Ethics published the Standards of Ethical Conduct for Employees of the Executive Branch (Standards) for codification at 5 CFR part 2635. See 57 FR 35006-35067, as corrected at 57 FR 48557 and 57 FR 52583, with additional grace period extensions for certain existing agency provisions at 59 FR 4779-4780 and 60 FR 6390-6391. The Standards, which took effect on February 3, 1993, set uniform ethical conduct standards applicable to all executive branch personnel. They include regulations implementing the gift restrictions contained in 5 U.S.C. 7353 and section 101(d) of Executive Order 12674 as modified by Executive Order 12731. In accordance with those authorities, § 2635.204 sets forth exceptions to § 2635.202(a), which provides that, in the absence of an exception, an employee shall not directly or indirectly solicit or accept a gift from a prohibited source or a gift that is given because of the employee's official position.

One of several exceptions set forth in § 2635.204 is the exception at § 2635.204(g)(2) by which an employee may accept a sponsor's unsolicited gift of free attendance at all or part of a widely attended gathering. Unlike the de minimis exception at § 2635.204(a) for unsolicited gifts having a market value of \$20 or less per occasion (with a calendar year aggregate limit of \$50), § 2635.204(g)(2) imposes no limitation on the market value of the gifts of free attendance that may be accepted. While the tickets or other fees for attendance at such gatherings ordinarily cost much less, this exception would permit acceptance of free attendance at events for which the ticket price exceeds even \$1,000. In part to ensure that prohibited sources do not use this exception to provide lavish entertainment to employees of the agencies with which they do business or otherwise interact, § 2635.204(g)(2) specifies that an invitation to a widely attended gathering can be accepted only if it is from the sponsor of the event.

On March 9, 1993, shortly after the Standards first took effect, the White House declared a six-month suspension of application to press dinners of that portion of § 2635.204(g)(2) that limits acceptance of invitations to widely

attended gatherings to those issued by the sponsor of the event. During that six-month period, executive branch officials were authorized to attend press dinners as guests of individuals or organizations other than the sponsor of the event, if the event otherwise met the conditions of the widely attended gathering exception. On December 21, 1993, with another round of press association events in the offing, the White House issued a memorandum to all agency heads once again temporarily suspending administrative enforcement of the rule affecting widely attended gatherings solely as it relates to dinners sponsored by news associations for which admission for executive branch officials is paid by news organizations.

In a letter of December 21, 1993 addressed to OGE, the White House asked OGE to consider a revision to § 2635.204(g)(2) to provide that an employee may accept an invitation received directly from a news organization to attend a widely attended gathering sponsored by a news association where there has been a determination that the employee's attendance is in the interest of the agency. In the alternative, the White House suggested that OGE might wish to consider revising § 2635.204(g)(2) to provide an exemption for invitations to a broader range of widely attended gatherings from persons other than the sponsors of those events. The White House specified in its memorandum of the same date that the suspension was to extend until August 1, 1994, or until such later date as OGE responded to its request for revision of § 2635.204(g)(2). This proposed rule is the first step in OGE's response to the White House request. Thus, the suspension effected by the White House's most recent memorandum of December 21, 1993 will extend until OGE has issued an interim or final rule determination as to this matter after receiving and reviewing comments in response to this notice of proposed rulemaking.

In asking that OGE treat the press differently than others for purposes of permitting employees to attend press association events, the White House expressed the view that the press is not like other individuals, organizations or entities. The press, it suggested, provides the public with access to the institution of Government and, thus, functions on behalf of the greater public

good in seeking to gather, record and disseminate information about current events. In the view of the White House, members of the press and press organizations do not seek to do business with, nor do they seek official action from, the Government officials about whom they report. The White House suggested that this provides a justification for treating invitations from press organizations differently than invitations from others who are prohibited sources or who invite Government employees because of their official positions.

It may be true that members of the press, in some instances, do not seek to do business with or seek official action from the particular Government official about whom they are reporting. More often than not, however, those who report about the actions of Government officials or about Government programs do interview, or seek to interview, those who are the subject of their reporting or who have official knowledge about the subject. When that occurs they and the press organizations they represent often are seeking official information from Government officials and are seeking to occupy their official time. They are "prohibited sources" within the meaning of 5 CFR 2635.203(d)(1) to the same extent as are others who seek official action from the employees of a Federal agency. How successful they are in obtaining that official information impacts upon their work product and redounds to their benefit or detriment and, ultimately, to the benefit or detriment of the news organizations they serve. Members of the press and press organizations have interests that may be substantially affected by the performance or nonperformance of the official duties of the Government officials of whom they seek information and, thus, also meet the definition of prohibited sources in 5 CFR 2635.203(d)(4). See OGE informal advisory memorandum 87x13 issued October 23, 1987, as published in the "Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics" (at pp. 743-755 of the 1979-1988 bound volume), which is available from the U.S. Government Printing Office. We agree with the White House view that reporting by the press often serves the public good. Whether the product or service is a new cancer medication approved by the Food and Drug Administration or a blockbuster documentary on World War I funded, in part, by a grant from the National Endowment for the Humanities, the same can be said of the products or

services of many others who are prohibited sources.

For the reasons stated above, we cannot concur in the White House view that invitations from the press to widely attended gatherings should be treated differently than invitations from other prohibited sources or from others who invite Government officials because of their official positions. We do agree with the White House view, however, that § 2635.204(g)(2) may be unnecessarily restrictive in prohibiting acceptance of invitations to all widely attended gatherings from a person other than the sponsor of the event. By this notice, OGE proposes to adopt the White House's alternative suggestion to modify § 2635.204(g)(2) to permit acceptance of invitations to widely attended gatherings from persons other than the sponsors of those events where more than 100 will be in attendance and where the gift of free attendance has a market value of \$250 or less. The Office of Government Ethics also proposes to modify § 2635.204(g)(2) to clarify that events attended by a few, rather than many, are not widely attended gatherings. In addition, OGE is proposing to amend § 2635.204(g)(6) to permit authorization for a person other than a spouse to accompany an employee to a widely attended gathering or to an event at which the employee is assigned to participate as a speaker, panel participant or other presenter of information (pursuant to § 2635.204(g)(1)), where an invitation has been extended to the spouse or a guest and where others in attendance will generally be accompanied by a spouse or a guest.

The proposed amendments to § 2635.204(g) are incorporated in this notice of proposed rulemaking after consultation with the Department of Justice and the Office of Personnel Management.

II. Analysis of the Proposed Changes

As an exception to the gift prohibitions set forth in 5 CFR 2635.202(a), § 2635.204(g)(2) now permits an employee to accept an unsolicited gift of free attendance at a widely attended gathering where the agency makes a determination that the employee's attendance is in the interest of the agency, provided that the gift is from the sponsor of the event. One of the two changes to § 2635.204(g)(2) proposed by this rule would permit an employee to accept an unsolicited gift of free attendance at a widely attended gathering from a person other than the sponsor of the event where there has been a determination of agency interest, provided that more than 100 persons are

expected to attend the event and provided that the gift of free attendance has a market value of \$250 or less. The requirement that attendance be expected to exceed 100 persons is proposed to limit the use of this exception to events which, by their larger, more public nature are unlikely to prompt questions regarding the appropriateness of their characterization as widely attended. The \$250 ceiling on the value of free attendance that may be accepted from a person other than the event's sponsor coincides generally with the public financial disclosure reporting exclusion at 5 U.S.C. app. § 102(a)(2)(A) of the Ethics in Government Act (and 5 CFR 2634.304(a) of OGE's implementing regulations) for gifts of less than \$250 and, thus, comports with legislative consensus that gifts below that amount are of a value that need not be subjected to public scrutiny. Together, the two limitations reduce the possibility that the exception for widely attended gatherings might be used to provide lavish entertainment for Government employees.

To accommodate the proposed change to § 2635.204(g)(2), a conforming change to § 2635.204(g)(3)(i) is proposed to require a written finding of agency interest where the person who has extended the invitation may be substantially affected by performance or nonperformance of the employee's duties. The phrase "person who has extended the invitation" means the person who is the donor of the gift of free attendance. A conforming change to § 2635.204(g)(4) is proposed to clarify that the market value of free attendance by an accompanying spouse or other guest, when authorized under § 2635.204(g)(6), is to be added to the market value of the employee's own free attendance in determining the market value of the gift of free attendance for the purpose of applying the \$250 limit and for the purpose of considering the relevant factors under § 2635.204(g)(3)(i). A new example 2 is proposed to be added following § 2635.204(g) to illustrate this modification. Example 1 would be modified to incorporate a free attendance value in excess of \$250 so that the example will continue to illustrate that higher value gifts of free attendance may be accepted with agency approval only from the sponsor of the event.

The other change proposed to § 2635.204(g)(2) is to add language to clarify that widely attended gatherings are only those attended by a large number of persons. As presently in effect, the paragraph states that a gathering "is widely attended if, for

example, it is open to members from throughout a given industry or profession or if those in attendance represent a range of persons interested in a given matter." This sentence was intended to help describe the types of events that would qualify as widely attended gatherings and was not intended to alter the normal meaning of the phrase "widely attended" as encompassing those attended by many. It has been read otherwise by some who have argued that small gatherings of fewer even than 20 qualify if the few in attendance represent the range of persons interested in a given matter. Proposed new example 3 would help to illustrate the meaning of the phrase widely attended gathering.

The Office of Government Ethics also proposes to revise § 2635.204(g)(6) so that an employee who has received an invitation to a widely attended gathering that includes an invitation to bring a guest may be authorized by the agency designee to accept on behalf of an accompanying guest, without regard to whether that guest is the employee's spouse. Under paragraph (g)(6) as presently in effect, an agency may only authorize an employee to accept a sponsor's invitation to an accompanying spouse. The Office of Government Ethics agrees with those who have observed that it is unfair to an employee who is not married or whose spouse is unable or does not wish to attend an event to restrict acceptance to spouses only. The expanded authority for an accompanying guest would extend to an employee who, under § 2635.204(g)(1), is assigned to participate as a speaker, panel participant or other presenter of information at a conference or other event where others in attendance will generally be accompanied by a spouse or other guest. The change proposed would include language clarifying that the invitation to bring an accompanying spouse or other guest may be accepted only if it is unsolicited. The expanded authority could not be used for more than one accompanying guest.

In the last sentence of § 2635.204(g)(3)(i) the phrase "monetary value" is proposed to be changed to "market value" to comport with the definition at § 2635.203(c). Other language changes to § 2635.204(g)(2)-(g)(6) are proposed simply to conform to the proposed substantive changes discussed above.

III. Matters of Regulatory Procedure

Executive Order 12866

In promulgating this proposed rule, the Office of Government Ethics has adhered to the regulatory philosophy

and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These proposed amendments have also been reviewed by the Office of Management and Budget under that Executive Order.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed amendatory rule will not have a significant economic impact on a substantial number of small businesses because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed amendment because it does not contain information collection requirements that require approval of the Office of Management and Budget.

List of Subjects in 5 CFR Part 2635

Conflict of interests, Executive branch standards of conduct, Government employees.

Approved: April 5, 1995.

Stephen D. Potts,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend part 2635 of subchapter B of chapter XVI of title 5 of the Code of Federal Regulations as follows:

PART 2635—[AMENDED]

1. The authority citation for part 2635 continues to read as follows:

Authority: 5 U.S.C. 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart B—Gifts From Outside Sources

2. Section 2635.204 is amended as set forth below:

A. Revising paragraphs (g)(2) through (g)(6);

B. Republishing the note following paragraph (g)(4);

C. Revising example 1 following paragraph (g)(6);

D. Redesignating examples 2, 3 and 4 following paragraph (g)(6) as examples 4, 5 and 6, respectively; and

E. Adding new examples 2 and 3 following paragraph (g)(6).

The revisions, republication and addition read as follows:

§ 2635.204 Exceptions.

* * * * *

(g) * * *

(1) * * *

(2) *Widely attended gatherings.* When there has been a determination that his attendance is in the interest of the agency because it will further agency programs and operations, an employee may accept an unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties from the sponsor of the event or, if more than 100 persons are expected to attend the event and the gift of free attendance has a market value of \$250 or less, from a person other than the sponsor of the event. A gathering is widely attended if it is attended by a large number of persons and if, for example, it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter. For employees subject to a leave system, attendance at the event shall be on the employee's own time or, if authorized by the employee's agency, on excused absence pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee's leave account.

(3) *Determination of agency interest.* The determination of agency interest required by paragraph (g)(2) of this section shall be made orally or in writing by the agency designee.

(i) If the person who has extended the invitation has interests that may be substantially affected by the performance or nonperformance of an employee's official duties or is an association or organization the majority of whose members have such interests, the employee's participation may be determined to be in the interest of the agency only where there is a written finding by the agency designee that the agency's interest in the employee's participation in the event outweighs the concern that acceptance of the gift of free attendance may or may appear to improperly influence the employee in the performance of his official duties. Relevant factors that should be considered by the agency designee include the importance of the event to the agency, the nature and sensitivity of any pending matter affecting the interests of the person who has extended the invitation, the significance of the employee's role in any such matter, the purpose of the event, the identity of other expected participants and the market value of the gift of free attendance.

(ii) A blanket determination of agency interest may be issued to cover all or

any category of invitees other than those as to whom the finding is required by paragraph (g)(3)(i) of this section. Where a finding under paragraph (g)(3)(i) of this section is required, a written determination of agency interest, including the necessary finding, may be issued to cover two or more employees whose duties similarly affect the interests of the person who has extended the invitation or, where that person is an association or organization, of its members.

(4) *Free attendance.* For purposes of paragraphs (g)(1) and (2) of this section, free attendance may include waiver of all or part of a conference or other fee or the provision of food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees. Where the invitation has been extended to an accompanying spouse or other guest (see paragraph (g)(6) of this section), the market value of the gift of free attendance includes the market value of free attendance by the spouse or other guest as well as the market value of the employee's own attendance.

Note: There are statutory authorities implemented other than by part 2635 under which an agency or an employee may be able to accept free attendance or other items not included in the definition of free attendance, such as travel expenses.

(5) *Cost provided by sponsor of event.* The cost of the employee's attendance will not be considered to be provided by the sponsor, and the invitation is not considered to be from the sponsor of the event, where a person other than the sponsor designates the employee to be invited and bears the cost of the employee's attendance through a contribution or other payment intended to facilitate that employee's attendance. Payment of dues or a similar assessment to a sponsoring organization does not constitute a payment intended to facilitate a particular employee's attendance.

(6) *Accompanying spouse or other guest.* When others in attendance will generally be accompanied by a spouse or other guest, and where the invitation is from the same person who has invited the employee, the agency designee may authorize an employee to accept an unsolicited invitation to an accompanying spouse or to another accompanying guest to participate in all or a portion of the event at which the employee's free attendance is permitted under paragraph (g) (1) or (2) of this

section. The authorization required by this paragraph may be provided orally or in writing.

Example 1. An aerospace industry association that is a prohibited source sponsors an industry-wide, two-day seminar for which it charges a fee of \$400 and anticipates attendance of approximately 400. An Air Force contractor pays \$2,000 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance. Because the contractor specified the invitees and bore the cost of their attendance, the gift of free attendance is considered to be provided by the company and not by the sponsoring association. Had the contractor paid \$2,000 to the association in order that the association might invite any five Federal employees, an Air Force official to whom the sponsoring association extended one of the five invitations could attend if his participation were determined to be in the interest of the agency. The Air Force official could not in any event accept an invitation directly from the contractor because the market value of the gift exceeds \$250.

Example 2. An employee of the Department of Transportation is invited by a news organization to an annual press dinner sponsored by an association of press organizations. Tickets for the event cost \$250 per person and attendance is limited to 400 representatives of press organizations and their guests. If the employee's attendance is determined to be in the interest of the agency, she may accept the invitation from the news organization because more than 100 persons will attend and the cost of the ticket does not exceed \$250. However, if the invitation were extended to the employee and an accompanying guest, her guest could not be authorized to attend since the market value of the gift of free attendance would be \$500 and the invitation is from a person other than the sponsor of the event.

Example 3. An employee of the Department of Energy and his wife have been invited by a major utility to a dinner party for 20 people. Others invited include eight officials of the utility and their spouses and a representative of a consumer group concerned with utility rates and her husband. The DOE official believes the dinner party will provide him an opportunity to socialize with and get to know those in attendance. The employee may not accept, even if his attendance could be determined to be in the interest of the agency. The dinner

party is not a widely attended gathering; twenty is not a large number of persons and, notwithstanding the presence of another person who is not an official of the utility, those in attendance do not represent a range of persons interested in any identifiable matter.

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BILLING CODE 6345-01-U

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1046

[DA-95-18]

Milk in the Louisville-Lexington-Evansville Marketing Area; Proposed Suspension/Termination of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed suspension/termination of rule.

SUMMARY: This document invites written comments on a proposal to suspend or terminate the base-excess plan of the Louisville-Lexington-Evansville Federal milk marketing order, effective September 1, 1995. The proposed suspension/termination was submitted by Holland Dairies, Inc., which contends the action is necessary to allow handlers in the area to compete equally for a supply of milk and to ensure that producers will continue to have their milk priced and pooled under the Order.

DATES: Comments are due on or before July 17, 1995.

ADDRESSES: Comments (two copies) should be filed with the USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, PO Box 96456, Washington, DC 20090-6456.

FOR FURTHER INFORMATION CONTACT: Nicholas Memoli, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, PO Box 96456, Washington, DC 20090-6456 (202) 690-1932.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed rule would not have a significant economic impact on a substantial number of small entities. This rule would lessen the