



Federal Register

**Monday,
May 5, 2003**

Part VII

Office of Government Ethics

5 CFR Part 2601

**Implementation of Office of Government
Ethics Statutory Gift Acceptance
Authority; Proposed Rule**

OFFICE OF GOVERNMENT ETHICS**5 CFR Part 2601**

RIN 3209-AA21

Implementation of Office of Government Ethics Statutory Gift Acceptance Authority**AGENCY:** Office of Government Ethics (OGE).**ACTION:** Proposed rule with request for comments.

SUMMARY: The Office of Government Ethics is issuing a proposed regulation that would implement the agency gift acceptance authority contained in section 2 of the Office of Government Ethics Authorization Act of 1996, which authorizes OGE to accept gifts and certain other items for the purpose of aiding or facilitating the work of the agency and which requires the Director of OGE to issue regulations establishing criteria for determining whether the exercise of this gift acceptance authority is appropriate. The proposed rule would state the policy regarding the use of this authority, provide definitions of key terms, establish guidelines for the solicitation and acceptance of gifts, state certain conditions for acceptance and use of gifts, and establish accounting requirements.

DATES: Written comments by executive branch agencies and other interested persons are invited and are due on or before August 4, 2003.

ADDRESSES: Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917, Attention: Ms. Allison C. George. Comments also may be sent electronically to OGE's Internet E-mail address at usoge@oge.gov. For E-mail messages, the subject line should include the following reference—"Comments Regarding Proposed Gift Acceptance Authority Regulations."

FOR FURTHER INFORMATION CONTACT: Allison C. George, Associate General Counsel, Office of Government Ethics, Telephone: 202-208-8000; TDD: 202-208-8025; FAX 202-208-8037.

SUPPLEMENTARY INFORMATION:**I. Background**

This proposed rule, to be codified once finalized in a new part 2601 of 5 CFR, would implement section 2 of the Office of Government Ethics Authorization Act of 1996 (the 1996 Reauthorization Act), Pub. L. 104-179, 110 Stat. 1566, which amended the Ethics in Government Act of 1978 (the Ethics Act), as codified at 5 U.S.C. app. § 403(b).

Section 403(b)(1) of the Ethics Act as amended authorizes the Director of OGE to accept and utilize on behalf of the United States, any gift, donation, bequest or devise of money, use of facilities, personal property, or services, for the purpose of aiding or facilitating the work of OGE.

Section 403(b)(2) of the Ethics Act as amended prohibits the acceptance of any gift that attaches conditions inconsistent with applicable laws or regulations. It also prohibits acceptance of any gift that is conditioned upon or will require the expenditure of appropriated funds that are not available to OGE.

Section 403(b)(3) of the Ethics Act as amended requires the Director of OGE to establish written rules that set forth criteria for determining whether the acceptance of a particular gift is appropriate. The statutory standard for this determination is whether acceptance would "reflect unfavorably upon the ability of the Office of Government Ethics, or any employee of such Office, to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs."

The legislative history of the 1996 Reauthorization Act indicates that OGE sought this authority only "to support OGE's education and training program in carrying out its training mission." H.R. Rep. No. 104-595 at 7 (1996) (House Report). See also S. Rep. No. 104-244 at 5 (1996) (Senate Report). However, by its terms the law confers broad gift acceptance authority—similar to that bestowed upon other executive branch agencies—that may be used for any activity that furthers the work of the Office. The 1996 Reauthorization Act requires the Director to promulgate implementing regulations in order to ensure that this grant of broad authority is not used in a manner that would compromise the integrity of OGE or its employees. The House Report states:

It is the intention of the Committee that these rules will safeguard against not only conflicts of interest, but any appearance of a conflict of interest in the acceptance of gifts by OGE.

House Report at 7. See also Senate Report at 5.

The legislative history further notes that many executive branch agencies and departments that have statutory gift acceptance authority are not required to prescribe rules governing its use:

Moreover, those agencies and departments that have gift acceptance authority are not

required to prescribe regulations governing its use. While other agencies will not be required to follow the example of OGE's regulations in making determinations about their gift acceptance authority, OGE believes that its regulations will provide useful guidance to agencies.

House Report at 7-8. See also Senate Report at 6.

Finally, in the discussion of this legislation on the Senate floor, Senator William Cohen, a sponsor of the Senate bill, noted:

Currently, other agencies that have gift acceptance authority do not have to prescribe regulations governing its use. While other agencies would not be required to follow the example of OGE's regulations in making their own determinations about their gift authority, OGE's regulations would provide useful guidance to other agencies.

142 Congressional Record S8739, July 24, 1996.

Executive branch agency gift authorities differ widely in their terms. In some cases the authority may be agencywide, while in others it may be limited to a particular component or activity. Some agency authorities permit the acceptance of virtually any kind of gift; others limit gifts to a particular type. Some authorities permit the use of gifts for a broad range of purposes; others limit use of gifts to some particular purpose. The practice with regard to implementing regulations also differs widely among executive branch agencies. Some agencies have comprehensive directives, orders, or policy statements regarding the use of their gift acceptance authority. Other agencies have no written guidelines and make agency gift acceptance determinations on a case-by-case basis.

Although this proposed rule would implement authority that is specific to OGE, it addresses several agency gift acceptance issues of general concern to executive branch agencies. Therefore, it could provide guidance to other agencies in administering their gift authority. In order to develop a final rule that would have the greatest degree of utility in this regard, OGE invites comments by executive branch agencies and other interested persons on this proposed rule, in particular with respect to these issues of more general concern.

As noted above, however, there is great variation among existing agency gift acceptance authorities. Agencies also differ in terms of the frequency and amount of gifts they receive. Agencies also may have gift issues that are unique to their programs and missions. Thus, an agency that wishes to use the OGE rule as a model may need to modify the rule as proposed to meet its particular needs and circumstances.

II. Section-By-Section Analysis

The following section-by-section analysis discusses each section of the new proposed part 2601 regulation.

A. General Provisions

1. Proposed § 2601.101 would set forth the legal authority under section 2 of the Office of Government Ethics Authorization Act of 1996 for the promulgation of this rule.

2. Proposed § 2601.102 would state that the purpose of this rule is to establish written guidelines regarding OGE's implementation of its statutory gift authority.

3. Proposed § 2601.103 would set forth the policies that would guide OGE's interpretation and use of its gift authority. These policies deal with the scope of OGE's gift acceptance authority, permitted uses of gifts, sources of gifts, endorsement issues arising from the agency's acceptance of a gift, and types of gifts.

Proposed § 2601.103(a) would reflect OGE's interpretation that its statutory authority to "accept and utilize" gifts embraces the authority to accept, receive, hold, retain, utilize, use, administer, manage, sell, spend, liquidate, and dispose of a gift. It also includes the authority to destroy a gift, provided that such action is otherwise in accordance with Federal regulations, as for example, Federal property management regulations contained in chapters 101 and 102 of 41 CFR.

OGE also interprets the "accept and utilize" language as embracing the authority to invest or reinvest gifts. A number of agencies have express statutory language authorizing the agency to invest or reinvest gifts. However, even in the absence of such express language, the authority to "utilize" gifts includes the authority to properly manage property obtained by gift. In the case of monetary gifts or the proceeds of the sale of tangible gifts, this would include prudent investment or reinvestment. OGE will invest any available gift funds in interest bearing securities of the United States, as is the customary practice of executive branch agencies.

In addition, OGE interprets the authority to "accept and utilize" gifts as encompassing the authority to exchange one tangible gift for another. At least one agency has express statutory authority to "deal with" gifts. OGE might, for example, exchange or trade in donated equipment for other more useful equipment. Or, for example, if OGE were given a gift of common stock in a publicly traded company, it could convert that gift of stock to Government

securities. OGE believes that such trading or exchange of gifts would be rare. Other Federal entities might have more occasion to exchange or trade gifts. For example, an agency authorized to accept real property might exchange a particular parcel of donated land for another parcel that abuts other land for which the agency is responsible. Or a Federal museum that received gifts of art objects, gems or other items for its collections, or a Federal visitors center that had exhibits, might apply its authority to utilize gifts to trade or exchange a gift for another item that was more appropriate or relevant to its collection.

The authority to "accept and utilize" gifts also encompasses the authority to solicit gifts. The legislative history indicates that a primary purpose for granting this authority was to further OGE's training activities. In order to utilize effectively this authority for this purpose, it would be necessary for authorized employees to be able to contact persons who may be able to provide training facilities and services. OGE may also use this authority, e.g., to seek gifts of transportation and travel-related expenses. However, under the regulations as proposed, an employee would not be permitted to engage in an official capacity in activities on behalf of a private entity, to raise funds for future donation to the Office of Government Ethics.

Proposed § 2601.103(b) would state the purposes or activities for which gifts may be used. The statute authorizes OGE to use gifts "for the purpose of aiding or facilitating the work of the Office of Government Ethics." Although support of training activities is expected to be one of the most common uses, OGE envisions that this authority may be used for other activities as well. This is consistent with the broad language of section 403(b)(1) of the Ethics Act.

Although the gift statutes of other agencies use somewhat different language, the various agency authorities describe a link to, or connection with, the work of an agency, its programs, activities or functions. Similarly, OGE interprets the language of "aiding or facilitating the work of" OGE to mean that gifts may be utilized to further any activity that has a relationship to the programs, functions or activities of OGE. Gifts may be used by or for the benefit of OGE employees, provided that such use is otherwise permitted. For example, gifts may be used in accordance with this part as proposed to enhance employee morale or to recruit new employees.

Gifts may also be used for official travel other than travel that is covered

by section 1353 of title 31, United States Code. For example, when an OGE employee is engaged in carrying out a core agency function that is outside the scope of section 1353, OGE's statutory authority could be used. See, for example, OGE Informal Advisory Letter 98 x 8 (dealing with acceptance of a gift of ground transportation), which is included in *The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics*, as published by the U.S. Government Printing Office, and is also available in the Advisory Opinions section of OGE's Web site at <http://www.usoge.gov>.

Proposed § 2601.103(c) would state OGE policy with regard to the sources from which gifts may be accepted. The Ethics Act does not impose any restriction with regard to any particular source of a gift. The main concern with regard to the source of a gift is raised by a source that would be a "prohibited source" for the purpose of gifts to an agency employee. As defined by the statute on gifts to Federal employees, at 5 U.S.C. 7353(a), and OGE's regulation implementing the Standards of Ethical Conduct for executive branch employees, at 5 CFR 2635.203(d), a prohibited source is any person who is seeking official action from, doing business with (or, under the Standards, seeking to do business with), or conducting activities regulated by, the employee's agency, or any person whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. The Standards of Ethical Conduct further clarify that an organization made up of a majority of prohibited sources is itself a prohibited source of gifts. See 5 CFR 2635.203(d)(5). Some agencies do bar the acceptance of a gift to the agency from donors who would be considered prohibited sources for gifts to its employees. OGE, however, has determined that barring the acceptance of a gift from a prohibited source or from any other particular class of donors would be unduly restrictive. When a gift is from a prohibited source, there are different considerations if the gift is made to an agency rather than to an individual employee. Accordingly, the identity of the source is evaluated as one key factor in applying the conflict of interest standard to determine whether acceptance of a gift is appropriate. Although the proposed rule would not preclude OGE's acceptance of gifts from prohibited sources, such gifts would be scrutinized to try to ensure that their acceptance would not reflect unfavorably upon OGE or its employees.

Other kinds of sources may also raise special concerns. For example, gifts from intermediaries, including foundations and other organizations, may require additional analysis and evaluation. Although gifts generally should be made directly to OGE, the proposed rule would not preclude gifts from intermediaries. However, where a gift is made through an intermediary, it is relevant to the conflict analysis to consider both the intermediary and the ultimate source of the gift. In addition, the intermediary, such as a foundation or association, may itself be a prohibited source, as noted above, and call for the same degree of scrutiny. Gifts from intermediaries should also be examined in terms of the nature of the conditions that may be attached to the gift. However, rather than bar any source as a class, the proposed rule would resolve these special issues through application of the conflict of interest analysis.

Proposed § 2601.103(d) would state that acceptance of a gift should not in any way be construed to be an endorsement of the donor or the donor's products, services, activities or policies.

Proposed § 2601.103(e) would state that, with the exception of gifts of actual currency, OGE will not preclude the solicitation or acceptance of any kind of gift that is within its authority.

Although OGE's statutory authority does not bar gifts of currency, OGE believes that it is prudent to decline a gift in the form of actual currency. This approach is consistent with that taken by many agencies that have addressed the question in their policy guidelines. The reasons for this self-limitation are the greater risks that currency presents in terms of appearance problems and in terms of accountability of funds. Generally, there should be sufficient time to advise a donor to provide a gift by some alternative to currency, such as by check, by reimbursement of expenses, or by an in-kind gift. This should not unduly limit the use of this authority and will provide greater protection for OGE.

4. Proposed § 2601.104 would set forth the relationship of the authority implemented by this subpart to other authorities that provide for the acceptance of gifts either by OGE or by an OGE employee. The authority that would be implemented by this proposed regulation is general authority for OGE to accept gifts. There are other authorities that are more specific and that provide for the acceptance of gifts by either the agency or by an individual employee in a personal capacity. In some cases, an authority, by law, is the exclusive authority for agency acceptance of a gift. In such a case, that

authority would be the exclusive authority for acceptance by the agency. In other cases, a particular authority does not expressly state that it is exclusive. As a matter of policy, however, OGE will utilize the more specific authority for situations in which it is applicable. This would not, however, preclude use of OGE's authority for activities or purposes that are collateral to, or occur in conjunction with, but are not expressly covered by some specific authority.

Proposed § 2601.104(a)(1) would state the relationship of OGE's gift authority to the authority to accept payments made to the agency pursuant to 31 U.S.C. 1353. As mentioned, section 1353 is the exclusive authority by which executive branch agencies can accept certain travel reimbursements relating to an activity that is covered by that statute. Section 1353 applies to any payment "from non-Federal sources for travel, subsistence, and related expenses with respect to attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee." 31 U.S.C. 1353(a). Implementing regulations of the General Services Administration define the term "meeting or similar function" as "a conference, seminar, speaking engagement, symposium, training course, or similar event that takes place away from the employee's official station, and is sponsored or cosponsored by a non-Federal source." 41 CFR 304-1.2(c)(3).

Where section 1353 is applicable, that statute preempts the use of agency gift acceptance authority. This is made clear by the rules implementing section 1353 at 41 CFR 304-1.8(a), which state that an agency "may not accept, under an agency gift statute or other similar authority, payment for travel, subsistence, and related expenses incurred by an employee and/or accompanying spouse to attend a meeting or similar function." In other words, OGE's gift authority could not be used to accept payments in connection with attendance at a meeting or similar function that is within the scope of section 1353. However, using OGE gift acceptance authority would not be precluded in situations that are not covered by section 1353 that might occur in conjunction with a section 1353 event. Section 1353 does not apply to certain peripheral activities that may occur in connection with a section 1353 activity. Use of OGE gift acceptance authority may be appropriate in such cases, provided there is a connection to some official activity.

Section 1353 does not cover a meeting or other event required to carry out the agency's statutory or regulatory functions. OGE could use its own gift authority to cover transportation and travel related expenses connected with carrying out such core functions. For example, OGE could use its gift authority in conducting a regional ethics training event which would be in furtherance of one of OGE's core functions. Section 1353 also does not cover gifts of transportation when the employee is not in a travel status. OGE could use its authority to accept local transportation for an employee on official duty.

Proposed § 2601.104(a)(2) would state the relationship of this authority to the receipt of gifts of volunteer service accepted by the agency pursuant to 5 U.S.C. 3111. Section 3111 provides for an exception from the prohibition on acceptance of voluntary services contained in 31 U.S.C. 1342. It permits the acceptance of the services of student volunteers who are participating in an agency program established for the purpose of providing educational experiences for the student. The statute and its implementing regulations at 5 CFR part 308 contain criteria that must be met in order to accept student volunteer services.

Proposed § 2601.104(a)(2) provides that the acceptance of services by student volunteers that comes within the authority of 5 U.S.C. 3111 shall be accepted by the agency under that authority. Unlike section 1353, section 3111 does not expressly state that it is the exclusive authority for the acceptance of student volunteer services. However, OGE will use that authority for student volunteer services that are covered by the terms of that statute. On the other hand, OGE authority may be used in cases where the services to be volunteered by a student do not meet the terms of section 3111. For example, a person with more than a five-month interim between school years who would not qualify under the student volunteer program could provide volunteer services under the OGE gift acceptance authority. More importantly, the OGE authority would be available for acceptance of a broad array of other volunteer services that are not covered by the limited scope of section 3111.

There are also a number of authorities under which employees as individuals may accept gifts, such as gifts of training, gifts received from certain foreign governmental entities, and gifts that may be accepted in accordance with the provisions in the Standards of Ethical Conduct. In some cases, a gift

might be accepted either by an individual employee or by the agency. A choice of authorities would then be available.

Proposed § 2601.104(b)(1) would state the relationship of this authority to gifts of training, expenses for training and other benefits made to an employee pursuant to 5 U.S.C. 4111. Section 4111 permits employees to accept payments from certain qualifying organizations without regard to the supplementation of salary restrictions contained in 18 U.S.C. 209. Regulations implementing the statute are found at 5 CFR 410.501–410.503. The regulation at 5 CFR 410.501(b) provides that:

This subpart does not limit the authority of an agency head to establish procedures on the acceptance of contributions, awards, and payments in connection with any training and meetings that are outside the scope of this subpart in accordance with laws and regulations governing Government ethics and governing acceptance of travel reimbursements from non-Federal sources.

Thus, in a case where the payment qualifies under section 4111 and is made to an individual employee, OGE's agency gift authority and this proposed regulation would not apply because they concern gifts to the agency. *See also* the gift exception in the Standards of Ethical Conduct, at 5 CFR 2635.204(l)(1), for such gifts. However, section 4111 would not preclude OGE, as an agency, from accepting gifts of training for its employees that were outside the scope of that provision. Where such a gift is made to the agency, this proposed part would apply. Or OGE may elect to use this authority in instances where a gift could not be accepted by an employee because it is outside the scope of section 4111. For example, section 4111 applies only if the source is a tax exempt organization described in section 501(c)(3) of title 26 of the United States Code; other tax exempt organizations (described in other subparagraphs of 26 U.S.C. 501) are not within the scope of section 4111. Moreover, OGE's authority could be used in conjunction with, or as a supplement to, the payments to individual OGE employees for training.

Proposed § 2601.104(b)(2) would state the relationship of this authority to gifts to an agency employee made by a foreign government or organization, or representative thereof, and accepted in accordance with the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. Section 7342 provides an exception by consent of Congress which permits employees to accept certain gifts that would otherwise be barred by the Emoluments Clause of the Constitution (Article I, Section 9, Clause 8). This agency gift acceptance

authority would not alter the authority conferred by section 7342; *see also* the gift exception in the Standards of Ethical Conduct, at 5 CFR 2635.204(l)(2), for such gifts.

Proposed § 2601.104(b)(3) would state the relationship of this authority to gifts made to an employee in accordance with the Hatch Act, as revised, in subchapter III of 5 U.S.C. chapter 73. Gifts of meals, lodging, transportation, attendance at events, and other benefits given to an employee who is permitted to accept them under the Hatch Act are accepted by the employee in a personal capacity. This authority would not alter the authority of the Hatch Act; *see also* the gift exception in the Standards of Ethical Conduct, at 5 CFR 2635.204(f), for such gifts.

Proposed § 2601.104(b)(4) would state the relationship of this authority to gifts made to an employee personally that may be accepted under the gift rules of the Standards of Ethical Conduct, as codified at subparts B and C of 5 CFR part 2635. Whenever a gift is accepted by an employee personally pursuant to any particular gift exception, this part does not apply. There may be situations where alternatively the gift could be made to the agency; in such a case, the OGE gift authority might apply. For example, the sponsor of a conference at which an OGE employee is a speaker might give the OGE employee a book about ethics in government (with a market value of \$20 or less), which the OGE employee could accept under the gift exception in the Standards of Ethical Conduct, at 5 CFR 2635.204(a), for such gifts.

Alternatively, the sponsor of the conference might give the book to OGE, for OGE to place in its library.

5. Proposed § 2601.105 would set forth definitions applicable to this part.

Proposed § 2601.105 would define the term "Administration Division" to mean the Administration Division of the Office of Government Ethics.

Proposed § 2601.105 would define the term "agency" to mean the Office of Government Ethics (OGE).

Proposed § 2601.105 would define the term "authorized agency official" to mean the Director or the Director's delegatee.

Proposed § 2601.105 would define the terms "Director" to mean the Director of OGE, and the term "employee" to mean an employee of OGE.

Proposed § 2601.105 would define the term "gift." The definition would follow the definition set forth in the Act. Particular categories of gifts referenced in the definition in the Act are proposed to be further defined.

Proposed § 2601.105 would define "money" to include currency, checks, money orders or other forms of negotiable instruments. Note that although the Act authorizes the acceptance of money without limitation, as a matter of policy as set forth in proposed § 2601.103(e), OGE would not accept gifts of currency.

Proposed § 2601.105 would define "personal property." The definition of personal property is intended to cover all forms of personal property. It would include both tangible and intangible property. Some of the types of tangible personal property that might be accepted by OGE would include books, videotapes, training media, electronic training games and other educational materials, office and other supplies, as well as equipment such as computers, printing and copying equipment, cameras and recording equipment, visual and graphics materials, and exhibits. The definition would also cover tangible gifts of consumable or perishable products. The definition would also cover all forms of intangible property, including securities, options and warrants. It would also cover, for example, permission to use copyrighted material without payment of a fee. An example of such use would be use of music or visual material in the production of ethics training videos.

Proposed § 2601.105 would define "prohibited source" by referencing the definition contained in the Standards of Ethical Conduct, at 5 CFR 2635.203(d).

Proposed § 2601.105 would define "services" to cover virtually any type of personal service. Some typical types of services that OGE might expect to accept and use as furthering the work of the agency would include communication-related services to conduct training. These might include broadcast studio services, technicians, and global uplink technicians in connection with training via satellite broadcasts. Training might also call for audio visual services, design and graphics services, and planning services. For retreats, this authority could be used to accept gifts of the services such as motivational speakers or management consultants. Other professional services such as instructional, consulting and advisory services might also be accepted. In connection with a conference, there might be a gift of food and catering services.

Proposed § 2601.105 would also define "use of facilities" to encompass every type of use of facility. It would cover, for example, the use of space such as a hotel ballroom or lodging, conference center, retreat center,

conference room, auditorium, seminar or classroom, banquet room or other meeting or training space. It would also include the use of exhibit space, storage facilities, and broadcast or production studios. Use of facilities would also encompass use of the equipment associated with the facility, such as video production equipment and satellite broadcasting equipment.

B. Guidelines for Acceptance

1. Proposed § 2601.201 would provide for delegation of the OGE Director's general authority to solicit, accept, and utilize gifts.

2. Proposed § 2601.202 would set forth the procedures for handling gift offers.

Proposed § 2601.202(a) would provide that only an authorized agency official shall have the authority to solicit, accept, refuse, return or negotiate the terms of a gift.

Proposed § 2601.202(b) would provide that OGE employees who are not authorized to accept a gift are to forward all gift offers to an authorized agency official. Agency employees could respond to potential donors and inform them of OGE's gift authority but they should not engage in further discussions of the possibility of a gift without direction from an authorized agency official. OGE employees may also put a potential donor in touch with an authorized agency official. In any event, employees must not make any commitments to extend preferential treatment to any potential donor in connection with a gift offer.

Proposed § 2601.202(c) would provide that while gifts generally may be solicited or accepted only after an evaluation has been made under the conflict of interest standard of § 2601.203 as proposed, in exceptional circumstances, a gift in-kind could be accepted prior to an evaluation under the conflict standard. An example of such a situation might be an employee on official travel in a remote location who is offered a gift of local transportation. Although it would be preferable to anticipate such situations and make appropriate arrangements in advance, exceptional circumstances may warrant subsequent authorization. If subsequent authorization is determined not to be appropriate, then it may be necessary to return the gift, or make reimbursement to the donor.

Proposed § 2601.202(d) would provide that gifts may be acknowledged in writing in the form of a letter of acknowledgment, and describes the contents of such a letter to a donor or an intermediary. Gifts to the agency are considered gifts to the United States for

the purposes of Federal tax laws. Sections 170(c)(1), 2055, and 2522, respectively, of title 26 of the United States Code establish the status of such gifts for purposes of Federal income, gift, and estate taxes. The tax consequences or implications of any gift transaction are the responsibility of the donor. Therefore, donors should consult their own tax professionals for specific advice on permissible deductions. OGE will not estimate or place any value on a nonmonetary gift, for tax purposes.

Proposed § 2601.202(e) would provide that gifts may be declined orally or in writing. Donors generally may be advised of the reason for declining the gift but a gift may be declined solely as a matter of discretion.

Proposed § 2601.202(f) would provide that gifts of money (other than currency) and proceeds shall be placed in an OGE trust fund account. The Act does not specify where funds should be held when they are not being utilized. But following the practice of other executive branch agencies, OGE would establish the trust fund account through the Department of the Treasury. Disbursements would be available from the account upon order of OGE without fiscal year limitations.

3. Proposed § 2601.203 would set forth the analysis to be used for making the determination required by the Act as to whether the solicitation or acceptance of a gift would reflect unfavorably upon the ability of the Office of Government Ethics, or any employee of such Office, to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.

Proposed § 2601.203(a) would restate the language of the Act that sets forth the standard for determining whether it is appropriate for OGE to solicit or accept a gift.

Proposed § 2601.203(b) would provide a list of factors to be considered in making the determination as to whether solicitation or acceptance of a gift would be appropriate under this standard. The first of these factors, at proposed § 2601.203(b)(1), would require an evaluation of the identity of the source of the gift. As noted above, the proposed rule does not prohibit the solicitation or acceptance of gifts from any particular type of source, including persons who would be considered "prohibited sources" of gifts to agency employees. Evaluation of the source of the gift nonetheless is a critical element in the analysis of whether a gift may be solicited or accepted.

The second factor, in proposed § 2601.203(b)(2), would require an evaluation of the estimated market value or cost to the donor of a gift, or the amount if it is a gift of money.

The third factor, in proposed § 2601.203(b)(3), would require an evaluation of the donor's stated purpose of the gift.

The fourth factor, in proposed § 2601.203(b)(4), would require an evaluation of any other expected recipients of the gift on the same occasion. This may be particularly relevant in activities with a number of sponsors. Identifying other recipients can avoid situations that might reflect unfavorably upon the agency.

The fifth factor, in proposed § 2601.203(b)(5), would require an evaluation of the timing of the gift, to avoid situations that might reflect unfavorably upon OGE. Evaluation of timing is also necessary in order to avoid any impression that the agency is pressuring a potential donor to make a gift.

The sixth factor, in proposed § 2601.203(b)(6), would require an evaluation of any matter pending at OGE that might affect the interests of the donor. In addition to actual pending matters, it is relevant to consider any anticipated dealings between the agency and the donor and the significance of those dealings to a potential donor's revenues or business.

The seventh factor, in proposed § 2601.203(b)(7), would require an evaluation of the significance of an individual employee's role in any matter affecting the donor, if benefits of the gift will accrue to that employee.

The eighth factor, in proposed § 2601.203(b)(8), would require an evaluation of the nature or character of a gift. If it is a gift in-kind, then the nature of the gift must be evaluated. Because this part as proposed would not prohibit any particular type of gift (other than gifts of currency), evaluation of the nature of the gift is important.

The ninth factor, in proposed § 2601.203(b)(9), would require an evaluation of the frequency of gifts from the same source. Frequent gifts could create an appearance of a relationship between the agency and the donor as part of which favors might be granted.

The tenth factor, in proposed § 2601.203(b)(10), would require an evaluation of whether the purpose of the gift aids or facilitates the work of OGE, consistent with the terms of the statutory authority for OGE to accept gifts.

Proposed § 2601.203(c) would note that the agency may request additional information from the donor to assist in

determining whether acceptance is appropriate.

4. Proposed § 2601.204 would set forth the conditions for acceptance of gifts.

Proposed § 2601.204(a)(1) would restate the language of the Act that provides that no gift may be accepted that attaches conditions inconsistent with applicable laws or regulations. This prohibition would not bar acceptance of a gift that was donated for a specific purpose as, for example, to support OGE training. Nor would the fact that a donor expressed some nonbinding preference as to how the donor wished a gift be used preclude acceptance.

Proposed § 2601.204(a)(2) would restate the language of the Act that provides that no gift may be accepted that is conditioned upon or will require the expenditure of appropriated funds that are not available to OGE.

Proposed § 2601.204(a)(3) would bar acceptance of a gift that is given in exchange or return for some privilege, concession or other present or future benefit. Such an exchange could imply that the gift would compromise the integrity of the agency's programs.

Proposed § 2601.204(a)(4) would bar acceptance of a gift that would require OGE to adhere to particular requirements as to deposit, investment, or management of funds donated.

Proposed § 2601.204(a)(5) would bar acceptance of a gift that would require OGE to undertake activities that are not related to the agency's mission, programs or statutory authority.

Proposed § 2601.204(a)(6) would bar acceptance of a gift that would reflect unfavorably upon the ability of the agency, or any of its employees, to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.

C. Accounting Requirements

Proposed § 2601.301 would set forth guidance for the accounting of gifts. Accounting requirements may help ensure that OGE's gift acceptance authority is used in a way that does not reflect unfavorably on OGE or its employees.

Proposed § 2601.301(a) would provide for the regular accounting of gifts received. Money gifts must be accounted for under the same standards as are applicable to appropriated funds.

Proposed § 2601.301(b) would require OGE to maintain an inventory of donated personal property valued at over \$500.

Proposed § 2601.301(c) would require OGE to maintain a log of accepted gifts valued at over \$500.

The proposed rule does not expressly provide for any type of regular audit of gift funds. Some agencies provide for audits at such intervals as the Comptroller General, in his discretion, deems to be appropriate. Given the size of OGE and the expected relatively low volume of gifts, it is not believed that it is necessary to provide for any regular audit. Such audits could, however, be done as appropriate.

Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments to OGE on this proposed regulation, to be received on or before August 4, 2003. The Office of Government Ethics will review all comments received and consider any modifications to this proposal which appear warranted in issuing its final rule.

Paperwork Reduction Act

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

Congressional Review Act

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

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 regulation will not have a significant economic impact on a substantial number of small entities because it primarily affects OGE itself and OGE employees.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), the proposed rule would not significantly or uniquely affect small governments and would not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Executive Order 12866

In issuing this proposed regulation, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation as set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This proposed rule has not been reviewed by the Office of Management and Budget under that Executive order since it is not a significant regulatory action within the meaning of the Executive order.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2601

Conflict of interests, Government employees, Government property.

Approved: April 28, 2003.

Amy L. Comstock,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to add a new part 2601 to 5 CFR to read as follows:

PART 2601—IMPLEMENTATION OF OFFICE OF GOVERNMENT ETHICS STATUTORY GIFT ACCEPTANCE AUTHORITY

Subpart A—General Provisions

Sec.

- 2601.101 Authority.
- 2601.102 Purpose.
- 2601.103 Policy.
- 2601.104 Relationship to other authorities.
- 2601.105 Definitions.

Subpart B—Guidelines for Solicitation and Acceptance of Gifts

- 2601.201 Delegation.
- 2601.202 Procedure.
- 2601.203 Conflict of interest analysis.
- 2601.204 Conditions for acceptance.

Subpart C—Accounting Requirements

- 2601.301 Accounting of gifts.

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978).

Subpart A—General Provisions

§ 2601.101 Authority.

Section 2 of the Office of Government Ethics Authorization Act of 1996, amending the Ethics in Government Act of 1978, as codified at 5 U.S.C. app. § 403(b), authorizes the Office of Government Ethics (OGE) to accept and utilize gifts for the purpose of aiding or facilitating the work of OGE.

§ 2601.102 Purpose.

The purpose of this part is to establish guidelines governing the implementation of OGE's gift authority by defining its scope and application, by prescribing the policies, standards and procedures that govern the solicitation, acceptance and use of gifts, and by setting forth accounting requirements related to the use of this authority.

§ 2601.103 Policy.

(a) *Scope.* The Office of Government Ethics may use its statutory authority to solicit, accept and utilize gifts to the agency that aid or facilitate the agency's work. The authority to solicit, accept and utilize gifts includes the authority to receive, administer, spend, invest and dispose of gifts. Gifts to the agency from individuals or organizations can be a useful adjunct to appropriated funds and may enhance the agency's ability to fulfill its mission, as well as further mutually beneficial public/private partnerships, or other useful arrangements or relationships. Such uses of this authority are appropriate provided that solicitation or acceptance of a gift does not compromise the integrity of OGE, its programs or employees.

(b) *Use of gifts.* Gifts to OGE may be used to carry out any activity that furthers the mission, programs, responsibilities, functions or activities of the agency. Gifts may be used to carry out program functions whether or not appropriated funds are available for that purpose, provided that such expenditures are not barred by law or regulation. Gifts may also be used for official travel by employees to events or activities required to carry out the agency's statutory or regulatory functions. Gifts to the agency may also be used for the travel expenses of spouses accompanying employees on official travel, if such travel could be paid for by appropriated funds.

(c) *Sources.* Generally, gifts may be solicited or accepted from any source, including a prohibited source, provided that the standards of this part are met. Gifts generally should be made directly to the agency and not through intermediaries. However, where a gift is offered by an intermediary, both the intermediary and the ultimate source of the gift should be analyzed to determine whether acceptance would be appropriate.

(d) *Endorsement.* Acceptance of a gift pursuant to this part shall not in any way be deemed to be an endorsement of the donor, or the donor's products, services, activities, or policies. Letters to a donor expressing appreciation of a gift are permitted.

(e) *Type of gift.* The agency may solicit or accept any gift that is within its statutory authority. However, as a matter of policy, OGE will not solicit or accept gifts of currency pursuant to this part. Donors who offer currency should be advised that the gift may be made by check or money order payable to the U.S. Office of Government Ethics.

§ 2601.104 Relationship to other authorities.

(a) This part does not apply to gifts to the agency of:

(1) Travel and travel-related expenses made pursuant to the authority set forth in 31 U.S.C. 1353; or

(2) Volunteer services made pursuant to the authority set forth in 5 U.S.C. 3111.

(b) This part does not apply to gifts to an individual agency employee, including:

(1) Gifts of contributions, awards or other expenses for training made pursuant to the authority set forth in the Government Employees Training Act, 5 U.S.C. 4111;

(2) Gifts made by a foreign government or organization, or representative thereof, pursuant to the authority set forth in 5 U.S.C. 7342;

(3) Gifts made by a political organization that may be accepted by an agency employee who, in accordance with the terms of the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323, may take an active part in political management or in political campaigns; or

(4) Gifts made directly or indirectly that an employee may accept in a personal capacity pursuant to the authority set forth in 5 CFR part 2635, subpart B or subpart C.

§ 2601.105 Definitions.

For the purposes of this part:

Administration Division means the Administration Division of the Office of Government Ethics.

Agency means the Office of Government Ethics (OGE).

Authorized agency official means the Director of the Office of Government Ethics or the Director's delegatee.

Director means the Director of the Office of Government Ethics.

Employee means an employee of the Office of Government Ethics.

Gift means any gift, donation, bequest or devise of money, use of facilities, personal property, or services and may include travel reimbursements or payments for attendance at or participation in meetings or events.

Money means currency, checks, money orders or other forms of negotiable instruments.

Personal property means all property, tangible or intangible, not defined as real property, and includes stocks and bonds.

Prohibited source means any source described in 5 CFR 2635.203(d).

Services means all forms of voluntary and uncompensated personal services.

Use of facilities means use of space, equipment and all other facilities.

Subpart B—Guidelines for Acceptance**§ 2601.201 Delegation.**

(a) The authority to solicit, accept, and utilize gifts in accordance with this part resides with the Director.

(b) The Director may delegate this authority.

(c) Authorities delegated in accordance with paragraph (b) of this section may be redelegated only through a written delegation authorizing an agency employee to solicit or accept specific types of gifts, or a gift for a specific purpose, function, or event.

§ 2601.202 Procedure.

(a) The authorized agency official shall have the authority to solicit, accept, refuse, return, or negotiate the terms of acceptance of a gift.

(b) An employee, other than an authorized agency official, shall immediately forward all offers of gifts covered by this part regardless of value to an authorized agency official for consideration and shall provide a description of the gift offered. An employee shall also inform an authorized agency official of all discussions of the possibility of a gift. An employee shall not provide a donor with any commitment, privilege, concession or other present or future benefit (other than an appropriate acknowledgment) in return for a gift.

(c) Only an authorized agency official may solicit, accept or decline a gift after making the determination required under the conflict of interest standard in § 2601.203. An authorized agency official may find that, while acceptance of an offered gift is permissible, it is in the interest of the agency to qualify acceptance by, for example, limiting the gift in some way. Approval of acceptance of a gift in-kind after receipt of the gift may be granted as deemed appropriate by the authorized agency official.

(d) Gifts may be acknowledged in writing in the form of a letter of acceptance to the donor. The amount of a monetary gift shall be specified. In the case of nonmonetary gifts, the letter shall not make reference to the value of the gift. Valuation of nonmonetary gifts is the responsibility of the donor. Letters

of acceptance shall not include any statement regarding the tax implications of a gift, which remain the responsibility of the donor. No statement of endorsement should appear in a letter of acceptance to the donor.

(e) A gift may be declined by an authorized official orally or in writing. A donor may be advised of the reason why the gift has been declined. A gift may be declined solely as a matter of agency discretion, even though acceptance would not be precluded under the conflict of interest standard in § 2601.203.

(f) A gift of money or the proceeds of a gift shall be deposited in an appropriately documented agency fund. A check or money order should be made payable to the "U.S. Office of Government Ethics."

§ 2601.203 Conflict of interest analysis.

(a) A gift shall not be solicited or accepted if the authorized agency official determines that such solicitation or acceptance of the gift would reflect unfavorably upon the ability of the agency, or any employee of the agency, to carry out OGE responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.

(b) In making the determination required under paragraph (a) of this section, an authorized agency official may be guided by all relevant considerations, including, but not limited to the following:

- (1) The identity of the donor;
- (2) The monetary or estimated market value or the cost to the donor;

(3) The purpose of the gift as described in any written statement or oral proposal by the donor;

(4) The identity of any other expected recipients of the gift on the same occasion, if any;

(5) The timing of the gift;

(6) The nature and sensitivity of any matter pending at the agency affecting the interests of the donor;

(7) The significance of an individual employee's role in any matter affecting the donor, if benefits of the gift will accrue to the employee;

(8) The nature of the gift offered;

(9) The frequency of other gifts received from the same donor; and

(10) The agency activity, purpose or need that the gift will aid or facilitate.

(c) An authorized agency official may ask the donor to provide in writing any additional information needed to assist in making the determination under this section. Such information may include a description of the donor's business or organizational affiliation and any matters that are pending or are expected to be pending before the agency.

§ 2601.204 Conditions for acceptance.

(a) No gift may be accepted that:

(1) Attaches conditions inconsistent with applicable laws or regulations;

(2) Is conditioned upon or will require the expenditure of appropriated funds that are not available to the agency;

(3) Requires the agency to provide the donor with some privilege, concession or other present or future benefit in return for the gift;

(4) Requires the agency to adhere to particular requirements as to deposit, investment, or management of funds donated;

(5) Requires the agency to undertake or engage in activities that are not related to the agency's mission, programs or statutory authorities; or

(6) Would reflect unfavorably upon the ability of the agency, or any of its employees, to carry out its responsibilities or official duties in a fair and objective manner, or would compromise or appear to compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.

Note to § 2601.204: Nothing in this part shall prohibit the agency from offering or providing the donor an appropriate acknowledgment of its gift in a publication, speech or other medium.

Subpart C—Accounting Requirements

§ 2601.301 Accounting of gifts.

(a) The Administration Division shall ensure that gifts are properly accounted for by following appropriate internal controls and accounting procedures.

(b) The Administration Division shall maintain an inventory of donated personal property valued at over \$500. The inventory shall be updated each time an item is sold, excessed, destroyed or otherwise disposed of or discarded.

(c) The Administration Division shall maintain a log of all gifts valued at over \$500 accepted pursuant to this part. The log shall include, to the extent known:

- (1) The name and address of the donor;
- (2) A description of the gift; and
- (3) The date the gift is accepted.

[FR Doc. 03-11043 Filed 5-2-03; 8:45 am]

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