57 FR 35006--07/23/92--Standards of Ethical Conduct for Employees of the Executive Branch
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# OFFICE OF GOVERNMENT ETHICS

## 5 CFR Part 2635

## RIN 3209-AA04

## Standards of Ethical Conduct for Employees of the Executive Branch

**AGENCY:** Office of Government Ethics.

**ACTION:** Final rule.

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**SUMMARY:** The Office of Government Ethics is issuing a final rule which establishes uniform standards of ethical conduct for officers and employees of the executive branch of the Federal Government (hereinafter Government). When effective in 180 days, part 2635 will supersede most of subparts A, B and C of 5 CFR part 735 and agency regulations thereunder, as well as 5 CFR 2635.101 of the Office of Government Ethics regulations.

The final rule establishes standards relating to the receipt of gifts, whether from prohibited sources, because of official position, or between employees. It establishes standards for dealing with the employee's own and other financial interests that conflict with an employee's official duties. These include disqualification requirements that apply when a matter to which the employee is assigned affects a person with whom he or she is seeking employment. In addition to standards relating to use of official position and time, Government property and nonpublic information, it establishes specific standards for application to outside activities in which an employee may participate, including fundraising and outside employment.

**EFFECTIVE DATE:** February 3, 1993.

**FOR FURTHER INFORMATION CONTACT:** Leslie L. Wilcox, Office of Government Ethics, telephone (202/FTS) 523-5757, FAX (202/FTS) 523-6325.

**SUPPLEMENTARY INFORMATION:**

I. Rulemaking History

On July 23, 1991, the Office of Government Ethics (OGE) published for comment a proposed rule to establish uniform standards of ethical conduct for all employees of the executive branch (56 FR 33778-33815). The proposed rule was issued pursuant to section 201 of Executive Order 12674 of April 12, 1989, as modified by E.O. 12731, which directs the Office of Government Ethics to "establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable" and gives the Office of Government Ethics authority, with the concurrence of the Attorney General, to issue regulations interpreting 18 U.S.C. 207-209.

Title III of the Ethics Reform Act of 1989 amended title 5 of the U.S. Code to add a new section 7353 which, in language virtually identical to that contained in section 101(d) of Executive Order 12674, restricts the solicitation and receipt of gifts from outside sources and authorizes the Office of Government Ethics to issue implementing regulations for the executive branch. Subpart B of this regulation was thus proposed as the Office of Government Ethics' implementation of both 5 USC 7353 and the Executive order. Subpart C of the rule, which concerns gifts between employees, was proposed as the Office of Government Ethics' implementation of the longstanding statutory prohibition against gifts to superiors at 5 U.S.C. 7351. As amended by the Ethics Reform Act of 1989, 5 U.S.C. 7351 authorizes the Office of Government Ethics to issue implementing regulations applicable to employees of the executive branch.

The proposed rule provided a 60-day comment period and invited comments by agencies and the public. Timely comments were received from 1,068 sources. After carefully considering all comments and making appropriate modifications, the Office of Government Ethics is publishing this final rule after consultation with the Department of Justice and the Office of Personnel Management pursuant to section 201(a) of Executive Order 12674 of April 12, 1989, as modified by E.O. 12731, and authorities contained in titles I and IV of the Ethics in Government Act of 1978, Public Law 95521, October 26, 1978, as amended, 5 U.S.C. Appendix, and 5 U.S.C. 7351(d)(1) and 7353(b)(1) as added by the Ethics Reform Act of 1989, Public Law 101-194, November 30, 1989, as amended. Those portions of subparts D and F of this final rule which involve an interpretation of 18 U.S.C. 208 are issued with the concurrence of the Attorney General pursuant to section

201(c) of Executive Order 12674. The Office of Government Ethics expects to issue separate regulations to interpret 18 U.S.C. 207 and 209 and to provide waivers under 18 U.S.C. 208(b)(2).

## II. Summary of Comments

Of the 1,068 sets of comments timely submitted, 37 were from executive branch agencies (including 7 from agency Inspectors General) and 1,031 were from organizations and individuals. Many commented on several different sections of the proposed rule. OGE has considered each comment submitted by each commenter and those determined to be significant are discussed below in the context of the particular subparts or sections to which they pertain. We have not specifically discussed comments that were either generally laudatory or generally critical, either of style or substantive content, or that offered editorial suggestions or suggestions regarding format that would not affect meaning. In addition, we have not specifically discussed comments that were plainly unreasonable or that exhibited a clear misunderstanding of the purpose or language of the proposed regulation or of Government processes in general. The following comments fall within these categories: Proposals to revise the regulations to include a list of ethical obligations the Government owes to individual employees; recommendations to make the same ethical standards applicable to employees in all three branches of Government; comments that pertain to ethics training requirements that are the subject of other regulations; a suggestion to discuss the relationship between part 2635 and the ethical standards of the legal profession; and a recommendation to establish standards of "courtesy" for employees who deal with members of the public.

Other comments not separately addressed below include those that pertain only to a single agency. Comments that fall within this category include requests to clarify the application of certain provisions in the regulation to various types of military reserve officers and to include in the listing of statutory prohibitions generally relevant to outside activities a synopsis of a statute applicable only to employees of the Bureau of Indian Affairs and the Indian Health Service. The regulations in this new 5 CFR part 2635 apply to all executive branch personnel and, thus, contain provisions intended for broad application throughout the executive branch. To the extent they may need to be tailored to the functions and activities of a given agency, §2635.105 of this rule provides authority for individual agencies to issue supplemental regulations. We also have not addressed recommendations which information contained in the preamble

accompanying the proposed rule made clear could not be adopted because they are contrary to underlying legal authority. See, for instance, the discussion in the preamble of the proposed rule (56 FR 33779) of why the regulations do not cover enlisted members of the uniformed services. We have not specifically addressed comments that have been rendered inapplicable by changes to the regulation which have been made for other reasons. And, lastly, we have not discussed recommendations for additional examples unless, in our opinion, the proposed example would be helpful to illustrate a point in need of clarification.

Subpart A-General Provisions

Section 2635.101 Basic Obligation of Public Service

Because certain of the principles listed in §2635.101 are not further amplified in the regulation, one individual observed that the sentence, as proposed, introducing that listing inaccurately states that the general principles "form the basis for the standards contained in this part." This sentence has been revised to more accurately state that the general principles "apply to every employee and many form the basis for the standards contained in this part." One agency recommended a restructuring of §2635.101(b) to make it clear that the last sentence, as proposed, applies to all fourteen principles and not just the fourteenth. In accordance with this recommendation, the statement directing employees to apply the general principles to conduct not otherwise addressed in the subpart has been moved to the beginning of §2635.101(b) of this regulation.

The three agencies that commented on §2635.101(b)(6) agreed that an employee who acted without knowledge that those actions exceeded his or her authority should not be disciplined for violating the ethical principle, as stated in Executive Order 12674, that an employee "shall make no unauthorized commitments or promises of any kind purporting to bind the Government." While two endorsed the proposed addition of a knowledge standard to the restatement of that principle, one expressed concern that, as an evidentiary matter, §2635.101(b)(6) would require an agency to show that the employee acted knowingly. The Office of Government Ethics has not changed this paragraph. Whatever burden an explicit knowledge standard may impose upon an agency seeking to discipline an employee for a violation of this principle is more than compensated for by the fairness it affords thousands of employees who are called upon to exercise discretion in applying

complex laws and regulations.

One agency suggested that the principle at §2635.101(b)(7) be rephrased to include the prefatory caveat, "Except as authorized or permitted by law," in order to ensure that it is not interpreted to prohibit an employee's receipt of Federal salary and benefits. That agency suggested that the statement of the principle be further revised to prohibit employees' use of public office for private gain "of themselves and others." The Office of Government Ethics has not made the revisions suggested. The prohibition against use of public office for private gain has been in effect and stated in essentially the same terms since the 1960's with never a serious suggestion that it prohibits an employee's receipt of Federal salary or benefits. And §2635.702 serves to clarify that the principle is sufficiently broad to prohibit an employee's use of public office for the private gain of other persons.

Two agencies suggested that the impartiality principle at §2635.101(b)(8) be qualified so that the obligation to act impartially and not give preferential treatment does not apply when preferential treatment is required by law, such as the statute according veterans a preference when applying for Federal employment. Because the impartiality principle is further amplified in subpart E of this regulation, OGE did not adopt this suggestion.

Five agencies suggested changes to §2635.101(b)(11), the principle requiring disclosure of fraud, waste, abuse and corruption. The recommendation by two agencies to change "shall" to "should" was not adopted. Section 2635.101(b)(11) is a verbatim restatement of the principle enunciated in the Executive order and the recommended substitution of precatory for mandatory language would change the principle. The Office of Government Ethics does not share those agencies' concern that the principle will elicit frivolous reporting. The Government's interest in curbing waste, fraud, abuse and corruption is better served by overreporting than by underreporting, and the authorities to whom such disclosures are to be made can best determine the merits of allegations and ensure that harm does not result from any that are spurious.

The suggestion by two agencies to specify agency Inspectors General as an appropriate authority for reporting required by §2635.101(b)(11) was also rejected. The Executive order requires employees to report waste, fraud, abuse and corruption to "an" appropriate authority. Adoption of this suggestion might be viewed as limiting an employee's reporting options. The Office of Government Ethics also did not adopt the recommendation by one agency to revise §2635.101(b)(11) to include references to legal definitions of "fraud" and "corruption." Such references would tend to suggest that an employee is responsible for applying

complex legal principles in determining whether improprieties should be reported. The purpose of the principle is to elicit disclosures of improprieties, and the terms "waste" and "abuse" are sufficiently broad that an employee should not hesitate to report activities or conduct that he or she believes involve fraud or corruption as those terms are commonly used. The Office of Government Ethics also rejected the suggestion by one agency to expand upon the statement of the ethical principle at §2635.101(b)(11) to state that employees shall cooperate with Inspectors General.

The Office of Government Ethics did not adopt a suggestion by one agency and one individual to delete §§2635.101(b)(12) and 2635.101(b)(13), dealing respectively with just financial obligations and adherence to equal opportunity laws and regulations, on the basis that agencies do not have sufficient authority to enforce these principles. Both principles are stated in the Executive order. For example, while agencies do not generally have authority to act as collection agents on behalf of an employee's creditors, they do have authority to initiate disciplinary action for failure to satisfy financial obligations in good faith to the extent that such action promotes the efficiency of the service. Because it is beyond the scope of the Executive order, we did not adopt the suggestion by one agency to augment the listing of prohibited bases for discrimination at §2635.101(b)(13) to reflect Federal Personnel Manual provisions prohibiting discrimination on the basis of politics or marital status. The term "handicap" is used in the Executive order. For this reason and for reasons of consistency with other statutes and regulations applicable within the executive branch, OGE did not adopt that agency's other recommendation to substitute the term "disability" for the term "handicap."

Of the three agencies that commented on §2635.101(b)(14), two specifically endorsed addition of the reasonable person test to the appearance principle as it is stated in the Executive order. While one agreed that appearances should be judged from the "perspective of a reasonable person with knowledge of the relevant facts," the third agency was concerned that so judging appearances would weaken the principle, since the public may not have knowledge of all relevant facts. The Office of Government Ethics has retained the reasonable person test as set forth in the proposed regulations. The test assumes that conduct will be judged by a reasonable person having knowledge of the relevant facts and does not depend on the public's actual knowledge. We do not view that test as weakening the appearance principle, but rather as appropriate assurance to an employee that his or her conduct will not be judged from the perspective of the

unreasonable, uninformed or overly zealous.

In a comment on a later section, one agency suggested that appearances might more appropriately be judged on the basis of the "knowledge common to the community." We do not believe this affords employees a useful yardstick for judging appearances, but rather invites debate about how many facts, out of the body of all relevant facts, should be considered and what constitutes "the community." At the time an employee is trying to judge whether a particular fact situation will give rise to an appearance of violating any principle or standard in part 2635, it is unlikely that "the community" will have any knowledge of the relevant facts and, in a particular case, such knowledge as "the community" ultimately gains may depend on factors as unpredictable as whether the media takes an interest in the matter.

One of the three agencies that commented on §2635.101(b)(14) felt that the appearance principle should require only that employees avoid "substantial" appearance problems. This recommendation was not adopted. While OGE agrees that employees should not be disciplined for appearance problems that are trivial, the requirement to judge appearances from the perspective of a reasonable person with knowledge of the relevant facts will insulate employees from unreasonable application of the appearance principle.

One agency suggested that a paragraph be added to §2635.101 stating that an agency may enforce a violation of one of the principles even if the conduct involved is not covered under another provision within part 2635. The suggested paragraph was not added since it would essentially duplicate §2635.106, which provides that a violation of anything in part 2635 may be cause for appropriate disciplinary or corrective action.

Section 2635.102 Definitions

One individual and one organization objected to the proposed definition of the term "agency" at §2635.102(a) as including an "executive agency as defined in 5 U.S.C. 105." Both suggested that the definition in 5 U.S.C. 106 be used to treat the Army, Navy and Air Force as separate agencies. Use of 5 U.S.C. 105 to define the term "agency" is required by the definition at section 503(c) of the Executive order. The Office of Government Ethics views as fairly minor the concern expressed by one commenter that an additional level of delegations can be avoided by treating the Army, Navy and Air Force as separate agencies. The regulations contain authority at §2635.203(a) for the Department of Defense to designate the Army, Navy and Air Force as separate agencies for purposes of subpart B and §2635.807. Moreover, the effect

of the definition, which has not been modified, is to subject all Department of Defense employees to one Department-wide set of supplemental agency regulations. This is preferable, in our view, to the Army, Navy and Air Force each issuing its own supplemental regulations.

One agency agreed generally with the concept at §2635.102(b) of this rule of permitting an agency to delegate to agency designees authority to make determinations, give approvals or take other action required by the regulations. In a comment supported by an outside organization, a second agency recommended that the definition of the term "agency designee" be deleted and that any responsibilities delegable to agency designees be placed upon agency ethics officials. A third agency suggested that the proposed definition specifically require that agency designees be "sufficiently qualified to perform their duties" or that their determinations be reviewed.

The Office of Government Ethics has not changed §2635.102(b) on the basis of the above recommendations. The agency that advocates reserving all determinations to ethics officials is itself small enough that it may be able to administer its ethics program in this manner and it is free to designate only ethics officials as its agency designees. The Office of Government Ethics is convinced that this would be impractical in many departments and larger agencies, and has retained the agency designee concept to give those agencies the flexibility needed to administer their ethics programs. As to the need to specify qualifications for or to oversee the determinations of agency designees, it should be noted that the determinations reserved to agency designees, like those at §§2635.204(g) and 2635.502(d), generally involve determinations of agency interest to be made under standards specified in the regulations. We expect agencies to designate individuals who are qualified to make determinations of this type and, in this regard, anticipate that the ethics training program required under section 301 of the Executive order and subpart G of 5 CFR part 2638 of OGE's regulations will prove helpful. More complex determinations, as under §2635.805(c), are reserved to agency ethics officials.

One organization expressed concern that an employee's duties as an agency designee will take time away from his or her other responsibilities. In drafting the regulations in part 2635, OGE has imposed as few requirements as possible for authorization or approval. Whether performed by the agency designee or someone else, these responsibilities will involve time. The Executive order clearly contemplates that appropriate agency resources will be devoted to the executive branch ethics program, and

employee time is but one of those resources.

One agency asked that the definition in §2635.102(b) be revised to make it clear that delegations may be accomplished with less formality than required for regulations. Since this should be clear from §2635.105(c)(2), OGE determined that no change was needed. Neither did we make any change as the result of another agency's suggestion, without specific recommendations, to "strengthen and clarify" the authority of agency heads stated in the last sentence of the paragraph. That agency also suggested that OGE's role be clarified by cross-reference to the enforcement provisions of 5 CFR part 2638. Because the authorities in part 2638 are cross-referenced in §2635.106, a crossreference in §2635.102(b) was determined to be unnecessary. Moreover, such a crossreference in §2635.102(b) could be confusing since the effect of an agency designee's determination or authorization will be to ensure that the employee is not subject to disciplinary action when the employee is acting according to that determination or authorization.

The Office of Government Ethics did not adopt the recommendation by two individuals to include in §2635.102(c) information about the qualifications for appointment as an ethics official. Jointly, §§2635.102(c) and 2635.102(f) contain crossreferences to subpart B of part 2638, which sets forth the responsibilities of designated agency ethics officials and their alternates and their authority to delegate certain of those responsibilities to deputy ethics officials. As with similar authorities, it is implicit that the individuals chosen to serve as designated agency ethics officials or as alternates or deputy ethics officials will have the knowledge and ability necessary to perform the responsibilities specified.

For consistency with subparts D, E and F of this regulation, one agency recommended that the word "disqualification" be substituted for the word "recusal" in the definition of the term "corrective action" at §2635.102(e). This change has been made. Because the term "corrective action" as used in §2635.106 has reference to the authorities in subpart E of part 2638 to remedy existing violations, OGE did not adopt the suggestion by another agency to include within that definition action necessary to remedy a "future" violation.

Six individuals felt that it was unfair to include special Government employees within the definition of the term "employee" at §2635.102(h). The Office of Government Ethics has not changed this definition. Where appropriate, the regulations apply standards to special Government employees that differ from those applicable to other employees. However, their inclusion within the definition of the term "employee" is required by section 503(b) of the

Executive order.

Two agencies and one organization recommended that the regulations specify what is meant by the reference in §2635.102(k) to "management and control" of a subsidiary, suggesting that it will be difficult to determine, without examining public filings, whether the proposed equity test is met. The proposed definition has been revised to substitute "ownership of 50 percent or more of the subsidiary's voting securities" for the proposed language concerning management and control. Information as to ownership of voting securities can be obtained from reference volumes generally available in libraries.

The Office of Government Ethics did not adopt an agency's suggestion to revise §2635.102(l) to address the circumstances of an individual appointed as a special Government employee whose actual service within a 365 day period exceeds 130 days. Section 2635.102(l) adequately reflects the statutory definition at 18 U.S.C. 202(a) of the term "special Government employee" and is not intended to provide comprehensive guidance on procedural matters relating to the appointment of special Government employees. Nor have we adopted the suggestion by another agency to expand §2635.102 to include a definition of the term "reasonable person." The concept of reasonableness is generally understood and does not require a regulatory definition. In addition, it is amplified in §2635.101(b)(14) by reference to the perspective of a "reasonable person with knowledge of the relevant facts."

Section 2635.104 Applicability to Employees on Detail

Two agencies objected to §2635.104(a) insofar as it would subject an employee on detail to another agency to the supplemental regulations of the agency to which the employee is detailed rather than to those of his or her employing agency. They suggested instead that an employee be required to comply with the supplemental regulations of both agencies. One of the agencies raised the concern that detailed employees might acquire a financial interest that they could not retain after termination of the detail and indicated that its own supplemental regulations might ultimately contain provisions implementing special statutory restrictions that will continue to apply to its employees even while they are detailed to other agencies.

Because of the confusion that could result from different, and possibly inconsistent, requirements in two agencies' supplemental regulations, OGE concluded that it would be impractical to subject an employee to the supplemental regulations of his or her own agency as well as to those of the agency to which he or she

is detailed. Unless it would violate a statutory restriction, any problem posed by an employee's investment activities while on detail can be readily remedied by divestiture when the employee returns to his or her regular duties. This prospect should serve to temper the investment activities of detailed employees. For these reasons, the section retains the basic concept of subjecting a detailed employee to the standards of the entity to which he or she is detailed. However, a new §2635.104(d) has been added to clarify that any restrictions on the employee's activities or holdings imposed by an agency statute that are reflected in the agency's supplemental regulations will continue to apply during the detail. Proposed §2635.104(a) has been divided into §§2635.104(a) and 2635.104(b) dealing, respectively, with interagency and interbranch details, and new §2635.104(d) is cross-referenced in those sections.

One agency was concerned that proposed §2635.104(b), now redesignated as §2635.104(c), would inappropriately subject employees to standards less restrictive than Federal standards while detailed to international organizations or to State and local governments. We note that the paragraph provides for an exception only from the gift provisions in subpart B, and then only on the basis of a case-by-case determination by the agency ethics official that takes into consideration the standards of the organization or government to which the employee will be detailed. Another agency interpreted proposed §2635.104(b) as applicable to details to universities, as well as to State and local governments, and suggested that a specific reference to the Intergovernmental Personnel Act, 5 U.S.C. 3371, be incorporated into redesignated §2635.104(c). The suggested reference has not been included since 5 U.S.C. 3371 is but one authority under which details covered by §2635.104(c) may be made. Moreover, the section does not extend to all details permissible under the Intergovernmental Personnel Act. Section 2635.104(c) applies only to details to international organizations and to State and local governments, whereas 5 U.S.C. 3371 authorizes details to universities and certain other organizations.

In a joint request, eleven agencies, all of whom have significant numbers of employees assigned to overseas posts of duty, asked that the overseas assignment provisions of proposed §2635.104(c) be deleted. The majority preferred that employees serving overseas remain subject to the supplemental agency regulations of their respective employing agencies rather than to those of the Departments of State or Defense. They agreed, however, with one premise underlying the proposed section: all employees in one overseas location should be subject to the same gift rules. In the international

context, employees from several agencies may participate in particular diplomatic or commercial matters and it is desirable that foreign nationals and companies be able to rely on a single set of gift standards. In lieu of proposed §2635.104(c) as a means of achieving uniformity, the eleven agencies jointly recommended an additional gift exception for application overseas. In response to this recommendation, OGE has adopted a new exception at renumbered §2635.204(i) which is discussed below in connection with other comments on subpart B of this regulation. As suggested, we have deleted proposed §2635.104(c).

Section 2635.105 Supplemental Agency Regulations

No changes have been made to §2635.105 notwithstanding two agencies' comments. Both would treat part 2635 as establishing a floor on ethical standards rather than as setting uniform ethical standards for application to all executive branch personnel. By way of example, one raised the possibility of an agency, by supplemental regulation, revoking exceptions to the gift restrictions in subpart B of this rule and thereby imposing stricter gift standards. Both felt that more guidance was needed on agency authority to supplement part 2635.

Section 2635.105 permits supplemental regulations "which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part" and that are "(1) in the form of a supplement * * * and (2) in addition to the substantive provisions of this part." The requirement that they be "in addition" means that the basic provisions will apply and that a supplemental regulation can add something more, such as an additional gift exception, but cannot be used to negate or revoke the provisions of this part. The uniformity required by the Executive order cannot be achieved if agencies can pick and choose which provisions they adopt or override.

One individual asked whether, in view of the principle at §2635.101(b)(13), all regulations implementing equal employment opportunity laws will have to be included in supplemental agency regulations. We do not believe that §2635.105 needs to be revised to further clarify that regulations implementing other statutory requirements should continue to be issued separately and should not be included in an agency's supplemental regulations. Section 2635.105(c)(3) states that the requirements for issuance of supplemental agency regulations in §2635.105 do not apply to "regulations or instructions that an agency has authority, independent of this part, to issue." One agency objected to this aspect

of the regulations based on its view that supplemental agency regulations should include all regulations that relate to any of the principles or standards in this part 2635. This would mean, for example, that because §2635.705 contains standards that refer to regulations dealing with use of Government property, an agency would be required to publish all property-related regulations in its supplemental regulations. Under this approach, supplemental agency regulations would become a repository for a large portion of all agency management regulations. This approach was rejected as impractical. However, the agency's concern that employees be placed on notice of relevant provisions can be easily accommodated by cross-references in its supplemental regulations or by handbooks that may encompass more than what is contained in its supplemental regulations, including references to or synopses or complete reprints of related regulations.

Because it would be contrary to the Executive order's requirement for joint issuance by the agency and OGE, we did not adopt one agency's recommendation to revise §2635.105(b) to eliminate the requirement for concurrence in supplemental agency regulations and co-signature by OGE "in urgent situations." We anticipate few "urgent situations" that will warrant issuance of or changes in supplemental agency regulations and expect any that do arise will be handled expeditiously. Nor has OGE revised this section to accommodate two agencies that would prefer to publish their supplemental regulations in the titles of the Code of Federal Regulations that contain their other agency regulations. The stated requirement for publication in title 5 of the Code of Federal Regulations is imposed by section 301(a) of the Executive order. As long as this requirement is met, an agency is not prohibited from otherwise republishing the part, as in an internal instruction.

One organization expressed concern that, whereas supplemental agency regulations must be issued under normal rulemaking procedures, §2635.105(c) will permit agencies to issue other regulations without notice and comment. Section 2635.105(c) states nothing about rulemaking; rulemaking requirements will apply, as appropriate. Insofar as §2635.105(c) provides that delegations of authority and documentation and processing requirements need not be issued as part of a supplemental agency regulation, we further note that 5 U.S.C. 553(a)(2) exempts matters of this nature from the statute's notice and comment requirements. Those requirements also would not apply to a handbook that simply reiterates and explains regulations that have been issued under proper rulemaking procedures.

Regarding the agency handbooks contemplated by §2635.105(c)(1),

one agency and one organization suggested that OGE instead prepare a handbook for use by all agencies. Because nothing in the section would preclude OGE's intended publication of such a handbook and because agencies that wish to issue their own handbooks should have clearly stated authority to do so, this section has not been revised.

One agency asked that §2635.105(c) be revised to require all agencies to place in their supplemental agency regulations all provisions now contained in their individual agency standards of conduct regulations. The agency noted that its current standards of conduct regulations include a provision regarding sexual harassment. This revision has not been made. By addition over time, a variety of provisions not based specifically on the standards of ethical conduct have been included in agency standards of conduct regulations. Insofar as Executive Order 12674 provides for individual agency regulations, it contemplates that those regulations will supplement part 2635 only to the extent necessary to apply the principles and standards in part 2635 to an agency's particular functions and activities. Provisions in current agency regulations that do not relate specifically to the principles and standards in part 2635 may be reissued by the agency, but not as part of its supplemental agency regulations issued under §2635.105.

Seven agencies and one individual requested a delay in the effective date of the regulations. This suggestion was adopted to provide agencies the lead time necessary to repeal or preserve, as appropriate, existing agency regulations, and otherwise to adapt their existing ethics programs to the new regulations. One agency sought authority to "grandfather in" and, thus, retain for one year any provisions contained in its current standards of conduct regulations. Its request, in effect, is for a one-year delay in the effective date of part 2635 and, therefore, was not adopted. However, the concerns that prompted its request should be met, in part, by the 180-day delay in the effective date of part 2635. The Office of Government Ethics rejected another agency's request to revise the regulations to preserve a provision in its current standards of conduct regulations that creates a one-year restriction on former agency employees engaging in representational activities before the agency. Because part 2635 does not apply to former employees, restrictions such as these fall outside the scope of the regulations. To the extent that an agency has authority to issue rules governing practice before it, such rules may be issued separately under that authority in accordance with §2635.105(c)(3). The 180-day delay in the effective date of this part should give the agency time to reissue

or otherwise preserve this particular provision.

Section 2635.106 Disciplinary and Corrective Action

One individual raised technical concerns about an agency's ability to enforce the standards of ethical conduct through disciplinary action. The individual noted that under the Uniform Code of Military Justice a military officer can only be charged with failure to obey a regulation that is either a Presidential order or a departmental regulation and, accordingly, urged deletion of the second sentence of proposed §2635.106(a). Based on this comment, OGE has deleted the statement that officers of the uniformed services shall continue to be subject to the Uniform Code of Military Justice for a violation of this part or of supplemental agency regulations. Instead, we have included specific reference to the Uniform Code of Military Justice in the definition of disciplinary action at §2635.102(g). The manner in which it is there referenced incidentally addresses one agency's technical concern that the Uniform Code of Military Justice does not apply to officers in the Public Health Service. To ensure that agencies that commission military officers do not encounter technical impediments when bringing disciplinary action, each such agency should formally adopt part 2635 as part of its own agency regulations.

Two agencies asked for guidance on the nature and extent of disciplinary action to be taken for violations of this part. The Office of Government Ethics recognizes that there are legitimate concerns about uniformity in enforcement of the standards of ethical conduct. However, part 2635 is not the appropriate vehicle for establishing tables or guidelines for disciplinary action and, as is generally true with disciplinary action for violations of other laws and regulations, the precise action to be taken is a matter for determination by each agency in accordance with applicable Governmentwide regulations and agency procedures. Accordingly, OGE has modified the statement at §2635.106(b) regarding the agency's responsibility to initiate disciplinary and corrective action to clarify that it is also the agency's responsibility to decide upon the appropriate action to be taken in an individual case.

No revision has been made in response to another agency's recommendation to limit application of the first sentence of §2635.106(c), concerning violations of the standards, to a person "claiming to be aggrieved by a violation of part 2635." The section, as proposed and adopted herein, more closely reflects section 504 of Executive Order 12674 which states that the Executive order "is not intended to create any right or benefit, substantive

or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."

Section 2635.107 Ethics Advice

Several commenters endorsed §2635.107(b) insofar as it provides that employees will not be disciplined for standards of conduct violations when they have acted in accordance with the advice of an agency ethics official. Based on recommendations by two agencies and one individual, OGE has revised the second sentence of §2635.107(b) to clarify that the employee must act in good faith reliance upon the advice of an agency ethics official. This revision satisfies another agency recommendation to clarify that ethics advice will only provide protection against disciplinary action if it predates the employee conduct in question.

The Office of Government Ethics did not adopt an agency recommendation to recast §2635.107 so that employees are protected only when the ethics advice on which they rely has been given in writing. Traditionally, ethics counseling within the executive branch has been given informally and, unless required by a statute such as the procurement integrity provisions at 41 U.S.C. 423(k), has been reduced to writing at the discretion of the agency ethics official, or insofar as practicable, when requested by an employee. Many agency ethics officials maintain a log to serve as an aid to memory. On any given day, an agency ethics official may give advice on dozens of matters. Considering that much of that advice is routine and is rarely brought into issue, on balance we do not believe that the benefits of a requirement for written ethics advice are worth the time, expense and disruption it would cause.

Because it would be contrary to the weight of legal authority, OGE did not revise proposed §2635.107(b), as recommended by one agency, to state that disclosures to an agency ethics official who is an attorney will be protected by an attorney-client privilege. Nor have we accommodated another agency's request to address in the regulations unique circumstances that may give rise to an attorney-client privilege. The case of concern to that agency involved circumstances unique to the military legal services programs that can be addressed, if necessary, by the Department of Defense. Because employees are unlikely to have questions about the application of any privilege other than the attorney-client privilege, OGE also rejected an agency recommendation to revise proposed §2635.107(b) to state that disclosures are not protected by the attorney-client privilege "or any other privilege."

One agency felt that §2635.107 should alert employees to the fact that agency ethics officials are required by 28 U.S.C. 535 to report information they receive relating to any violation of the provisions in title 18 of the U.S. Code. Language to this effect has been included in §2635.107(b).

## Subpart B-Gifts From Outside Sources

### Section 2635.202 General Standards

Two agencies and two others who commented objected to the proposed prohibition at §2635.202(a)(2) against gifts given because of an employee's official position. In part, they believe the prohibition unfairly requires an employee to speculate about the motives of the person offering the gift and could unreasonably limit a broad range of purely social activities. The Department of Defense expressed particular concern that the prohibition would inhibit the ability of its personnel to interact with members of local communities in which its military installations are located. Like other agencies with field offices away from the Washington, DC area, the Department of Defense believes its interests are best served by encouraging its personnel to participate in the civic activities of those communities. The Office of Government Ethics has not deleted the prohibition against gifts given because of official position. The absence of that standard would significantly diminish the fundamental ethical principle that an employee shall not use public office for private gain. However, to address the problems these four commenters have noted, a new exception §2635.204(h) has been added to permit attendance at certain social events to which an employee is invited because of his or her official position by a person who is not a prohibited source. This exception is discussed more fully in the context of the comments on §2635.204.

The Office of Government Ethics has adopted the recommendation by one agency to expand the limitation at proposed §2635.202(c)(2) to provide that, notwithstanding any exception in subpart B, an employee shall not "solicit or coerce the offering of a gift."

Six agencies objected to the limitation at proposed §2635.202(c)(3) on use of any of the exceptions in subpart B to accept a gift from a person who "has interests that may be substantially affected by the performance or nonperformance of the employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the employee's impartiality in the matter affecting that person." Three agencies

with a contrary view proposed language that would tighten the limitation, either by making it applicable to gifts from any prohibited source or by revising the language which, as proposed, focuses on the timing and nature of the gift.

The concerns of those opposed to the appearance limitation in proposed §2635.202(c)(3) relate primarily to its subjective nature. Requiring an employee to exercise judgment in accepting a gift from a person affected by the performance of his or her duties, in the view of some, invites Inspectors General and others with investigative, review or oversight functions to second-guess the employee's judgment. And, because it would place an employee in the position of having his or her judgment reviewed against the more perfect standard of hindsight, it would also create an incentive for the employee to seek the insulation of ethics advice concerning even the most trivial of gifts. Two of the agencies that commented expressed the same concerns regarding proposed §2635.202(c)(4).

Based in part on concerns regarding its subjective nature, OGE has deleted proposed §2635.202(c)(3). We have, however, retained the appearance limitation at proposed §2635.202(c)(4), now renumbered §2635.202(c)(3), to ensure that no employee engages in a pattern or practice of accepting even de minimis gifts. There are reasons other than those noted by the commenters for deleting proposed §2635.202(c)(3) that relate to the prospect of inconsistent application of the gift standards throughout the executive branch. Several of the agencies that commented on the proposed $25 de minimis exception at paragraph (a) of §2635.204 suggested that they would seek to build upon the proposed limitation at §2635.202(c)(3) either by including in their supplemental agency regulations provisions to prohibit use of the de minimis exception by certain classes of employees, or by interpreting proposed §2635.202(c)(3) to achieve the same result. In fact, the comments submitted by two regulatory agencies suggested that they would view proposed §2635.202(c)(3) as a basis for prohibiting all agency employees, without regard to the nature of their duties, from accepting anything from a regulated entity. What these comments portend would be an ethics program destined to fall short of meeting the President's goal of a uniform set of standards of conduct for all executive branch employees.

The Office of Government Ethics has deleted the proposed appearance limitation at §2635.202(c)(3) only after reviewing all of the gift exceptions in §2635.204 and revising the de minimis exception at §2635.204(a). That appearance limitation had been proposed primarily to temper use of the proposed $25 de minimis exception. As discussed in more detail below, that

$25 amount has been reduced to $20 and the proposed aggregate limitation of $100 per year has been reduced by half. With these reductions, the need for an appearance limitation becomes less compelling, particularly when balanced against the disparate treatment such a limitation promises to generate.

Each of the other exceptions in §§2635.204(b) through 2635.204(l) is so drawn that the exception itself addresses major appearance concerns. For example, the exception for awards at §2635.204(d), like the newly added exception at §2635.204(h) for attendance at certain social events, has a built-in prohibition against a gift being given by a person affected by the employee's duties. Similarly, the exception at §2635.204(e)(3) for interview travel expenses applies only after the employee has been disqualified from participation in matters affecting the prospective employer. The determination of agency interest that, under §2635.204(g)(3), is a prerequisite to participation in a widely attended gathering specifically requires that appearance issues be taken into consideration, and appearance considerations were taken into account in crafting the exception at §2635.204(c) for discounts. By its terms, the exception at §2635.204(b) for gifts based on a personal relationship would not apply unless the circumstances make it clear that the gift is motivated by the family relationship or personal friendship involved, and the exceptions at §§2635.204(e)(1) and 2635.204(e)(2) for certain gifts based on outside business and employment relationships would not apply to gifts offered or enhanced because of the employee's official position.

Consistent with the congressional intent in enacting 5 U.S.C. 7353 and with the fact that appearance and related standards of conduct issues have been taken into account in formulating subpart B of this regulation, OGE has expanded the first sentence of §2635.204 to make it clear that a gift accepted under the standards set forth in subpart B will not violate the appearance or any other principle set forth in §2635.101(b). Nevertheless, we have added a second sentence to the prefatory part of §2635.204 to remind employees that they should exercise judgment in accepting gifts even though they will not be disciplined for accepting a gift permitted by one of the exceptions listed in that section.

One agency suggested that the term "public official" used in the synopsis of 18 U.S.C. 201(b) at redesignated §2635.202(c)(4)(i) be more specifically defined than by the proposed statement that it is "broadly construed and includes special Government employees as well as all other Government officials." For clarity, the words "regular or" have been inserted before "special" in this phrase. However, the recommendation otherwise to expand upon the definition of the term "public official" was not adopted.

Part 2635 applies to executive branch employees as defined at §2635.102(h), and it is sufficient that these employees understand that they are public officials within the meaning of 18 U.S.C. 201(b). That the term may have been more broadly construed to cover other persons is a matter beyond the scope of part 2635.

The Office of Government Ethics has added a new §2635.202(c)(5) to provide that none of the exceptions in §2635.204 may be used to accept vendor promotional training in contravention of applicable procurement regulations, policies or guidance. We have also included a definition of "vendor promotional training" at §2635.203(g) and have amplified the definition of a "gift" at §2635.203(b) to make it clear that it would include, for example, a gift of free attendance at a training course. Notwithstanding recommendations to expand the scope of subpart B to include standards for acceptance of vendor promotional training, we have included this limitation to ensure that the standards of ethical conduct do not limit the ability of those who establish policies relating to procurement of goods and services to address the issues of competitive advantage raised by offers of training by those engaged in the sale of products and services to the Government. Those issues are presently being addressed by the General Services Administration in the Federal Information Resources Management Regulations based on a congressionally mandated study by that agency of marketing practices in the automated data processing industry. It is OGE's purpose in adding §2635.202(c)(5) to ensure that employee attendance at vendor promotional training is in accordance with applicable procurement authorities. It is not an across-the-board prohibition on use of the exceptions in §2635.204 to accept vendor promotional training. Rather, it would apply only insofar as vendor promotional training is the subject of specified procurement regulations, policies or guidance.

Section 2635.203 Definitions

Two agencies specifically endorsed the authority at proposed §2635.203(a) for executive departments to designate certain components as separate agencies for purposes of subpart B. Such designations would serve to narrow the class of persons who meet the definition of a prohibited source at §2635.203(d) and would also contract the scope of the limitations on speaking, teaching and writing at §2635.807. One of the agencies objected, however, to the third sentence of §2635.203(a) which, as proposed, would have precluded any such designation from being effective as to the head of a designated separate agency or as to department-level employees. It noted, by way of example, that the Director

of the Bureau of the Mint would have little way of knowing what matters are pending before the Office of Thrift Supervision even though both are components of the Department of the Treasury. And, where a matter is pending within a separate bureau or office and has not been escalated to department level, the agency notes that department-level employees would face similar difficulties. In part because of these practical considerations, OGE has deleted the third sentence of proposed §2635.203(a). In addition to complicating the administration of subpart B, we find that the proposed limitation would have accomplished little beyond what is addressed by the prohibition on gifts given because of an employee's official position.

One agency and one organization recommended that all of the items excluded from the definition of the term "gift" by §2635.203(b) be treated instead as additional exceptions under §2635.204. In a related comment, one agency recommended that the proposed exclusion at §2635.203(b)(2) for certain discounts be merged with the exception for other discounts at §2635.204(c). These recommendations were not adopted. Certain of the excluded items, such as anything paid for by the employee, loans on customary terms and broadly available commercial discounts, simply are not gifts to the employee. Others, such as items secured under Government contract or accepted by the Government under specific statutory authority, accrue to the employee from the Government and, thus, are not gifts from an outside source. It could be fairly argued that the regulations should not mention any of these items. However, questions routinely arise as to whether they are gifts, and they are specifically excluded by §2635.203(b) to clarify that they are not. Also for the purpose of eliminating any questions about benefits that are not gifts, OGE has added a specific exclusion, now at renumbered §2635.203(b)(6), for pension and other benefits resulting from continued participation in an employee welfare or benefit plan maintained by a former employer.

As subpart B is structured, items excluded from the definition of the term "gift" can be accepted without regard to the limitations in §2635.202(c). Although they might have been treated instead as exceptions, a few items, such as plaques and certificates with little intrinsic value, have been treated as exclusions specifically so that they will not be subject to the limitations in §2635.202. Because the broad scope of the term "gift" should be clear from the listing of included items in the second sentence of §2635.203(b), OGE rejected an agency recommendation to insert the phrase "tangible or intangible" in the first sentence of that section.

At the suggestion of one agency and one organization, OGE has expanded the list of items excluded from the definition of the term "gift" to cover "modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal." OGE agrees with the observations made by both commenters that food and refreshments of this nature are given as a matter of custom when people meet and that employees should not have to decline these courtesies under any circumstances. The effect of the new exclusion at renumbered §2635.203(b)(1) is not only to exempt items, such as coffee and donuts, from the limitations in §2635.202(c), but also to permit their acceptance without regard to the $50 aggregate annual limitation at §2635.204(a) on de minimis gifts from any one person.

One agency expressed concern that the exclusion of loans by proposed §2635.203(b)(1) from the definition of the term "gift" might limit its ability to prohibit its employees from obtaining loans from the financial institutions it regulates. Under §2635.403 agencies have authority to prohibit certain financial holdings, including loans. The exclusion for loans on terms available to the public from the definition of the term "gift" merely recognizes their commercial character and has no effect on the agency's authority to treat any loan as a financial interest under §2635.403. The exclusion for loans has been redesignated as §2635.203(b)(3).

The Office of Government Ethics did not adopt the recommendation by one agency to augment the exclusion at proposed §2635.203(b)(2) to permit acceptance of offers, such as discounts on health club memberships, made available to tenants of specific buildings housing Government agencies. To the extent that such offers are made by the owner or manager of the building and flow to all tenants, they are a consequence of the Government's lease for that space and may be accepted in accordance with renumbered §2635.203(b)(7) as "secured by the Government under Government contract." Otherwise, such offers come within the ambit of the exception for discounts and similar benefits at §2635.204(c).

Two agencies offered recommendations to modify the exclusion at renumbered §2635.203(b)(5) for rewards and prizes. While one felt an employee should not be able to accept a prize from any prohibited source, even in a drawing open to the general public, the other recommended allowing rewards and prizes in contests if they are either open to the general public or unrelated to the employee's duties. Where a contest is open to the public, the danger is remote that a prohibited source will use the contest as a means of giving something to an employee or that a reasonable person would question the motive for any prize awarded. Where

the contest is not open to the public, appearance issues may arise without regard to whether the contest is related or unrelated to the employee's official duties. For these reasons, OGE has retained the exclusion for rewards and prizes in contests and events but, to ensure against the potential abuses that concern the commenters, has limited its applicability to those that are open to the public, and not, as proposed, to those open to a "broadly-defined class." And, we have reworded the exclusion to make it clear that an employee may accept a prize in a contest or random drawing open to the general public even though the opportunity to enter the contest occurs while or because the employee is on official duty. See also Comptroller General Opinion B-199656, July 15, 1981. As revised, it would continue to preclude receipt of a prize if, for example, members of an agency rifle team placed first in a competition open to the public. Because prizes of that nature are subject instead to the exception at §2635.204(d), discussed below, OGE did not revise renumbered §2635.203(b)(5), as suggested by one organization and one individual, to cover a prize for an essay contest open, for example, only to junior Naval officers.

One agency and two others suggested that the exclusion at proposed §2635.203(b)(4) be revised to allow "mementos" on the same basis as plaques, certificates and trophies. OGE did not adopt this recommendation. The word "memento" means simply a souvenir or keepsake. It can take any form and, thus, unlike the more specific terms "plaques," "certificates" and "trophies," would allow the giving of a broad range of items. While plaques and certificates, by their very nature, ordinarily have little intrinsic value, broadening the exclusion to cover "mementos" would invite controversy as to the value of other items that might not so clearly be of little intrinsic value. Mementos other than plaques, certificates and trophies may be accepted only if they come within one of the exceptions in §2635.204. The $20 de minimis exception at §2635.204(a) should be sufficient to permit many customary mementos.

Two agencies expressed concern with the scope of the exclusion for anything "paid for by the Government or secured by the Government under Government contract" which was proposed as §2635.203(b)(5) and now appears as renumbered §2635.203(b)(7). Both requested that language be added to make it clear that this exclusion does not permit a contractor to give a gift to an agency contracting official because the contractor has, by including its cost in overhead or otherwise, obtained reimbursement for the cost of the gift under a Government contract. The exclusion is intended to cover items the Government procures for use by its employees

under a Government contract or knowingly obligates itself to pay for. The Office of Government Ethics believes it is clear from the wording of §2635.203(b)(7) that the exclusion is not intended to cover items which are improperly or fraudulently charged to the Government.

Two organizations and one agency recommended deletion of the note regarding airline bonus points following renumbered §2635.203(b)(7). The note has been included as a caution to employees that airline bonus points received for Government travel are Government property. Several employees who have used these bonus points for personal travel have been required to reimburse the Government for the value of the travel taken. In issuing a regulation that covers gifts from outside sources and that speaks specifically to commercial discounts and favorable rates, OGE would be remiss in failing to caution employees that bonus points that accrue from official travel should not be used for personal travel. Thus, OGE has retained the cautionary note.

One organization asked that proposed §2635.203(b)(6)(i), now renumbered §2635.203(b)(8)(i), be revised specifically to permit reimbursement of transportation, meals and lodging for activities engaged in for reasons of furthering scientific exchange or professional development. The suggested revision cannot be made. The paragraph is merely a synopsis of the statutory authority contained in 31 U.S.C. 1353 for agencies to accept travel and related expenses for an employee's attendance at meetings and similar functions. The regulations implementing that statute at 41 CFR part 304-1 are promulgated by the General Services Administration and cannot be revised by OGE. However, those regulations will, in many cases, enable agencies to accept travel and related expenses for employees to participate in meetings that involve an exchange of scientific information or otherwise enhance professional development. We also did not adopt an agency recommendation to revise these part 2635 regulations to specifically state that a contribution to an agency's gift fund would not be considered a gift covered by subpart B. The fact that such contributions are not gifts within the meaning of subpart B should be clear from renumbered §2635.203(b)(8)(ii).

In a recommended departure from the definition of "market value" at §2635.203(c), one agency argued that the face value of a ticket that is in high demand may not be a fair measure of its market value. That agency urged that proposed §2635.203(b)(7), now renumbered as §2635.203(b)(9), be revised to exclude from the definition of a "gift" only those items that are "readily available for purchase by the employee, other than from a prohibited

source, for which market value is paid by the employee." Stating a contrary view with regard to the market value of tickets, one agency and one organization urged that §2635.203(c) be revised to provide that the market value of a ticket is the value of the food, refreshments, and entertainment purchased with the ticket rather than its face value. Both noted that the price of a ticket for a charitable event ordinarily includes a charitable donation and, thus, is more than payment to cover the value of the food, refreshments and entertainment provided at the event.

The three comments reflect legitimate, though differing, positions that capsulize a debate that has existed for years over how to value tickets. While each may highlight a shortcoming in the approach adopted in §2635.203(c), each suggestion has its own shortcomings. The recommendation to place a value higher than face value on hard-to-obtain tickets might, in some circumstances, place the Government in the position of sanctioning price scalping; the recommendation to place a lower value on tickets, for example to charitable events, would undervalue tickets which purchase access not only to food, refreshments and entertainment, but often to very exclusive occasions that many pay dearly to attend. Both approaches would leave employees with a difficult task in trying to determine the market value of a ticket. On balance, OGE believes that the most appropriate measure of the market value of a ticket is its face value, an amount that can be readily determined.

One agency suggested that the definition of "market value" at §2635.203(c), when combined with the exclusion at renumbered §2635.203(b)(9), could create a windfall to the donor who purchased a gift at wholesale but was reimbursed by an employee on the basis of retail prices. The Office of Government Ethics has not changed either section. The purpose of these sections is to ensure that the employee pays the fair value of an item he or she cannot accept under subpart B and not to ensure that the donor, through reimbursement, comes out even. Moreover, the approach adopted in the regulations should, in most cases, allow the employee to determine the value or the amount to be reimbursed without having to consult the donor as to the donor's cost.

The Office of Government Ethics also did not adopt the recommendation by one agency to insert a parenthetical phrase in §2635.203(d)(2) to specifically state that persons who do business or seek to do business with the employee's agency include "all persons or organizations receiving benefits from a Federal program involving a grant, contract, subsidy, loan guarantee, insurance or other

form of Federal assistance from the employee's agency and those seeking to obtain such benefits." Section 2635.203(d)(2) restates the language of the Executive order and 5 U.S.C. 7353. While we agree that the class of persons who do or seek to do business with an agency would include persons seeking or receiving the benefits listed by the agency, OGE has a general concern that employees may read any enumeration, such as that proposed, as excluding all others not mentioned.

Three agencies and four others opposed the definition at §2635.203(d)(5) of a "prohibited source" as including an organization, a majority of whose members are otherwise prohibited sources within the meaning of §§2635.203(d)(1) through 2635.203(d)(4). Some of those opposed cited the fact that many such organizations have established educational foundations and other entities for laudable purposes. Others expressed concern that the definition may hinder agency relations with professional associations and that it may be difficult to determine the composition of an organization.

Notwithstanding that it may require inquiry about the composition of some organizations, OGE did not change the definition of a prohibited source at §2635.203(d)(5) to eliminate its coverage of organizations a majority of whose members are otherwise prohibited sources. The Office of Government Ethics has long held that a gift from an organization that does not itself meet the definition in the Executive order of a prohibited source should be treated as a gift from a prohibited source if all or a substantial majority of its members are prohibited sources. Office of Government Ethics informal advisory opinion 84 x 5 issued May 1, 1984, as published in the Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics (1979-1988). We believe this view is still warranted. Where, for example, an organization is composed largely of agency contractors, that organization should not give a gift to an agency employee that its individual members could not give. The explicit inclusion of such organizations in the definition of a "prohibited source" at §2635.203(d)(5) addresses the fact that, through payment of dues or otherwise, gifts from such organizations are paid for wholly or in substantial part by their members. If the employee and the agency are unwilling to pay for attendance, an employee may be able to attend certain events sponsored by such organizations under the exception at §2635.204(g) for widely attended gatherings or, perhaps, using the Governmentwide gift acceptance authority at 31 U.S.C. 1353 or an agency gift acceptance statute. It should be noted that nothing in the regulations prohibits any employee from being

a member of such an organization on the same basis as all other members and §2635.204(c) specifically permits certain discounts on membership and other fees offered by such organizations.

One agency did not agree with the seven commenters who objected to the prohibited source definition at §2635.203(d)(5), but suggested a tightening of the standard so that an organization would be considered a prohibited source if "a significant number" or "some" of its members are prohibited sources. It expressed concern that an individual member who is a prohibited source might have authority to offer gifts on behalf of the organization. The language of proposed §2635.203(d)(5) has not been changed. The Office of Government Ethics believes the more specific standard proposed is preferable to one that leaves the status of many organizations in question. The agency's concern that a prohibited source will use an association that is not a prohibited source as a means of giving an improper gift to an employee is addressed, in part, by the prohibition against acceptance of a gift given because of the employee's official position.

One organization suggested that the definition of a prohibited source at §2635.203(d) be revised so that, in the specific case of universities, only the particular school or department that has an agency contract or grant, and not the whole university, is a prohibited source. This recommendation has not been adopted. Its logical extension would be to allow corporations to carve out divisions and subsidiaries from the effect of subpart B, contrary to the definition of the term "person" at §2635.102(k).

One individual was concerned that the prohibition on gifts because of official position might be interpreted as applying to gifts between employees and, thus, preclude an employee from giving a gift to his or her secretary on Secretary's Day. Unless the employee giving the gift is a prohibited source, OGE had intended that subpart C, rather than subpart B, apply to gifts between two employees, and we have revised §2635.203(e) to make this clear.

One agency and one organization suggested that the definition at §2635.203(f) of "indirect" receipt of a gift be revised to allow an employee to suggest a list of charities to receive a gift he or she cannot accept. The Office of Government Ethics did not adopt this recommendation. While the process these two commenters propose ensures that individual employees will not personally profit from gifts from prohibited sources or because of official position, it would create an incentive for donors to offer employees items they cannot accept and, in the case of highly visible employees, might result in their favorite charities profiting from their official positions. The Office

of Government Ethics recognizes that the Ethics in Government Act, as amended, 5 U.S.C. App. 501(c), and the implementing regulations at 5 CFR 2636.204, permit charitable donations in lieu of certain payments employees cannot receive. For the reasons stated, we have chosen to treat gifts differently.

Section 2635.204 Exceptions

Gifts of $20 or Less

The proposed exception at §2635.204(a) for gifts of $25 or less prompted comments from 20 agencies, 15 organizations and 5 individuals. The concept of a de minimis limitation was endorsed by four agencies, 14 organizations and one individual. Five agencies, one organization and one individual were opposed to any exception for gifts of de minimis value, arguing variously that: There is no sound reason for a de minimis exception; it will be used to accept restaurant lunches and dinners from prohibited sources; it will pressure outside sources to give gifts to Federal employees; it will impair the integrity of Government ethics programs; it will make it difficult for employees to tactfully decline offered gifts; and its use should be absolutely prohibited by employees with regulatory or procurement responsibilities. Three of the agencies that opposed any de minimis exception recommended permitting only promotional items and refreshments of nominal value. One agency recommended that the proposed de minimis exception apply only to gifts offered because of official position.

Of those who commented specifically on the $25 dollar amount proposed by §2635.204(a), four agencies and seven organizations thought the amount should be raised to anywhere from $35 to more than $100. One individual suggested a higher amount for gifts given because of official position. Three agencies, on the other hand, thought $25 was too high. Three individuals observed that any amount that might be chosen will have an element of arbitrariness. Two agencies suggested revising §2635.204(a) to specifically exclude restaurant meals, tickets to sporting events, greens fees and personal services. One agency expressed concern, on the other hand, that $25 would be insufficient to cover working meals and recommended a separate exception for working meals with a value in excess of $25. Two agencies and one organization thought the proposed $100 aggregate annual limitation on gifts from any one source should be lowered, while two agencies and four organizations urged the deletion of any

such limitation.

Regardless of whether they opposed or endorsed the concept of a de minimis exception, eight agencies and two organizations thought that any such exception should not apply to certain categories of employees, such as those with inspectional or procurement responsibilities. Two regulatory agencies believed that no employee of a regulatory agency should be permitted to accept a gift using the proposed de minimis exception.

Six agencies stated that they were opposed to the appearance limitation in proposed §2635.202(c)(3) and, in particular, were concerned with its application to de minimis gifts. One agency endorsed the appearance limitation, as proposed, and three recommended that it be tightened. The comments by several of the agencies that thought a de minimis exception should not apply to certain categories of employees indicated that they anticipated using the proposed appearance limitation at §2635.202(c)(3) as a basis for supplemental agency regulations that would prohibit use of any de minimis exception by some, if not all, of their employees. For the reasons discussed in connection with other comments on §2635.202(c)(3), OGE has deleted that particular section. However, we have retained the limitation at proposed §2635.202(c)(4), which is now renumbered as §2635.202(c)(3).

This final rule was prompted, in large measure, by the President's desire for a uniform set of standards of conduct applicable to all executive branch personnel. In reviewing existing agency standards of conduct, OGE found a great deal of variation between the gift standards applicable to employees of different agencies. The Office of Government Ethics proposed the $25 de minimis exception in an effort to eliminate the variations that now exist between agencies in gift exceptions and in interpretation of the gift rules. As noted in the discussion accompanying the proposed rule at 56 FR 33781, we had concluded that a de minimis exception is preferable to a laundry list of exceptions for small, unobjectionable gifts that employees would have difficulty remembering and applying. While the 40 comments we received concerning §2635.204(a) reflect anything but a clear consensus, they confirm the need for an across-the-board de minimis exception that can be used by all executive branch employees. Without such an exception, we foresee the slow erosion of the uniformity in gift standards we have sought to achieve by this regulation.

While we adhere to our earlier view that a de minimis exception is appropriate, we have reconsidered the appropriateness of the $25 amount proposed. When coupled with the appearance limitation in proposed §2635.202(c)(3), OGE had viewed a $25 amount as appropriate. In the absence of that limitation, we have reduced

the amount to $20. Our sense from the comments submitted is that few would object to a $10 de minimis amount and many would have no problem with a $15 de minimis amount. But it appears that several would find reason to object to a $25 de minimis amount decoupled from an appearance limitation such as that at proposed §2635.202(c)(3). We rejected a $10 amount as too low to eliminate the necessity to create additional exceptions for certain unobjectionable gifts likely to be worth more than $10. We have chosen $20 rather than $15 because we believe it will allow employees to accept a range of unobjectionable items, but will generally be low enough to discourage the restaurant dinners and lavish lunches that concerned some of the commenters. The Office of Government Ethics expects that the de minimis amount will remain at $20 for the foreseeable future and has not adopted recommendations to include provisions for cost of living adjustments. We would note that a de minimis exception for gifts is not without precedent. House and Senate gift rules currently contain a $100 de minimis exception and the procurement integrity provisions at 41 U.S.C. 423 require a de minimis exception for gifts given to procurement officials by competing contractors. That amount is presently set by the Federal Acquisition Regulation at $10.

The Office of Government Ethics also has lowered to $50 the proposed $100 annual aggregate limitation on de minimis gifts from any one source. We appreciate the view expressed by some that any aggregate limitation will be difficult to monitor, but do not think it wise to adopt a de minimis gift exception that will allow repeated gifts from any one source. We have also declined to create a formal reporting requirement for individual gifts. The administrative burden that such a requirement would impose could well negate many of the benefits that will result from a de minimis rule that is otherwise easy to apply. We expect individual employees to keep their own tallies. To help simplify their task, OGE has added a new exclusion from the definition of a gift at renumbered §2635.203(b)(1) for modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal. Because they can be disregarded for purposes of applying the $50 aggregate limitation, employees need not keep a running mental tab on coffee and similar items. The examples accompanying §2635.204(a) have been changed to reflect the above-noted revisions to this section.

Gifts Based on a Personal Relationship

One agency urged that the discussion in Example 1 following

§2635.204(b) be expanded to address other implications of the dating relationship between the Federal Deposit Insurance Corporation employee and the employee of a member bank. The agency is concerned that a reasonable person with knowledge of the relationship might question the Federal Deposit Insurance Corporation employee's impartiality in performing duties affecting the member bank. Although some dating relationships may give rise to questions about an employee's impartiality, OGE did not revise the example to address these concerns. The example is intended to illustrate the gift exception at §2635.204(b) and the discussion is limited to that purpose.

Discounts and Similar Benefits

Seven agencies, three organizations and two individuals commented on the exception at §2635.204(c) for discounts and similar benefits. Five of those who commented either overlooked the exclusion from the definition of a "gift" at renumbered §2635.203(b)(4) or were concerned that those reading the regulations would fail to note the relationship between that exclusion for certain publicly available discounts and the exception at §2635.204(c) for discounts and similar benefits available to more narrowly defined classes of persons. Because the publicly available discounts excluded by §2635.203(b)(4) are not gifts and because OGE believes their acceptance should not be subject to the limitations in §2635.202(c), we have not adopted the offered solution of merging the exclusion into the exception. However, to ensure that employees note both the exclusion and exception, §2635.204(c) has been redrafted to include a prominent cross-reference to the exclusion at §2635.203(b)(4).

Three agencies recommended that proposed §2635.204(c) be revised to allow employees to accept a broader range of discounts. One felt that an employee should be able to accept discounts offered as a result of activities unrelated to his or her Federal employment; another felt that an employee should be able to accept certain broadly available discounts from even prohibited sources; and the third asked OGE to reconsider the proposed exception with a view to allowing employees to accept discounts under additional circumstances where the potential for abuse is minimal. One organization was concerned that §2635.204(c), as proposed, would prohibit a union from offering discounts to its own members.

After reviewing proposed §2635.204(c), OGE agrees with the observations by these four commenters that it is unnecessarily restrictive. The Office of Government Ethics has redrafted §2635.204(c)

to accommodate their recommendations, all of which seemed reasonable. As revised, it includes a specific exception for certain reductions in membership rates and other fees offered by professional and similar organizations. The section also permits discounts and similar benefits offered to members of a class when membership in that class is unrelated to Government employment or, when membership is related to Government employment, if the same offer is made broadly available to large segments of the public through organizations of similar size.

One individual took exception to the limitation in proposed §2635.204(c)(2). In his view, high-level officials should be able to accept "perks," such as free country club memberships, in recognition of the sacrifices they make to serve their country. The Office of Government Ethics disagrees. To the extent that they have monetary value and are given by outside sources because of the employee's official position, such gifts are subject to the basic prohibition in §2635.202(a)(2). The limitation on favorable rates offered to a class defined in a manner that discriminates among employees on the basis of rank, rate of pay or type of official responsibility was proposed at §2635.204(c)(2) to ensure that gifts, such as free country club memberships, are not simply recharacterized as reduced rates to avoid the general prohibition. That general concept has been retained.

One agency and one individual raised a legitimate concern that the restriction at proposed §2635.204(c)(2) on reduced rates or discounts that discriminate on the basis of rank or rate of pay may be overly broad and could be viewed as precluding the customary practice of offering discounts, for example, to all enlisted members of the armed services. Although enlisted personnel in particular are not subject to the regulations, the restriction now included in renumbered paragraph §2635.204(c)(2)(iii) has been rephrased to prohibit reduced rates and discounts from other than prohibited sources when they discriminate on a basis that favors those of higher rank or rate of pay. Discounts that discriminate in favor of those of lower rank or rate of pay are more likely to have a legitimate commercial purpose and are not likely to present significant issues of use of public office for private gain.

Awards and Honorary Degrees

Six agencies, eight organizations and two individuals commented on the proposed exception at §2635.204(d) for awards and honorary degrees. Two agencies were concerned that the scope of the requirement in the second sentence of §2635.204(d)(1) for approval for "other"

gifts was unclear. This lack of clarity was evident from comments by three organizations and one individual, all of whom misconstrued the proposed regulation as placing a flat bar on awards with an aggregate market value in excess of $200. Subject to the stated limitation on the source of the award, it was OGE's intent to permit awards with an aggregate market value in excess of $200 based on a written determination by an agency ethics official that the award is made as part of an established awards program meeting the criteria stated. To avoid further misconstruction, the second sentence of the section has been revised to include specific reference to gifts with an aggregate market value in excess of $200.

Those who addressed the requirement in §2635.204(d)(1) for approval of awards with a market value in excess of $200 presented opposing views regarding the appropriateness of that dollar threshold. One agency and one organization believed that, regardless of value, no award should be permitted unless the agency ethics official specifically determines that it is part of a bona fide awards program. Of a contrary view, another agency suggested that the $200 amount be raised to $1,000 and coupled with specific authority to accept travel expenses, meals and entertainment. The Office of Government Ethics has not adopted either recommendation.

The Office of Government Ethics' determination to exempt awards with an aggregate value of $200 or less from any requirement for review or approval was based, in part, on programmatic considerations. When its value is not great, a bona fide award given for meritorious public service or achievement by a person who is not affected by the recipient's official duties is not likely to pose significant appearance or other conflict of interest problems that demand the time and attention of busy agency ethics officials. We have retained the $200 amount, however, as an appropriate threshold and believe that awards with an aggregate value above that amount should be reviewed to ensure that they are given as part of an established awards program. The Office of Government Ethics has also retained §2635.204(d)(3), which excludes meals and entertainment given to the employee and his or her family members at the event at which the presentation takes place from the aggregation requirement. The purpose of this exclusion is to permit members of the recipient's family freely to attend awards ceremonies.

Subject to the requirement that their values be aggregated, and subject to any consequent requirement for review by an agency ethics official, travel expenses incident to an award or the presentation of an award may be accepted under §2635.204(d)(1). Because travel expenses may have considerable value, OGE rejected

the recommendation by one individual to include travel expenses, as well as meals and entertainment, under §2635.204(d)(3) and thereby permit their acceptance without regard to value. The discussion in Example 3 following §2635.204(d)(3) has been expanded to illustrate the proper treatment of travel expenses offered incident to an award.

One agency objected to the prohibition in the first sentence of proposed §2635.204(d)(1) on acceptance of awards from persons affected by the employee's duties, and one organization objected to the prohibition on acceptance of awards from an organization the majority of whose members have interests that may be substantially affected by the employee's duties. Neither limitation has been deleted. Some limitation is necessary, even for established programs, to ensure that awards are not used by outside sources to make gifts to employees whose official duties affect their interests. In the absence of a limitation on awards from persons affected by the employee's duties, the regulation would have to be recrafted, as suggested by another agency, to include a requirement for agency ethics officials to review every award with a view to considering any appearance problem it might create. The Office of Government Ethics does not expect the application of the limitation in §2635.204(d)(1) on awards from organizations with affected members to be unnecessarily restrictive. While many organizations may be prohibited sources because more than half of their members are prohibited sources, relatively few will have a membership composed of a majority of persons affected by any one employee's official duties. Moreover, in view of the gift exclusion at §2635.203(b)(2), even these organizations are free to honor employees with modest plaques and certificates.

The Office of Government Ethics also did not revise §2635.204(d)(1) to require, as suggested by one agency, that the employee or the agency ethics official specifically consider any "appearance of impropriety" before accepting or authorizing acceptance of an award. In most cases, significant appearance problems will be effectively addressed by the requirement for review of any award over $200 to ensure that it is part of an established awards program and by the prohibition against awards from any person affected by performance or nonperformance of the employee's official duties.

One agency and one organization recommended deletion of the requirement in the second sentence of §2635.204(d)(1) for a written determination by an agency ethics official that the award is part of an established program of recognition. An award that is given for reasons related to an employee's performance of his or her official duties could raise questions regarding

improper supplementation of Federal salary in possible violation of the criminal statute, 18 U.S.C. 209, unless the award is given pursuant to a bona fide awards program. The requirement for a written determination regarding more significant awards is retained for the protection of employees. For similar reasons, OGE also did not adopt the recommendation by one agency to delete the requirement that awards subject to the second sentence of §2635.204(d)(1) be reviewed by the agency ethics official to determine that selection of the award recipient is made pursuant to written standards. Written standards help to ensure that the awards program is an established program of recognition and that the employee's selection was not motivated by an intent to supplement his or her Federal salary. To ensure that the condition is not interpreted in an unduly restrictive manner, we have deleted the word "specific" that appeared prior to "written standards" in proposed §2635.204(d)(1)(iii), which is now renumbered as §2635.204(d)(1)(ii).

One significant change to §2635.204(d)(1) was prompted by comments from three agencies, two organizations and one individual all of whom objected to the requirement at proposed §2635.204(d)(1)(ii) that individuals other than Federal employees be eligible for the award. Several cited existing awards for Federal employees that would not meet this condition. On further review, OGE agrees that the condition is neither necessary nor desirable, and it has been deleted.

One agency suggested that the condition at proposed §2635.204(d)(2) that acceptance of an honorary degree not "create an appearance of loss of impartiality or use of public office for private gain" be changed to focus instead on whether the timing of the award or the degree would cause a reasonable person to question the employee's impartiality in a matter affecting the degree-granting institution. OGE adopted this recommendation for its greater specificity and revised Example 2 accordingly. One individual suggested that an employee has a "right" to receive an honorary degree offered for reasons related to his or her official duties. We do not agree and, therefore, have rejected that individual's suggestion to provide a mechanism to appeal adverse determinations under §2635.204(d)(2).

One organization recommended that §2635.204(d)(2) be revised to permit acceptance of honorary degrees without regard to whether the degree-granting institution is an institution of higher education under 20 U.S.C. 1141(a). Unlike awards under established programs permitted by §2635.204(d)(1), honorary degrees are customarily bestowed on a purely discretionary basis and the stated limitation on the source of honorary degrees is an appropriate

means of preventing their use to recognize employees who would not qualify for recognition as part of a bona fide awards program.

Gifts Based on Outside Business or Employment Relationships

Four agencies and one individual commented on the exception at §2635.204(e) for gifts based on outside business or employment relationships. The Office of Government Ethics did not adopt one agency's recommendation to revise §2635.204(e)(1) to permit acceptance of benefits that flow from spousal employment activities only when an agency ethics official has determined in writing that acceptance of the benefits would not appear to improperly influence the employee in the performance of his or her official duties. In large agencies, like the Department of Defense, there may be thousands of employees whose spouses are employed by one of the thousand or more companies that meet the definition of a prohibited source. In practice, most employees are disqualified from working on matters that affect their spouses' employers and, thus, it is the rare employee whose official duties would prompt his or her spouse's employer to offer or enhance an employment benefit. The suggestion to require every employee to obtain a written opinion before enjoying the normal benefits that flow from a spouse's employment with a prohibited source would be so administratively burdensome as to be unworkable. Because it is intended simply to illustrate the gift exception in that section and because the preceding example includes a specific cross-reference to relevant provisions in subpart E of this regulation, OGE did not accommodate one agency's request to elaborate upon the possible applicability of the standards in subpart E to the facts stated in Example 2 following §2635.204(e)(1). The Office of Government Ethics did, however, adopt an agency recommendation to expand the exception in §2635.204(e)(2) to cover regular as well as special Government employees.

Because such gifts are appropriately addressed by the respective exclusions and exceptions related to discounts at §§2635.203(b)(4) and 2635.204(c), we did not adopt an individual's recommendation to create an additional category of exceptions under §2635.204(e) for benefits "offered as a public relations gesture." Based on an agency suggestion to amplify the need for the employee's disqualification, Example 1 following §2635.204(e)(3) has been revised so that the regulation for which the employee is responsible affects only cable television networks and so that the employee is seeking employment with an affected cable television holding company.

Gifts From a Political Organization

One individual alluded to policies under which certain employees who are exempt from the Hatch Act restriction in 5 U.S.C. 7324(a)(2) against active participation in political management or campaigns are asked, nevertheless, to refrain from partisan political activities. His suggestion to revise §2635.204(f) to reflect this policy was rejected. It is not the purpose of this section to implement 5 U.S.C. 7324 or to reflect related policies that may change from time to time. The authority in §2635.204(f) for Hatch-exempt employees to accept certain gifts from political organizations would be unaffected by the fact that a particular employee's participation on behalf of a political organization may violate an existing agency or other policy on participation in political activities.

Widely Attended Gatherings and Other Events

The proposed exception for speaking engagements and widely attended gatherings at §2635.204(g) elicited comments from 21 agencies, ten organizations and four individuals. Three agencies and one association suggested that proposed §2635.204(g)(1)(i) be revised to recognize that employees are sometimes assigned by their agencies to take an active but less formal role than that of a speaker or panel participant in the presentation of information at conferences and similar events. Consistent with this observation, OGE has revised proposed §2635.204(g)(1)(i) to permit free attendance on the day an employee is assigned to participate as a speaker, panel participant, or "otherwise to present information on behalf of the agency at a conference or other event." This language appears as renumbered §2635.204(g)(1).

The Office of Government Ethics did not adopt the recommendation by one agency and one organization to revise proposed §2635.204(g)(1) to routinely permit those speaking or otherwise presenting information to accept free attendance for the entire event. In addition to being customary, attendance on the day of an employee's presentation will ordinarily be useful, and often necessary, to the presentation. The same cannot be said for attendance on days the employee is not speaking or otherwise presenting information. It may be possible, however, for an employee to accept an offer of free attendance on those additional days under renumbered §2635.204(g)(2) if the event is widely attended. Or, the employee or the agency may be able to accept an offer of free attendance, as well as travel and related expenses, under statutory authorities such as those referred to in renumbered §§2635.203(b)(8) and 2635.204(l).

Conforming revisions have been made to the determination requirements of renumbered §2635.204(g)(3). Contrary to the view expressed by one agency, free attendance at the entire event cannot simply be extracted by an agency as "consideration" for providing an agency speaker.

More than half of those who commented on §2635.204(g) objected to or questioned the basis for the condition at proposed §2635.204(g)(1)(ii) that an employee may accept free attendance at widely attended gatherings only if attendance will be on his or her "own time." Three noted that the Government benefits from the employee's attendance at events that are educational in nature, and many pointed out the logical inconsistency between the condition that attendance be on the employee's own time and the requirement, now at renumbered §2635.204(g)(3), for a threshold determination of agency interest. Two noted that distinctions between official and personal time cannot be made in the case of Cabinet officials and others who are not subject to formal leave systems.

Proposed §2635.204(g)(1)(ii) has been renumbered as §2635.204(g)(2) and revised to provide that, in the case of an employee who is subject to a leave system, attendance will be on the employee's own time or, when authorized, on excused absence or otherwise without charge to the employee's leave account. The phrase "or otherwise" was included to refer to those, such as military officers, who are excused from duty otherwise than under systems that use the precise concept of excused absence. While this revision may not fully address the concerns noted, it is imposed of necessity to ensure that the gift is made to the employee rather than to the agency and, thus, that it does not improperly augment agency appropriations available for payment of expenses of attendance at training, meetings or similar events. Appropriate use of the authority in chapter 630 of the Federal Personnel Manual to grant brief periods of excused absence without loss of pay or charge to leave will ensure that employees are not charged leave to attend events that are in the agency's interest.

In order to craft a regulatory exception permitting an employee to accept a gift of free attendance at meetings and other events that serve an agency's interests, it must be clear that the gift is to the employee and does not augment the appropriation of his or her employing agency by permitting an outside source to pay for attendance that the agency should finance. In addition to authority to pay for all or part of the expenses of training employees, agencies have authority under 5 U.S.C. 4110 to use travel expense appropriations to facilitate "attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved

conduct, supervision, or management of the functions or activities." Implementing guidance at Federal Personnel Manual chapter 410, subchapter 8, encourages agencies to adopt policies to facilitate attendance at meetings where ideas and information in areas significant to agency operations will be communicated, even when the agency cannot pay the necessary expenses of attendance. That subchapter recommends that agencies adopt a liberal standard for authorizing attendance at meetings without charge to leave when travel funds cannot be provided by the agency. Thus, the Office of Personnel Management (OPM) specifically recognizes that employees may pay for the cost of attending meetings either on their own time or, when authorized, on excused absence. In view of these authorities recognizing that an employee may pay for attendance at meetings and similar events while on excused absence, an employee's acceptance of a gift of free attendance while on his or her own time or while on excused absence would not augment the agency's appropriations.

It is in part the purpose of renumbered §2635.204(g)(2) to fill a gap in statutory authorities under which agencies or employees may accept gifts of free attendance. Some agency gift acceptance statutes and 31 U.S.C. 1353 provide authority for agencies, that otherwise would use their own funds for those purposes, to accept gifts from non-Federal sources to enable their employees to attend certain events on official time. Not all agencies have gift acceptance statutes, however, and 31 U.S.C. 1353 cannot be used to accept free attendance at an event that takes place at an employee's duty station. Provided that the offer is from an organization that is exempt from taxation under 26 U.S.C. 501(c)(3) or from a State, county or municipality, an individual employee may be authorized to accept expenses for attendance at training or meetings under 5 U.S.C. 4111 without regard to whether the event takes place at or away from his or her official duty station. If the event takes place at the employee's duty station and if the offer cannot be accepted under 5 U.S.C. 4111, there is no statutory authority for an employee or for an agency without independent statutory gift acceptance authority to accept an offer of free attendance. Section 2635.204(g)(2) partially fills this void. Based on comments by one agency and one organization suggesting a need to clarify that §2635.204(g) is but one of several authorities to accept free attendance, OGE has added a note to that effect following renumbered §2635.204(g)(4).

One agency recommended deletion of the condition that the widely attended gathering be of "mutual interest to a number of parties." The recommendation, intended to permit attendance

at events that are primarily social in nature, was not adopted. Where the invitation is from a person who is not a prohibited source, and provided that no one in attendance is charged an attendance fee, the exception at renumbered §2635.204(h) may permit an employee to accept an invitation to an event of a social nature.

Only one individual objected to the requirement at proposed §2635.204(g)(2) for a determination of agency interest. However, twelve who commented felt that the requirement for a written determination of agency interest would be difficult to administer. After further consideration, OGE has retained the requirement for a determination of agency interest but has revised renumbered §2635.204(g)(3) to permit that determination to be made orally unless the sponsor has interests that may be substantially affected by performance or nonperformance of the employee's duties. At the suggestion of one organization, we also have added a provision at §2635.204(g)(3)(ii) to permit certain group or class determinations of agency interest.

The Office of Government Ethics did not revise §2635.204(g), as requested by one agency, to include a statement that it may be possible to accept free attendance at some events under the exception at §2635.204(a) for de minimis gifts, without regard to whether they are widely attended or serve an agency interest. It would be unnecessarily repetitious to note in every exception to the gift prohibitions that the de minimis exception might be used in lieu of a more specific exception when the market value of the particular gift does not exceed $20. Example 3 following §2635.204(g), however, makes this point.

One agency suggested that proposed §2635.204(g)(4) be rephrased to make it clear that a prohibited source cannot funnel payment for the employee's attendance through a sponsor. As renumbered, that section is now §2635.204(g)(5). Espousing precisely the contrary position, one agency and one organization suggested that this paragraph be liberalized to permit any prohibited source to pay for an employee's attendance, provided that seating is arranged solely and randomly by the sponsor. As a check on possible appearance problems that could result when a prohibited source, such as a NASA contractor, finances attendance by the NASA contracting official who administers its contract, the agency suggested that employees be required to indicate to sponsors those persons with whom they should not be seated and be required to change seating as necessary. One organization suggested that the requirement for a written determination of agency interest be the sole check on the ultimate source of payment.

Renumbered §2635.204(g)(5) has not been revised. As stated,

the section provides a sufficient safeguard that a person other than the sponsor will not funnel payment for a particular employee's attendance through a nominal sponsor. The recommendation to permit payment by other than the sponsor was rejected as potentially more troublesome than worthy. Artificial requirements, in the nature of those suggested, to assure random seating and anonymity of the donor are not likely to be perceived as shielding the identity of the actual donor. In OGE's view, they are an overly complex means of accomplishing a goal that is met more directly by requiring that the sponsor actually bear the cost of attendance.

Four agencies commented on the authority at proposed §2635.204(g)(5) for employees to accept free attendance for an accompanying spouse. One suggested that, in addition to the requirement for attendance by other spouses, the section require a determination that the spouse's presence will support the mission of the agency. Another suggested that the requirement that others at the event be accompanied by spouses be deleted in favor of a determination that the gift not appear to influence the employee in the performance of his or her official duties. Neither recommendation has been adopted. The Office of Government Ethics recognizes that, as a condition of the agency's acceptance of travel and related expenses for an accompanying spouse, the General Services Administration's interim regulations implementing 31 U.S.C. 1353 (56 FR 9878-9881) require a determination that the spouse's presence will support the agency's mission or assist the employee in carrying out his or her participation in the event. Because that statute authorizes "agency" acceptance of the gift, a regulatory requirement for a finding that the spouse's participation will serve an agency purpose may be appropriate, particularly when travel and subsistence expenses are likely to be involved. In contrast, §2635.204(g) is authority for acceptance by the employee rather than the agency and it does not permit acceptance of travel and lodging expenses but is limited to gifts of free attendance. Because of the limited nature of the benefit involved, OGE believes it is a sufficient limitation that others attending the portion or portions of the event in question will generally be accompanied by their spouses. Moreover, a requirement for a determination that the gift will not create an appearance of improper influence would largely duplicate the determination required by renumbered §2635.204(g)(3).

At the recommendation of one agency, language has been included in renumbered §2635.204(g)(6) to clarify that the offer of free attendance for an employee's spouse must also be from the sponsor of the event. The Office of Government Ethics rejected as unnecessary the suggestion by another agency to add language specifying

that acceptance of free attendance by a spouse does not obligate the agency to assume travel costs for an accompanying spouse. The examples following §2635.204(g)(6) have been revised to reflect the changes in §2635.204(g) noted above.

One organization sought clarification as to whether an employee serving as an agency representative or liaison to an outside organization may attend ongoing working groups where no fee is charged to any attendee. Renumbered §2635.204(g)(4) defines a gift of free attendance as including 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. Where the meeting does not involve food, refreshments, entertainment, instruction or materials and no fee is charged to any participant, there is no gift. Moreover, an employee serving as an agency liaison to a particular organization is authorized to perform those liaison duties on official time and could accept waiver of an attendance fee under §2635.204(g)(1) if his or her participation in the particular meeting involves presentation of information on behalf of the agency.

Social Invitations From Persons Other Than Prohibited Sources

The Office of Government Ethics has added a new exception at renumbered §2635.204(h) to address several concerns that relate to the limitations in §2635.204(g) on free attendance at widely attended gatherings and those noted in the first paragraph of this discussion of the comments regarding subpart B. Where no one in attendance is charged a fee, this exception permits acceptance of food, refreshments and entertainment at a social event attended by several persons where the employee is invited by a person who is not a prohibited source. Some of these events may fall within the exception at §2635.204(g) for widely attended gatherings and others may fall within the exception at §2635.204(b) for gifts based on a personal relationship. However, §2635.204(h) will extend to smaller gatherings and will permit attendance even when the agency has no interest in the employee's participation. It is intended to ensure that the prohibition on gifts because of official position not unreasonably restrict social interaction and to accommodate some of the community relations concerns expressed by the Department of Defense.

Meals, Refreshments and Entertainment in Foreign Areas

As explained in the above discussion of the comments concerning

proposed §2635.104(c), eleven agencies with overseas operations jointly requested that an exception be added to subpart B to permit employees assigned to duty overseas to accept certain meals and entertainment. These agencies are concerned that employees will be required to decline the customary invitations of hospitality that frequently accompany the transaction of business in many foreign countries and that the foreign nationals and entities involved may be offended. Although some of those agencies currently use gift acceptance statutes to enable employees to accept meals and entertainment overseas, it is the consensus of these eleven agencies that there should be a uniform standard applicable to all executive branch personnel overseas. Presently, the Foreign Gifts and Decorations Act, 5 U.S.C. 7342, contains a nominal value exception of $200 for gifts from foreign governments and international or multinational organizations and their representatives. This authority does not extend, however, to gifts from foreign individuals or nongovernmental entities.

In renumbered §2635.204(i), OGE has adopted the concept of a special exception for foreign areas recommended by the 11 agencies with overseas operations. The exception drafted and offered by the group would have allowed acceptance of meals, refreshments and entertainment up to the per diem rate for the foreign area without any approval, and would have permitted acceptance without regard to value when approved by a supervisor or agency designee. As that proposal has been modified and adopted by OGE at §2635.204(i), the value of food, refreshments and entertainment that may be accepted is limited to the applicable daily per diem rate for the particular foreign area. The daily per diem rate is the amount the agency may pay an employee on temporary duty in the particular overseas area to cover lodgings, meals and incidental expenses for one day and should be sufficient to permit participation in most meetings or events of the character envisioned by the agencies that recommended the exception. In those few cases where it is not sufficient, agencies may be able to use the authority at 31 U.S.C. 1353 to accept free attendance at meetings and similar events, or may be able to use a separate agency gift acceptance statute.

Gifts Accepted Under Specific Statutory Authority

One organization noted that the synopsis of 5 U.S.C. 4111 in proposed §2635.204(j)(1) does not reflect the interpretive regulations in 5 CFR 410.702 which permit acceptance not only from 501(c)(3) tax exempt organizations, but from organizations to which the prohibitions in 18 U.S.C. 209 do not apply. The

section, renumbered as §2635.204(l)(1), has been revised to reflect the broader scope of this authority to accept expenses incident to training or attendance at meetings from State, county and municipal governments.

Additional Exceptions Recommended

Three agencies and two others requested an additional exception to permit acceptance of gifts in "special situations" when approved in writing. One of the agencies noted that acceptance in certain special situations may now be permitted under some agency gift acceptance statutes. Another agency noted that its regulations now provide for acceptance of "items of nominal value and perishable gifts from inhabitants of the islands, territories and possessions that fall within the responsibility of the United States," with a provision that other gifts given by such inhabitants become the property of the agency.

A "special circumstances exception" has not been added to §2635.204. OGE views the de minimis exception at §2635.204(a) as appropriate to deal with nominal gifts, including those from inhabitants of islands, territories and possessions of the United States. We recognize that agencies, using gift acceptance statutes, may be able to provide for acceptance of gifts in certain special circumstances. However, where the item is tangible and nonperishable, acceptance under an agency gift statute means that the item cannot be retained by the employee but must be turned over to the agency. Thus, the fact that some agencies may have statutory gift acceptance authority does not warrant an exception that would result in the employee, rather than the agency, retaining a nonperishable item that may be of more than nominal value. Nor did OGE adopt a recommendation to add an exception to §2635.204 to cover "working meals." The Office of Government Ethics views the recommendation for a "working meals" exception as eclipsed by the de minimis exception at §2635.204(a).

Section 2635.205 Proper Disposition of Prohibited Gifts

One individual suggested that the sharing of perishable items within an office could never raise an appearance of impropriety and, thus, that the reference to supervisory discretion in §2635.205(a)(2) was unnecessary. Two agencies felt, to the contrary, that even supervisory approval was insufficient to guard against appearance problems. One would permit sharing of perishable items within the office only if the items cannot be given to a charitable organization, and the other would require a specific determination

that sharing within the office does not create an appearance of impropriety. The Office of Government Ethics has not revised §2635.205(a)(2) to limit the discretion of supervisors or agency ethics officials to choose between destruction, donation or sharing of perishable items. Although donation to a charity may often be the most appropriate disposition of perishable items that cannot be accepted under subpart B, there are any number of factors, including costs of delivery, that may make it more appropriate to share perishable items within the office.

We did not adopt the recommendation by one agency to illustrate the reimbursement requirement at §2635.205(a)(3) with an additional example involving the sponsor of a reception who provides a box permitting executive branch employees to deposit their fair share of the reception's cost. Section 2635.205(a)(3) imposes a requirement for reimbursement but does not specify particular means by which reimbursement may be accomplished. Because it would relate more appropriately to renumbered §2635.203(b)(4) and was overly complex, we also did not adopt that agency's recommendation to add an example following §2635.205(a)(3) involving tickets offered at a reduced rate to all Government employees. We also did not adopt an agency recommendation to revise §2635.205(a)(4) to include a reference to the excess personal property provisions at 41 CFR 101-43.305. It is not feasible for OGE to address all the various issues relating to property management and disposal that may arise when items of tangible property are accepted by agencies.

## Subpart C-Gifts Between Employees

### Section 2635.302 General Standards

Because both suggestions would be contrary to the underlying statutory language of 5 U.S.C. 7351, OGE did not adopt the recommendation by one individual to permit only group gifts to superiors or the recommendation by two agencies to delete the prohibition at §2635.302(b) on acceptance of gifts from employees receiving less pay. Section 7351, as amended by the Ethics Reform Act of 1989, specifically authorizes OGE to issue regulations that contain an exemption for "voluntary gifts or contributions that are given or received for special occasions such as marriage or retirement or under circumstances in which gifts are traditionally given or exchanged." Thus, the statute contemplates exceptions allowing individual gifts as well as contributions for group gifts. The prohibition against an employee accepting a gift

from another employee who receives less pay is mandated by 5 U.S.C. 7351(a)(3) and cannot be eliminated by the implementing regulations.

One organization recommended deletion of §2635.302(b)(2) so that an employee can freely accept a gift from any employee receiving less pay as long as the two employees are not in a superior-subordinate relationship. The Office of Government Ethics has not deleted the paragraph and does not agree with the organization's suggestion that the mere assertion of "friendship" will always permit a gift and that the limitation serves no purpose. To permit acceptance of a gift from an employee receiving less pay, §2635.302(b)(2) requires a personal relationship "that would justify the gift." For example, where the two employees are acquainted simply because they work for the same agency, the paragraph would preclude an employee from giving a gift to a higher-paid employee in another office who is the selecting official for a position for which the lower-paid employee has applied.

Section 2635.303 Definitions

The Office of Government Ethics did not adopt the recommendation by one organization to eliminate the last sentence of §2635.303(f) which requires that any recommendation of an amount to be contributed to a group gift be accompanied with a statement that an employee may contribute less or not at all. In OGE's opinion, the organization's recommendation instead to require an annual notification to this effect would not provide the same degree of assurance that contributions will be voluntary.

Section 2635.304 Exceptions

Of the four agencies that commented on the general exception at §2635.304(a)(1) for items with an aggregate market value of $10 or less, one opposed any such de minimis exception and three asked that the amount be raised. The first agency's recommendation to prohibit gifts on all but special, infrequent occasions was rejected in view of the statutory language which requires an exception for circumstances in which gifts are traditionally given or exchanged. For this same reason, OGE did not revise §2635.304(a) in response to one individual's concern that the exception may operate in a manner that is biased in favor of certain religious holidays. Although gift-giving is frequently associated with religious holidays, the exception is not limited to such holidays or to the holidays of any particular religious

group.

The three agencies that recommended a higher de minimis amount for the occasional gifts permitted by §2635.304(a)(1) all suggested that the $10 amount be raised to comport with the de minimis exception at §2635.204(a) for gifts from outside sources. The Office of Government Ethics has not raised the amount. The underlying statute, 5 U.S.C. 7351, specifically requires an exception for gifts for occasions such as birthdays and certain holidays. While a de minimis exception for these and other occasional gifts is appropriate to permit modest exchanges of gifts between coworkers, OGE believes that a standard more restrictive than §2635.204(a) is appropriate for gifts between superiors and subordinates. In an office environment where superiors and subordinates interact daily and where subordinates compete for advancement, there may be subtle pressures to give gifts to superiors that are not present when outside sources deal only occasionally with employees. The $10 amount was proposed and is retained because it is high enough to permit an exchange of modest tokens between all employees, such as cookies on holidays and flowers and vegetables from home gardens in the summer, but low enough generally to discourage employees from purchasing gifts for their superiors. The Office of Government Ethics has modified §2635.304(a)(1) to make it clear that gifts of cash are not included within the exception for gifts of $10 or less.

Two agencies recommended that the exception at §2635.304(a)(3) for gifts of personal hospitality not be limited to hospitality extended at an employee's personal residence. The Office of Government Ethics has retained the limitation, in the absence of which the term personal hospitality could be interpreted to permit any form of entertainment as long as the employee is personally present. The term personal residence is flexible enough to cover entertainment at a second home the employee maintains for personal use and to cover amenities, such as use of a swimming pool or tennis court, available to all tenants of the employee's apartment building. One agency expressed concern that §2635.304(a)(3) could justify an employee hosting an official superior for an entire week at his or her beach cottage. The exception was not intended to facilitate entertainment of this nature, but rather to permit employees to entertain superiors in their homes on the same basis that they customarily entertain personal friends. Occasional dinners and, if the employee owns a weekend residence, a weekend visit are within the range of personal hospitality contemplated. To help convey this meaning, OGE has revised §2635.304(a)(3) to permit personal hospitality provided at a residence "which is of a type and value customarily

provided by the employee to personal friends."

To ensure that items that are highly valuable cannot be given simply because they are customary in nature, two agencies suggested that a dollar limitation be placed on hostess and similar gifts permitted by §2635.304(a)(4). While OGE has not revised this section to include a specific dollar amount limitation, the section has been revised to stipulate that the value as well as the type of the gift must be customary.

One agency disagreed with the exception at §2635.304(a)(5) which permits an employee to transfer leave to an official superior in accordance with the leave transfer provisions of 5 CFR part 630, subpart I. Another agency pointed out that these leave transfer regulations specifically prohibit an employee's transfer of leave to his or her immediate supervisor. The exception was retained in order not to defeat the purpose of the leave transfer program but has been revised to reflect the regulatory prohibition at §630.906(d) on transferring leave to an immediate supervisor.

The two agencies and one organization that commented on §2635.304(b) suggested a specific dollar limitation on gifts for special, infrequent occasions. Two of the three recommended a $25 limit and one individual suggested limiting gifts on such occasions to those of a purely sentimental nature. The Office of Government Ethics did not revise the section to incorporate a dollar limitation or to limit gifts to those of a sentimental nature. More flexibility is required to permit appropriate gifts on the special occasions covered. For example, where an employee is invited by his or her official superior to a formal wedding and reception, a gift in excess of $25 may be customary and, thus, appropriate to the occasion. On the other hand, a gift worth considerably less may be appropriate for an office bridal shower.

In commenting on §2635.304(c), one agency suggested that the term "nominal amount" be specifically defined by a dollar limit and one organization specifically recommended $5 as an appropriate limitation. Although collections for gifts of all types within the executive branch generally involve individual contributions less than $5, OGE has not imposed a specific dollar limit. Where contributions meet the regulatory requirement that they be entirely voluntary, higher amounts may appropriately be contributed in some cases, as when several senior members of an office provide an additional contribution to subsidize a collection that has come up short of sufficient funds to purchase a desired gift. The Office of Government Ethics is not aware of any particular abuse of the longstanding restriction on gifts to superiors contained in 5 CFR 735.202(d) which, for special occasions such as marriage, illness or retirement, has similarly

limited donations to those of "nominal amount."

One individual expressed concern that within large offices, collections of voluntary contributions for a retirement gift might be sufficient to purchase a new automobile. Because OGE is not aware that this is other than a theoretical concern, an aggregate limitation on the value of group gifts has not been imposed. However, to comport with the similar limitation on individual gifts contained in §2635.304(b), the word "appropriate" has been inserted before the word "gift" both times it appears in the first sentence of §2635.304(c). This serves to limit group gifts for special, infrequent occasions to those of a type and value appropriately given by a group on such occasions and will preclude gifts of the extravagant nature postulated.

Subpart D-Conflicting Financial Interests

Section 2635.402 Disqualifying Financial Interests

One agency and one individual noted an internal inconsistency in the statement at §2635.402(b)(1)(ii) that a matter will have a direct and predictable effect if there is a "real," as opposed to a "slight or speculative," possibility that the matter will affect a financial interest. To avoid possible confusion resulting from the fact that a "slight" possibility may be a "real" possibility, OGE has deleted the word "slight." Based on another agency suggestion, the last sentence of that section has been expanded to include the statement that the dollar amount of the effect on the financial interest is immaterial.

One agency asked for further clarification of the definition of "direct and predictable effect" at §2635.402(b)(1) to ensure its correct application to matters affecting corporations in which employees hold stocks or bonds. The agency was concerned that an employee might argue that a million dollar change order under a Government contract with a corporation in which the employee owns stock will not have a "direct and predictable effect" on his or her financial interests. For the purpose of clarification, OGE has revised the note following §2635.402(b)(1)(ii) to reflect its longstanding position, and that of the Department of Justice, that an employee's ownership of stock may give rise to a financial interest that, under the direct and predictable effect test, could require disqualification. By way of illustration, we have added Example 1 following §2635.402(b)(1)(ii). And, as requested by one agency, we have added Example 2 immediately thereafter to illustrate the application of the direct and predictable

effect test to an employee's participation in a procurement that involves the competitor of a corporation in which the employee holds stock. We note, furthermore, that because a bond evidences a debt of the corporation, the question of whether a particular matter will have a direct and predictable effect on the financial interests of a bondholder will depend on whether the matter will affect the market value of the bond or the corporation's ability to pay the debt.

One agency requested further guidance in §2635.402(b)(2) for dealing with conflicts that arise when an employee is assigned to participate in a particular matter that affects the employer of his or her spouse. Under 18 U.S.C. 208, matters affecting the employer of an employee's spouse are treated differently than matters affecting the employee's own outside employer. The statute requires an employee's disqualification from a particular matter affecting the financial interests of a person he or she serves as officer, director, trustee, general partner or employee without regard to whether the matter will ultimately affect the employee's own financial interests. Where the matter affects the employer of a spouse, the statutory prohibition applies only if the matter will affect a financial interest of the spouse. To illustrate the application of §2635.402 to both types of employment interests, and to highlight the fact that spousal employment interests also should be addressed under §2635.502, Examples 1 and 2 have been added following §2635.402(b)(2). The Office of Government Ethics has not revised this section to accommodate three commenters who requested specific standards for determining when a child is a "minor child." Minority status is generally dependent on State law.

Two agencies suggested that the definition of "imputed interests" in §2635.402(b)(2) be expanded to cover stepchildren, adult children, divorced spouses, members of an employee's household and any person an employee serves as an adviser or consultant. Section 2635.402 implements the criminal statute, 18 U.S.C. 208, and OGE does not have authority to expand its reach by extending the definition of "imputed interests" at §2635.402(b)(2) to cover additional categories of persons. The fact that a particular person's financial interests are not imputed to an employee under §2635.402(b)(2) does not mean, however, that the employee should participate in a matter affecting a person with whom he or she has a close personal relationship. The impartiality principle, as amplified in §2635.502, is intended to address matters affecting the financial interests of members of the employee's household and others with whom the employee has certain business and personal relationships.

The Office of Government Ethics did not adopt the suggestion by one agency and one organization to add language to §2635.402(b)(2) to make it clear that an obligation of disqualification will arise only if an employee knows that a matter will affect the financial interests of a person whose interests are imputed to him or her by that section. Section 2635.402(b)(2) is intended only to define "imputed interests." The statutory requirement of knowledge is appropriately reflected in §§2635.401, 2635.402(a) and 2635.402(c) of this regulation.

Two agencies and two organizations asked for further clarification of the definition at §2635.402(b)(3) of a "particular matter." Examples 1 and 2 have been added following §2635.402(b)(3) to illustrate the difference between regulations affecting members of a particular industry which, generally, are "particular matters," and matters of broader applicability that, generally, are not.

One agency requested further clarification of the phrase "material significance" used in the definition of "personal and substantial" participation at proposed §2635.402(b)(4). To conform this section to the definition of the same concept used in the postemployment statute, 18 U.S.C. 207, OGE has deleted the word "material" and expanded the discussion of substantial participation to more closely reflect the definition of substantial participation at 5 CFR 2637.201(d).

Five agencies, one organization and one individual commented on the provisions at §2635.402(c) governing disqualification. Three agencies and the individual argued that written disqualification statements should be required. Three agencies noted that practical problems of supervision are likely to arise if employees can unilaterally disqualify themselves from participation in particular matters. One agency and one organization asked that the regulation be revised to require an employee to inform his or her supervisor of the disqualification.

Those who proposed a requirement for written disqualification statements may misperceive the value of such statements. While it may be useful to document that an employee understands that he or she is not to participate in a particular matter, a written disqualification statement will not insulate an employee who, nevertheless, participates in a particular matter that directly and predictably affects his or her own financial interests or the financial interests of any person that are imputed to the employee under §2635.402(b)(2). Actual nonparticipation in the matter is what is required by 18 U.S.C. 208. In proposing §2635.402(c) without a general requirement for written disqualification statements, it was OGE's purpose to ensure that employees who properly refrain from participating in particular matters from which they are

disqualified will not be disciplined simply for failing to document their good intentions.

One factor that had entered into OGE's decision not to require written disqualification statements under §2635.402(c) was the practical difficulty of defining precisely the circumstances under which a written disqualification statement should be filed. The mere fact, for example, that a matter that may directly and predictably affect the employee's financial interests is pending before his or her agency, or even before the employee's particular office, should not ordinarily trigger a requirement for written disqualification statements. If the employee has been assigned to a matter that directly and predictably affects his or her financial interests, it may be reasonable to require a written disqualification statement. However, the fact that an employee has been assigned to a matter does not necessarily mean that the employee has begun working on it, and many matters that have been assigned are not active. When an employee finds that he or she is disqualified from working on a particular matter to which he or she has been assigned, OGE believes it should generally suffice that the employee arranges to have the matter reassigned. If the employee does not have authority to cause that reassignment, then the employee may need to notify a supervisor or other person responsible for the assignment. We are hesitant to complicate a simple process that will meet the requirements of 18 U.S.C. 208 by requiring all employees to file written disqualification statements.

Although §2635.402(c) has not been revised to require written disqualification statements, OGE has undertaken to address the stated concern that, without notification to a supervisor, an employee's unilateral disqualification may pose practical problems for managers who are responsible for ensuring that the agency's work is accomplished. Section 2635.402(c)(1) has been revised to state that an employee who becomes aware of the need to avoid participating in a matter to which he or she has been assigned should notify the person responsible for that assignment. Section 2635.402(c)(2) has also been revised to provide that, in addition to an agency ethics official, the person responsible for the employee's assignment may require a written disqualification statement in an individual case. Example 1 following §2635.402(c)(2) has been modified to reflect these changes.

One individual claimed that written disqualification statements are an essential part of the process by which his agency reviews financial disclosure statements and that his agency must be able to impose an across-the-board requirement for written disqualification statements in its supplemental agency regulations. The Office

of Government Ethics does not believe the circumstances that confront the individual's employing agency are significantly different from those encountered by other agencies nor would otherwise justify a departure from renumbered §2635.402(c)(2).

The Office of Government Ethics has not adopted the recommendation by one agency to revise §2635.402(d)(2)(ii) to provide that individual waivers can only be granted by agency ethics officials. Under 18 U.S.C. 208(b)(1), authority to grant individual employee waivers is not reserved to agency ethics officials but is expressly given to the Government official responsible for the employee's appointment. We see no reason to constrain the ability of those individuals to delegate that authority as they deem appropriate. As a matter of practice, agency ethics officials have been consulted or otherwise have participated in the granting of individual waivers. The consultation provision set forth in renumbered §2635.402(d)(4) helps to ensure that their involvement will continue. We also did not adopt an agency recommendation to delete that consultation requirement or the requirement, also contained in §2635.402(d)(4), to forward copies of such waivers to OGE. Both requirements are specifically imposed by section 301(d) of Executive Order 12674.

The Office of Government Ethics did not adopt one agency's suggestion to include in the first sentence of §2635.402(e)(2) a statement indicating that an employee may be required to divest a financial interest under §2635.403 even though the employee has disqualified himself or herself from participation in matters affecting that interest. We believe this is clear from §2635.403. We also rejected an agency recommendation to revise §§2635.402(e)(2) and 2635.403 to further define what constitutes a substantial conflict under §2635.403(b). That concept is sufficiently addressed in §2635.403(b). To ensure that employees do not prematurely divest and thereby lose tax benefits provided by certificates of divestiture under subpart J of 5 CFR part 2634, OGE adopted one agency's suggestion to revise the last sentence of renumbered §2635.402(e)(3) to delete the word "voluntarily" from the statement that "an employee who voluntarily divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment."

Section 2635.403 Prohibited Financial Interests

In commenting on §2635.403(a), one agency sought assurance that it will continue to have authority to implement certain statutory provisions in its organic act by regulations issued separately from its supplemental agency regulations. Another

agency expressed concern that §2635.403(a) not interfere with its authority to provide for regulatory waivers of such statutory prohibitions. We believe §2635.105(c)(3) makes it clear that an agency need not include in its supplemental agency regulations any regulations it has independent authority to issue. To address both comments, however, OGE has included in the note following §2635.403 a statement to indicate that, in some cases, agency specific statutes prohibiting employees from holding or acquiring specified financial interests may be implemented by agency regulations issued independent of part 2635. At the suggestion of another agency, OGE has revised §2635.403(b) to clarify that authority to determine that a substantial conflict exists may be delegated to an agency designee.

Three agencies objected to the definition of the term "financial interest" at proposed §2635.403(c) insofar as it would exclude interests of an employee's spouse or minor child over which the employee does not have control. Each argued that it is necessary to the functioning of its ethics program to prohibit certain holdings by the spouses and minor children of its employees. And each suggested that it makes little sense to prohibit an employee from holding a particular financial interest when the employee is free to transfer that interest to his or her spouse. The limitation to which these agencies object was included in the proposed regulations because of OGE's concern that an agency might be unsuccessful in pursuing disciplinary action against an employee for his or her spouse's refusal to divest an independently held financial interest. After further consideration, OGE now believes it may be appropriate to apply similar standards to the financial interests of employees and to those of their spouses and minor children. The definition at §2635.403(c)(1) has been revised accordingly and conforming changes have been made to §2635.403(a).

The success of disciplinary action against an employee whose spouse or minor child acquires a financial interest prohibited by an agency's supplemental regulations is likely to turn on the nexus between the prohibition and the efficiency of the service. The Office of Government Ethics, in exercising its concurrence function under §2635.105(a), will review any provisions in proposed supplemental agency regulations that would restrict the financial interests of spouses and minor children to ensure that a direct and appropriate nexus exists. For reasons discussed in connection with similar comments regarding §2635.402(b)(2), we did not extend the definition, as suggested by one agency, to cover a person other than a spouse or minor child who is a member of the employee's household.

One agency and one organization found it confusing that the term "financial interest" is used differently in §2635.402 and §2635.403 and suggested that the term "financial holding" might be substituted in §2635.403 to avoid confusion. We did not make the substitution recommended because the term "financial interest" as defined in §2635.403(c) covers more than those interests that are ordinarily viewed as "holdings." It may cover, for example, indebtedness or compensated employment relationships. We believe the term "financial interest" is used in sufficiently different contexts in §§2635.402 and 2635.403 that there should be little confusion. The term is used in §2635.403 to refer to a discrete holding or relationship, such as a share of stock, a loan or a deed of trust. In §2635.402, as in 18 U.S.C. 208, it is used in the broader sense of the employee's overall financial well-being to describe the effect that will trigger an employee's obligation to disqualify himself or herself from participation in a particular matter. The Office of Government Ethics has added a new Example 2 following §2635.403(c)(1) to illustrate this distinction.

One agency suggested that §2635.403(c)(2) be revised to specify that the interests of an outside organization will not be imputed to an employee under §2635.402(b)(2)(iv) if the employee serves on the organization's advisory board rather than on its managerial board. The Office of Government Ethics did not adopt this recommendation because it could be misleading. Although members of advisory boards generally are not directors, they may be employees of the organization within the meaning of §2635.402(b)(2)(iv). We also rejected as unnecessary and potentially misleading an organization's request to add a statement to §2635.403(c) that "the retention of seniority rights or an unpaid leave of absence" is not a financial interest. Employees who have these rights or benefits often have stock or other ownership interests that are financial interests, whether held directly or indirectly, as through participation in pension plans. At the request of one individual and one agency, the discussion in Example 1 following §2635.403(c)(2) has been modified to clarify the basis for the agency's request for the employee to resign his office with the nonprofit organization as a condition to his promotion.

Subpart E-Impartiality in Performing Official Duties

Section 2635.502 Personal and Business Relationships

Three agencies and one organization objected to §2635.502

for imposing standards that elaborate upon the impartiality and appearance principles in §§2635.101(b)(8) and 2635.101(b)(14). They variously characterized the section as vague, subjective, overbroad or burdensome to administer. One agency and the organization suggested that the section be deleted in favor of "the present practice of having such matters handled case-by-case by ethics officials." Another agency advocated reframing the section as "guidance only," and retaining the status quo, which it characterized as educating employees to apply the "Washington Post Standard" to solve appearance problems. The agency explained that it resolved appearances of conflicts informally and by various means.

Employees have long been required by the standards of conduct to avoid even an appearance of loss of impartiality. Section 2635.502 does not in fact change the first step of the process by which employees have long addressed appearance problems. Under §2635.502(a), it is the employee's responsibility in the first instance to consider whether a reasonable person with knowledge of the relevant facts would question his or her impartiality in a particular matter involving specific parties and, thus, to decide whether he or she has an "appearance problem." In pinpointing certain relationships that are especially likely to raise issues of lack of impartiality, the section helps to focus the employee's inquiry.

Additionally, §2635.502 makes clear that an employee who has determined that his or her impartiality in a matter would be questioned may not authorize his or her own participation in that matter. Under the standards as they have been articulated in regulations since the 1960's, the employee's determination that his or her participation in a particular matter would raise an appearance of lack of impartiality is supposed to end the inquiry: the employee is not supposed to participate in the matter. However, as indicated by the comment that these matters are "handled" or "resolved," in some cases an ethics official may determine that it is important to the agency that the employee participate in the matter even though his or her impartiality is likely to be questioned. Often, these determinations are not made by ethics officials but by the employee involved, without prior consultation with a supervisor or ethics official. What §2635.502 does is sanction the former type of approach by providing specific standards in accordance with which an employee may be authorized by an agency designee to participate in certain matters. It modifies current informal practice by taking these decisions out of the hands of the employee involved for the very reason that his or her judgment is likely to be questioned.

Commenting on §2635.502(a), one agency suggested that the

inquiry be changed from whether the circumstances "would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter" to whether the circumstances "might result in or reasonably be expected to create the appearance of loss of impartiality by an employee." The Office of Government Ethics has not changed the proposed standard which, for the purpose of this particular section, is an appropriate articulation of the appearance standard as applied to the principle that an employee shall act impartially and not give preferential treatment to any private organization or individual. We also rejected the suggestion by another agency to delete §2635.502 and issue instead a new proposed rule dealing more broadly with appearance issues. That agency believes §2635.502 inappropriately focuses on issues relating to impartiality. Section 2635.502 is not intended to diminish the importance of the appearance principle or to suggest that it is not to be applied in conjunction with other standards and principles in part 2635. In fact, many standards incorporated throughout part 2635 are based on appearance considerations. We have found, however, that appearances of lack of impartiality raised by certain outside relationships are among the most common and troubling of the various appearance problems that arise and we believe they warrant the specific treatment given by §2635.502.

Eight agencies and one organization commented on one or more of the covered relationships listed in §2635.502(b)(1). In comments directed at §2635.502(b)(1)(ii), two agencies requested a more specific definition of the phrase "member of the employee's household" and three agencies and one organization requested more guidance in determining who is a "relative with whom the employee has a close personal relationship." One agency asked whether a roommate with whom an employee shares living quarters for primarily economic reasons is a member of the employee's household. Another agency asked the same with regard to a college student who only lives at home between semesters and a visitor who stays for a month in the employee's home.

Both phrases used in §2635.502(b)(1)(ii) are intended to be broadly construed and for this reason OGE has not expanded upon the meaning of either. The question of whether the college student is a member of his or her parents' household is easily resolved by the fact that the student is, in any event, a relative with whom the parents have a close personal relationship. We do not believe any reasonable reading of the term "member of household" would include a guest who visits briefly, as for a month. The term is broad enough, however, to cover a roommate who shares the rent or mortgage payments. That roommate is,

moreover, a person with whom the employee has a financial relationship within the meaning of §2635.502(b)(1)(i). Any problem with either phrase being construed too broadly will be checked by the employee's consideration of whether a reasonable person would question his or her impartiality if the employees were to participate in a particular matter involving specific parties in which the particular person is or represents a party. The particular nature of the relationship is a factor to be taken into account in that consideration. For example, an employee's decision regarding participation in a matter affecting a member of his or her household could well be different depending upon whether the person is someone with whom the employee lives in an intimate relationship or whether the person is simply one of four acquaintances who share a group home.

One agency suggested that the list of covered relationships at §2635.502(b)(1) be expanded to include anyone with whom the employee has a "close personal friendship." Another agency noted that the definition would not cover a boyfriend or girlfriend. Because the term "friendship" can be used to cover a very broad range of relationships, OGE has not expanded the definitions at §2635.502(b)(1) to cover friendships. Section 2635.502(a)(2) is intended to alert employees to the fact that the covered relationships described in §2635.502(b)(1) are not the only relationships that can raise appearance issues and to encourage employees to use the process set forth in §2635.502 to address any circumstances that would raise a question regarding their impartiality. These could well include an employee's assignment to a particular matter to which a boyfriend, girlfriend, or other close friend is a party.

One of the three agencies that commented on §2635.502(b)(1)(iii) felt that the paragraph was too broad, in light of the concept of seeking employment used in subpart F, in covering "a person with whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." In fact, the definition of the term "seeking employment" at §2635.603(b) is not applicable to §2635.502(b)(1)(iii). Any potential §2635.502(b)(1)(iii) may have for unreasonable application is checked by the admonition in §2635.502(a) that the employee consider whether the circumstances would cause a reasonable person with knowledge of the relevant facts to question his or her impartiality in the matter. The particular steps an employee's spouse, parent or dependent child has taken to serve another as an employee or in another specified capacity would be relevant facts. Another agency objected to

the coverage of such relationships involving an employee's parent, and the third objected to use of the term "dependent child" as inconsistent with the coverage of only "minor" children in 18 U.S.C. 208(a) and §2635.402(b)(2)(ii). The Office of Government Ethics has not revised §2635.502(b)(1)(iii). We believe it is appropriate to ask an employee to consider whether a reasonable person would question his or her impartiality in a particular matter to which the employer of a parent or dependent child is a party.

Here again, the importance of relevant facts must be emphasized. An employee who knows that his or her mother has sent a resume to a company that is a party to a matter to which the employee is assigned could well conclude that the circumstances would not cause a reasonable person to question his or her impartiality in the matter. Where the employee's mother is the company's attorney who worked on that matter, then the conclusion that a reasonable person would question his or her impartiality in the matter becomes compelling. The Office of Government Ethics recognizes that under §2635.402(b)(2)(ii), as under 18 U.S.C. 208(a), the financial interests of a child are imputed to the employee only if the child is a minor. We have purposely included the employment relationships of dependent children in §2635.502(b)(1)(iii) because children beyond the age of majority are more likely than minor children to have the business and employment relationships listed.

One agency objected to the definition of a "covered relationship" at §2635.502(b)(1)(iv) as including a person by whom the employee was employed during the previous year. It noted that Congress has not enacted a "reverse revolving door statute" and urged that OGE not create any such restrictions by regulation. One agency and one organization objected to the definition as establishing a one-year bar on participation in matters involving prior employers and nonprofit organizations that employees served as officers or directors. The Office of Government Ethics has retained §2635.502(b)(1)(iv) as proposed. Contrary to the suggestions by two commenters, this definition does not constitute a "bar." As in the situation described in Example 4 following §2635.502(b)(3), we believe an employee ought to consider whether recently severed employment and similar relationships, including such relationships with nonprofit organizations, will give rise to questions about his or her impartiality in specific party matters. Under §2635.502(d), the agency designee may authorize the employee's participation in an appropriate case.

Postulating a case in which an employee makes a large bequest by will to an environmental organization to be used to oppose

legislation that would affect agency programs, one agency urged that the last sentence of §2635.502(b)(1)(v) be revised so that any such donation would render the donor an active participant. The section has not been revised. The unusual situation postulated, if combined with the employee's assignment to work on matters related to that legislation, can be satisfactorily addressed by §2635.502(a)(2). We have inserted a note following §2635.502(b)(1)(v) to ensure that §2635.502 is not interpreted as requiring disqualification on the basis of an employee's political, religious or moral views. At the request of one agency, Example 3 following §2635.502(b)(3) has been revised to clarify the basis for the conclusion that a reasonable person would not question the employee's impartiality.

One agency objected to the next to the last sentence of proposed §2635.502(d) which gives the agency designee discretion to decide whether to document his or her authorization. That agency would prefer an across-the-board requirement to document all authorizations and recommended, in addition, that any employee who disagreed with an agency designee's determination be given a right to a "second opinion." Although OGE has not revised §2635.502(d) to require written authorization in every case, the next to the last sentence has been revised to require documentation when requested by the employee. In part, because an employee is effectively insulated by the agency designee's determination authorizing his or her participation in a matter, we did not adopt the recommendation to create an appeal process. We view an appeal process as inappropriate since the determinations contemplated by §2635.502(d) necessarily call for the agency designee's exercise of judgment and not the application of precise standards from which only one correct conclusion can be reached.

One agency recommended that §2635.502(e) be revised to require written disqualification statements and another agency and one organization asked that it be revised to require an employee to give notice of his or her disqualification. We rejected the first recommendation for essentially the same reasons we rejected recommendations to require written disqualification statements under §2635.402(c). In response to the other suggestion, however, we have revised §2635.502(e) to conform to the changes to §2635.402(c) which are discussed in connection with other comments on subpart D. We did not adopt another agency's suggestion to revise §2635.502(e) to include language cautioning that care be taken to avoid disclosures of personal information. We do not believe any special caution is warranted.

One agency and one organization asked that §2635.502(f) be deleted and took exception to the statement that an employee's reputation for honesty and integrity is not a relevant consideration

for purposes of any determination under §2635.502. The Office of Government Ethics has retained this section. The effect of retaining §2635.502(f) is to treat the honesty and integrity of all employees as equally above reproach. Moreover, we believe it is inadvisable to expect an agency designee to make a judgment about a subordinate's or coworker's character or reputation. An agency designee's reliance upon an assessment of an employee's reputation for purposes of either §2635.502(c) or 2635.502(d) would tend to result in a determination allowing the employee's participation. Reliance on an employee's own assessment of his or her reputation for honesty and integrity for purposes of the consideration required by §2635.502(a) would most likely result in few appearance issues being raised for resolution under the process described in §2635.502.

Section 2635.503 Extraordinary Payments From Former Employers

Four agencies and one organization commented on §2635.503. The Office of Government Ethics has made no changes to this section. One agency and the organization simply stated that the section has no constructive value and should be deleted. One agency thought that a two-year period of disqualification was too long and another agency criticized the section for being "subjective." The Office of Government Ethics' reasons for including this section are detailed in the discussion at 56 FR 33786 accompanying the proposed rule. We continue to believe that extraordinary payments within the meaning of §2635.503(b)(1) are likely to raise greater concerns about an employee's impartiality in specific party matters involving the payor than would the mere fact that a former employer is or represents a party. Moreover, we do not view the section as "subjective." It includes specific standards for determining whether a payment is an extraordinary payment and defines a narrow range of matters, particular matters in which the former employer/payor is a party or represents a party, to which the disqualification applies. In OGE's view, a two-year hiatus between the employee's receipt of an extraordinary payment and his or her participation in particular matters involving the payor as a party or representative of a party is warranted. As to whether two years may be unnecessarily long in a specific case, we note that §2635.503(c) gives the head of the agency, or his delegee, authority to waive any or all of the two-year period of disqualification.

One agency suggested that the effect of §2635.503 be expanded by redefining an "extraordinary payment" to include even a payment made pursuant to an employment contract or employee benefits

plan if it is related to the acceptance of employment. In its view, the definition at §2635.503(b)(1) could improperly encourage private entities to insert "reward" provisions in employment contracts in the hope that employees will subsequently obtain Government positions which could benefit their businesses. The Office of Government Ethics has not made the change requested. In our view, the generally unpredictable character of future employment prospects makes it unlikely that employers will contractually obligate themselves to make extraordinary payments to employees who later serve in a Government position which could benefit the employer.

One organization questioned whether a waiver could ever be granted under §2635.503(c). In its view no payment in excess of $10,000 could ever be "not so substantial as to cause a reasonable person to question the employee's ability to act impartially in a matter in which the former employer is or represents a party." The standard contemplates a consideration of relevant factors other than simply the dollar amount of the payment. For an employee whose assets are very substantial, a payment of $10,000 could well meet the test stated.

Subpart F-Seeking Other Employment

Section 2635.602 Applicability and Related Considerations

At the suggestion of one agency, we have revised §2635.602(a)(2) to include specific references to the special post-employment restrictions imposed by statute upon procurement officials and upon certain Department of Defense personnel. One agency misread §2635.602(b) as forbidding an employee's acceptance of interview travel expenses from any prohibited source. At the suggestion of another agency and to ensure that others do not misread that section, OGE has revised §2635.602(b) by substituting a specific reference to §2635.204(e)(3) for the proposed general reference to subpart B of this regulation. The added reference should help to clarify that interview and other expenses in connection with bona fide employment discussions can be accepted from a prohibited source once the employee has complied with the disqualification requirements in subpart F.

Section 2635.603 Definitions

One agency noted that the definition of "employment" at §2635.603(a) does not specifically exclude uncompensated services. An individual

may be an employee of an organization, within the meaning of 18 U.S.C. 208(a), even though his or her service is uncompensated and, thus, OGE has not revised §2635.603(a) to exclude uncompensated services. Rather, we have modified Example 2 following that section to more clearly indicate that the many officers and directors of nonprofit organizations who serve without compensation are, nonetheless, officers and directors of those organizations. While we recognize that certain volunteer services, such as washing dishes one night a week at a soup kitchen, do not involve an employment or other specified relationship, we do not believe these circumstances need to be specifically addressed in subpart F. In general, the employees who engage in these good works do not send resumes or engage in negotiations over their service. They simply volunteer their time and effort.

Nine agencies and one organization objected to the proposed definition at §2635.603(b) of "seeking employment" insofar as it would cover an employee who had merely dispatched an unsolicited resume or other employment proposal. They generally were of the view that a requirement for disqualification upon the sending of an unsolicited resume would have a chilling effect on employees who wish merely to "test the waters" of the employment market and who would prefer that their superiors not know they are doing so. The consensus of those who commented seemed to be that the adverse effects such a rule would have on employees outweigh any appearance of lack of impartiality that might result from employees' continued performance of official duties affecting resume recipients.

Four agencies and the organization suggested that the definition be revised to cover only those actions that constitute negotiating for employment within the meaning of 18 U.S.C. 208(a). Four other agencies suggested an exception from the proposed definition of "seeking employment" for any resume dispatched as part of a "mass mailing." One commenter believed that the concurrent dispatch of ten resumes should constitute a "mass mailing." One agency suggested "a rule of reason addressed to appearance problems that arise in job seeking." The Office of Government Ethics has fully considered these comments but has not narrowed the definition at §2635.603(b) to cover only employment negotiations. Such a narrowing would be inconsistent with the ethical principle restated at §2635.101(b)(10) which uses both the terms "negotiating" and "seeking" and thus contemplates coverage of actions that fall short of actually negotiating for employment. Neither have we revised that definition to create a mass mailing exception for resumes. We have, however, extended to all employees the proposed exclusion at §2635.603(b)(1)(ii)(B) for a resume or

other employment proposal sent to a person affected by performance or nonperformance of the employee's duties only as part of an industry or other discrete class. As originally proposed, that exclusion would have applied only to special Government employees. Because it failed to cover all aspects of the proposed definition, we also rejected alternate language offered by one agency in an effort to simplify the wording of §2635.603(b).

None of those who commented objected to the proposed definition of employment negotiations in §2635.603(b)(1)(i). That definition is derived from 18 U.S.C. 208(a) which prohibits an employee from participating in a particular matter that affects the financial interests of a person with whom he or she is negotiating for or has any arrangement concerning prospective employment. For purposes of this criminal statute, the phrase "negotiating for employment" has been interpreted as referring to bilateral communications looking toward an agreement concerning employment. Because the phrase has an established meaning for purposes of 18 U.S.C. 208(a) and because we could not and would not wish to broaden the reach of that criminal statute, we have not adopted one agency's recommendation to eliminate the more expansive proposed definition of "seeking employment" in favor of a broadened definition of "negotiating."

It has long been OGE's view that the standards of conduct require disqualification in a broader range of situations than those covered by 18 U.S.C. 208 that involve employment negotiations. Thus, in a memorandum concerning "Negotiation for Future Employment" dated April 27, 1987, OGE advised that an employee should avoid acting on matters which directly affect a person or organization which the employee has contacted inquiring about future employment or which has unilaterally expressed to the employee an interest in employing him or her which the employee has not rejected. Consistent with the principle of ethical conduct restated at §2635.101(b)(10), the regulations use the concept of seeking employment to encompass contacts of this type that fall short of negotiations and, thus, fall outside the criminal statute.

In the 1987 memorandum, supra, OGE stated that, in the absence of other communications, it did not view the mass distribution of resumes as requiring disqualification. Notwithstanding this memorandum or the fact that three agencies and one organization have recommended revising §2635.603(b) to incorporate a "mass mailing" exception, we have concluded that a regulatory exception for mass mailings would be inappropriate. Carried to its logical conclusion, an exception for mass mailings of, for example, ten or more resumes would mean that an employee who sent out a single resume to a person affected by his or her duties would

be disqualified from performing those duties, but could avoid any obligation of disqualification simply by sending out nine similar resumes to companies in which he or she had no real interest.

However, in response to concern expressed by one agency that the proposed definition of "seeking employment" will have an especially harsh effect on employees whose duties affect entire industries, we have expanded the exemption at §2635.603(b)(1)(ii)(B) to cover regular as well as special Government employees. This will permit an employee to submit resumes to persons involved in matters of industry-wide or class-wide applicability in which the employee is participating without requiring disqualification until the employee receives a response indicating interest in employment discussions. We have revised accompanying Example 4 to conform to this revision. Under that section as revised, an employee who is engaged, for example, in general rulemaking affecting all airlines would not be disqualified from continuing to participate in that general rulemaking by reason of having sent a resume to an airline. That employee would have begun seeking employment and would be disqualified from further participation in the rulemaking only upon receipt of a response to the resume indicating an interest in employment discussions. The exemption from the definition and, thus, from the disqualification requirement would not apply, however, if the employee's official duties involved a matter affecting one airline, such as an investigation of an accident or a review of an airline's safety procedures. We have added Example 6 following §2635.603(b)(3) to illustrate that the exception at §2635.603(b)(1)(ii)(B) does not apply to matters such as these that affect a resume recipient distinctly.

While one agency that has a number of advisory committees recommended liberalizing the standards for special Government employees, another agency noted reasons for treating special Government employees the same as all other employees. Because many, if not most, advisory committees have charters that involve their members in matters that affect industries or other large, discrete classes, we do not anticipate that advisory committee operations will be unduly encumbered by §2635.603(b)(1)(ii) and have modified Example 5 following §2635.603(b)(3) to illustrate the section's application to advisory committee members. By the modification to §2635.603(b)(1)(ii)(B) discussed above, special Government employees are subject to the same rules as other employees with regard to the obligation to disqualify themselves from participation in matters that affect persons to whom they have sent unsolicited resumes other than as part of an industry or other discrete class.

One agency questioned the need for a two-month period of disqualification following dispatch of an unsolicited resume or business proposal and suggested that the two-month period stated in §2635.603(b)(2)(ii) be reduced to 30 days. The Office of Government Ethics has not adopted this recommendation. We view two months as a more realistic period than 30 days within which to expect a response to an unsolicited resume or other employment proposal. We would point out that the two-month period establishes an outside limit. An earlier response from the recipient indicating no interest in pursuing the matter further will terminate the employee's disqualification at that time.

One organization requested that the definition of "seeking employment" be revised to exclude the retention of seniority rights and leaves of absence from previous employment. The Office of Government Ethics has not made the revision requested. As the organization has noted, the definition of seeking employment clearly conveys the idea that subpart F applies to the situation in which action is taken, whether by the employee or the prospective employer, and not to the passive holding of rights that may have accrued from previous employment. However, where an employee is on a leave of absence at the end of which he or she will return to work for a previous employer, the employee has an arrangement concerning prospective employment that, under 18 U.S.C. 208(a), would require disqualification from matters affecting the person with whom he or she has that arrangement. Section 2635.606 has been revised to more clearly highlight this statutory disqualification requirement and, for illustration, Example 2 has been added following §2635.606(a).

One agency was concerned that an employee who phrased his or her rejection of an unsolicited employment overture otherwise than as in Example 1 following §2635.603(b)(3) would be found to be seeking employment under §2635.603(b)(1)(iii) even though he or she had intended rejection. Example 1 does not suggest that any particular words need to be used to communicate an employee's rejection. If the employee makes it clear to the prospective employer that he or she has no interest in considering the employment overture at the present time and has no plans for such consideration in the foreseeable future, the employee may couch his or her rejection in whatever language the circumstances and etiquette require.

One agency and one organization recommended that §2635.603(b)(3) be revised to provide that an employee with an established separation date who defers discussions until after separation will be regarded as having rejected an unsolicited employment overture. We have not adopted this suggestion, which would encourage prospective

employers to curry favor by raising the possibility of employment discussions with employees who, though they are approaching separation from Federal service, nevertheless are working on matters that affect the prospective employers' interests. We expect, in fact, that disqualification will be less troublesome for these short-termers than for many other employees.

One agency incorrectly concluded that §2635.604 would require an employee's disqualification upon being contacted about possible employment by a "headhunter" even if that agent did not identify the party on whose behalf the contact was being made. To the contrary, §2635.604(a) requires disqualification from a matter affecting a "prospective employer" and, in the case of an employment contact made to the employee by an agent of another party, §2635.603(c) defines a "prospective employer" as a person who uses that agent only where the agent has identified that party to the employee.

Section 2635.604 Disqualification While Seeking Employment

Three agencies objected to the lack of any requirement for written disqualification statements in §2635.604(b) and four agencies and one organization requested that the section be revised to require notice of disqualification. One agency raised a question as to whether an employee should notify his supervisor before he or she had been assigned to work on a matter as to which he or she would be disqualified. For the reasons discussed above in response to similar comments regarding §2635.402(c), OGE has not revised §2635.604(b) to require written disqualification statements. We have, however, revised §2635.604(b) to conform to the above-discussed revisions to §§2635.402(c)(1) and 2635.502(e)(1) to provide that notice of disqualification should be given by employees who are not responsible for their own assignments. The examples following that section have been modified accordingly.

One organization recommended that the word "direct" be deleted from the statement at §2635.604(d) that an "agency may allow or direct the employee to take annual leave or leave without pay while seeking employment or may take other appropriate administrative action." We have deleted the word "direct" as unnecessary in view of the statement that an agency may take "other appropriate administrative action." This organization and one agency requested additional guidance on what might constitute other appropriate administrative action. For the same reason that we have declined to further elaborate upon disciplinary actions under §2635.106, we do not believe it is appropriate for OGE to expand upon matters that are the subject of OPM regulations and of agency discretion. The range of administrative and personnel actions an agency

can take is determined by other statutes and regulations.

Section 2635.606 Disqualification Based on an Arrangement Concerning Prospective Employment or Otherwise After Negotiations

Section 2635.606(b) gives the agency designee authority to disqualify an employee from participating in matters affecting a person with whom he or she had sought employment, even though the employment negotiations ended without an employment offer. One agency stated that it would better understand the need for this provision if the expressed rationale were a concern that an employee who had been turned down for a job might use his or her official duties to effect some kind of reprisal. Whether it exists in fact or is merely a matter of perception, the "getting even" syndrome to which this agency alludes is, in large part, the basis for this section. Reprisal is not the only concern, however. Most employment negotiations end amicably and, in some cases, the concern is one of favoritism. In Example 1 following §2635.606(b), we have characterized the problem more generally as an appearance of lack of impartiality. One agency suggested that an agency designee should not be able to require an employee's disqualification under §2635.606(b) if the employee had been given a waiver under §2635.605 while seeking employment. While we agree that §2635.606(b) is unlikely to be used in such cases, we have not revised the section, as suggested by this agency, to prohibit its use when an employee has been given a waiver under §2635.605. We believe an agency should have the flexibility to use §2635.606(b) when it deems appropriate.

Subpart G-Misuse of Position

Section 2635.702 Use of Public Office for Private Gain

One agency recommended that the first sentence of §2635.702 be rephrased to state that an employee may not use public office for his or her own private gain "or for the private gain of anyone else." This recommendation was not adopted. The section is based on the general principle stated in Executive Order 12674 that "employees shall not use public office for private gain." That principle is one of long standing and consistently has been interpreted as prohibiting an employee's use of public office for the gain of persons other than himself or herself. The recommended language, however, is overly broad and could be construed as prohibiting employees from energetically and

properly assisting citizens they know only because they have contacted the employee's agency. It would raise repeated questions about individual employee actions that have less to do with individual conduct than with how agency programs are carried out. Issues relating to an individual employee's use of public office for private gain tend to arise when the employee's actions benefit those with whom the employee has a relationship outside the office and the language of §2635.702 is intended to pinpoint this conduct without unreasonably limiting employees in the performance of their official duties. However, a reference to the prohibition on endorsements has been added to §2635.702 based on the observation by one agency that this particular prohibition, spelled out more specifically in §2635.702(c), is not limited to endorsements on behalf of friends, relatives or affiliated persons.

One agency stated that the regulations should include standards to prohibit an employee from participating in his or her official capacity as a speaker in a "for-profit" conference unless it has been determined that the employee's participation is in the interest of the agency. The question of whether an agency should assign an employee to speak at a for-profit, privately sponsored conference is one that the agency must address considering such factors as the agency's mission, whether the conference is an appropriate forum in which to disseminate the information, whether agency participation is necessary to provide balance and perspective, the reasonableness of the conference fees charged and the availability of the employee's time and funding for any travel involved. These are considerations that relate to how an agency runs its program or otherwise carries out its mission and not considerations that should be included in a regulation that deals with the individual conduct of the employee assigned as a speaker.

Two agencies and one organization suggested that, in the absence of coercion, §2635.702(a) should only prohibit an employee from using his or her official position, title or authority in a manner intended to "improperly" induce another to provide a benefit to himself or herself or to other persons specified. The word "improperly" has not been inserted because it would suggest that there are ways in which an employee may properly invoke his or her official title, position or authority specifically to induce another person to provide a benefit to the employee or to another person with whom he or she has a relationship as specified. As stated, the prohibition does not preclude an employee from using his or her official title or position as necessary for identification purposes. The prohibition is on

use of official title, position or authority "in a manner intended to coerce or induce" another person to provide a benefit.

One agency recommended that the definition of the term "relative" used in §2635.702(a) be limited to an employee's parent, spouse or child. This recommendation was not adopted. The term "relative," like the term "friend," is intended to have an expansive rather than a narrow interpretation in the context of this section. Another agency commented on Example 2 accompanying §2635.702(a) and suggested that it might be part of the employee's official duties in that example to request expeditious processing of the friend's export license. We believe the facts as stated make it clear that the employee is in a different office and does not have responsibility in the matter. Moreover, an employee should not use his or her official authority to induce special treatment of a friend's application.

Three agencies and one organization that commented on §2635.702(b) objected to any restriction on the use of official title in conjunction with an employee's signature on any letter of recommendation for any person. One expressed the view that use of an employee's official title in a letter of recommendation is not generally construed to imply agency endorsement of the person who is the subject of the recommendation. Another stated that it is customary for a person giving a recommendation to identify himself or herself professionally and even suggested that it would be appropriate for an employee to use official stationery to write a letter of recommendation for any personal friend. Three believed that it was inconsistent to preclude an employee's use of official stationery and official title to write a letter of recommendation for a personal friend but, as indicated in Example 1 accompanying §2635.702(b), to permit reference to the employee's official position in the body of the letter.

Notwithstanding these comments, OGE has made no change to §2635.702(b). Official stationery is to be used for official purposes. Where the employee has not dealt with the person in the course of Federal employment, no official purpose is served by a letter recommending that individual other than for Federal employment. We recognize that letters of recommendation frequently include some indication of the job or profession of the person making the recommendation. It is for this reason that Example 1 states that, when writing a letter of recommendation that cannot be signed using one's official title, it may be appropriate, nevertheless, for an employee to include some reference to his or her official position in the body of the letter. We do not agree that custom can be served only if employees are permitted to sign letters of recommendation for personal friends using

their official titles. It is not customary for employees to sign other personal letters using their official titles. And, it would not be unreasonable for the recipient of a letter of recommendation signed by a high-level official, such as a Cabinet Secretary, to construe that letter as conveying some official endorsement of the individual who is the subject of the recommendation. Section 2635.702(b) is an attempt to balance custom and necessity with the prohibition against use of public office for private gain.

Two agencies expressed concern that the prohibition in §2635.702(c) on use of official position, title or authority to endorse products and services not be interpreted to bar agencies from recognizing certain contributions and efforts that promote their missions. They point out that recognition of this type is not given for the purpose of endorsement even though it ultimately may by used by the recipient for a commercial purpose. Section 2635.702(c) has been revised to address this concern and a new Example 3 has been substituted for proposed Example 3, to which two commenters had objected. At the request of one agency and one organization we have added a new Example 4 to illustrate application of §2635.702(c) to an employee who has been asked to write a book review or a book jacket endorsement. We did not adopt another recommendation by that agency and organization to append the word "person" to the listing at §2635.702(c) of any "product, service or enterprise." This suggestion would unduly extend the essentially commercial reach of the proscription.

Four agencies noted that the phrase "significant relationships" used in proposed §2635.702(d) is not defined. To comport with the introductory language of §2635.702 and the parallel language of §2635.702 (a) and (b), the phrase "certain persons with whom he has a significant relationship" has been changed to "a friend, relative or person with whom he is affiliated in a nongovernmental capacity." While the procedures in §2635.502 apply, by their terms, only when the relationship is a "covered relationship" as defined in §2635.502(b)(1), §2635.502(a)(2) encourages employees to use the process described in the section to address other circumstances that raise questions about their impartiality.

Section 2635.703 Use of Nonpublic Information

One organization suggested that §2635.703(a) be reworded to prohibit use of nonpublic information only if that use is to further the employee's own financial interests or the financial interests of a person with whom he has a significant relationship. Another organization recommended that the prohibition apply

only where the use of nonpublic information will further a financial interest. The Office of Government Ethics has not adopted either suggestion. The section's broad reach is a consequence of the breadth of the underlying principle as stated in the Executive order. While specifically prohibiting an employee from engaging in a "financial transaction" using nonpublic information, the principle provides further that an employee shall not allow the use of nonpublic information to further "any private interest." The purpose of the principle is as much to protect nonpublic information as it is ensure that the employee and others do not profit from the improper disclosure of such information.

Two agencies and one organization suggested that the phrase "is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute or Executive order" used at §2635.703(b)(1) be amplified by listing various statutes, other than the Freedom of Information Act, under which information is protected. The Office of Government Ethics has not made this change. All statutes cannot be listed and the risk of a partial listing is that it will be viewed as exhaustive. However, we have added "regulation" to the reference to other statutes and Executive orders protecting against disclosure.

One agency asked that the phrase "or any person" be inserted after the word friend in Example 2 following §2635.703(b)(3) to reflect the fact that 41 U.S.C. 423 prohibits unauthorized disclosure of proprietary or source selection information to anyone, not just to a friend. The Office of Government Ethics has not changed the example. It is intended to illustrate application of §2635.703 to the facts stated and it does not purport to provide a full explanation of the complex restrictions on disclosure of procurement-sensitive information imposed by the procurement integrity provisions. Commenting on that same example, one agency and one organization suggested that it be modified to state that bid or proposal information often remains sensitive after contract award. The example has not been changed. Example 3 immediately thereafter involves a proposal containing proprietary information that would be protected after award by 18 U.S.C. 1905 and provisions of the Federal Acquisition Regulation. This example should serve to alert employees that there are statutes and regulations other than 41 U.S.C. 423 that may protect procurement-sensitive information, even after award.

One organization expressed concern that the definition of nonpublic information at §2635.703(b), in covering information, "that has not been made available to the general public," could reach information that, although releasable under FOIA, simply has not been disseminated. As proposed, §2635.703(b)(3) expands

upon the concept of nonpublic information by explicitly stating that it means information which, if not protected by statute, Executive order or regulation or designated as confidential, "has not been disseminated to the general public and is not authorized to be made available to the public upon request." The Office of Government Ethics believes this portion of the definition adequately addresses the organization's concern and has not modified the section.

One agency asked that §2635.703(b) be revised to delete any mention of information "designated as confidential" and substitute a more general reference to information "that contains a restrictive legend placed on it by an agency such as `sensitive'." The Office of Government Ethics has not made this change since information so designated would come within §2635.703(b)(3).

Section 2635.704 Use of Government Property

One agency and one individual suggested that the regulations be expanded to address the use of Government vehicles. No change has been made since "Government property" is specifically defined at §2635.704(b)(1) to include Government vehicles. More detailed guidance is not provided since there are statutes, as well as General Services Administration and agency regulations, governing use of Government vehicles. Nor have we revised this section, as recommended by two agencies, to include specific prohibitions against gambling and use of alcoholic beverages and drugs on Government property. These matters are covered by the regulations of other agencies. See e.g., 41 CFR 101-20.306 and 101-20.307. The Office of Personnel Management also intends to reissue the constraint against gambling in 5 CFR part 735.

One agency and two organizations noted that §2635.704(b)(2), as proposed, failed to take into account the fact that many Federal facilities, such as libraries, are open to the public and that employees may use them to the same extent as other members of the public. Accordingly, OGE has expanded the definition of "authorized purposes" at §2635.704(b)(2) to encompass those "for which Government property is made available to members of the public."

A number of organizations and several individuals suggested that §2635.704(b)(2) is unnecessarily restrictive in limiting authorized purposes to those authorized by law or regulation for the performance of official duty. One commenter cited the practice at certain military bases of making Government facilities available for meetings by Boy Scout troops whose members are military dependents. Several suggested language specifically

permitting use of Government resources to support the activities of professional associations. The Office of Government Ethics has retained the requirement that Government property be used only for purposes authorized by law or regulation and has not incorporated a specific exception for the support of professional associations. However, we have revised §2635.704(b)(2) to make it clear that authorized purposes may be purposes that do not strictly relate to the performance of official duties and we have deleted the second sentence of that section, as proposed.

With the revisions discussed above, we believe §2635.704(b)(2) appropriately accommodates the purposes about which these commenters have raised questions. For example, authority can be found in regulations, such as 41 CFR 101-20.4, to allow outside organizations to occasionally use public buildings for certain purposes. And, guidance in chapter 250 of the Federal Personnel Manual provides that agencies may grant professional associations privileges, such as the use of agency facilities for meetings. Use of agency facilities under these circumstances would be for authorized purposes, even though not specifically related to performance of an employee's official duties. We have added Example 3 following §2635.704(b)(2) to clarify that the concept of authorized purposes is broad enough to accommodate concerns expressed by several organizations that this section would contract the authority agencies now have to permit use of Government property. Our specific purpose in revising §2635.704(b)(2) was to ensure that these regulations not interfere with those authorities.

One agency and several organizations suggested that the definition of authorized purposes be expanded to include any purpose authorized by an employee's supervisor. This change has not been made as it would suggest that supervisors have inherent authority to authorize the use of Government property for any purpose. To the extent that a supervisor is exercising authority that derives from a statute, Executive order or a regulation authorizing the use of Government property for certain purposes, including an agency regulation, those purposes would meet the definition at §2635.704(b)(2). Contrary to the suggestion by these and several other commenters, OGE does not have authority to promulgate regulations that expand upon authorities regarding use of Government property contained in General Services Administration or other regulations. Our authority is limited to implementing the principle of conduct stated in the Executive order that "Employees shall protect and conserve Federal property and shall not use it for other than authorized purposes." In §2635.704(b)(2), we have undertaken only to define what is meant by "authorized purposes." The revision made to Example 1 following §2635.704(b)(2) was

made only to reflect a recent change in regulations issued by the General Services Administration.

Four agencies commented on the language in proposed §2635.704(b)(2)(i) and (ii). The Office of Government Ethics has not adopted their recommendation to define the phrase "professional development" used therein. Instead, we have deleted both paragraphs as inappropriate for inclusion in regulations issued by OGE. As indicated above, nothing in Executive Order 12674 or in any statute gives OGE authority to issue regulations specifically authorizing use of Government property for any purpose. Such regulations are the province of other agencies. We had included §2635.704(b)(2)(i) and (ii) in the proposed rule in an effort to capsulize our understanding of existing guidance issued by other agencies regarding use of agency resources for training and other professional development. We have deleted both paragraphs out of concern that they may not accurately reflect regulations and policies in all agencies and to avoid any suggestion that OGE has authority to create exceptions permitting the use of Government property in circumstances otherwise falling within the general prohibition set forth in Executive Order 12674. For this reason, OGE has rejected informal recommendations to create an exception permitting de minimis personal use of agency photocopy equipment.

Section 2635.705 Use of Official Time

Two agencies and several organizations and individuals commented on §2635.705 and noted that there are statutes and regulations that specifically authorize employees to use official time for purposes that do not necessarily involve the performance of official duties. Two that commented cited the specific authority at 5 U.S.C. 7131 for employees to use official time for certain representational activities on behalf of employee labor organizations. Several employee and professional organizations referred to the Federal Personnel Manual as recognizing that agencies may grant excused absence to permit employees to participate during regular duty hours in the meetings or other affairs of professional organizations. To accommodate these and similar authorities that allow use of official time or authorize excused absences for purposes other than official duties, §2635.705 (a) and (b) have been redrafted to make it clear that laws and regulations, and guidance of this type regarding the exercise of such authorities, are proper exceptions to the requirement that employees use official time in an honest effort to perform official duties. Examples 1 and 2 have been added following §2635.705(a) to illustrate the breadth of these exceptions. The changes OGE has made to

§2635.705 are intended to ensure that these regulations will not be construed to limit any authority an agency may have to permit its employees to use official time for appropriate purposes.

One agency asked that §2635.705(b) be revised to prohibit a supervisor from accepting any work accomplished by a subordinate on official time that would further the supervisor's personal interests. OGE has revised this section to prohibit a superior from encouraging a subordinate to improperly use official time, but not to place an affirmative burden on a superior to ensure that a subordinate's voluntary efforts do not in any way accrue to the superior's personal benefit. If a subordinate, at his or her own initiative, improperly uses official time to perform work that benefits a supervisor, that subordinate will have violated §2635.705(a). The violation is not the supervisor's if he or she has not encouraged, directed, coerced or requested the subordinate's actions. On the theory that an employee should never be permitted to render personal services to a superior, one agency asked that the last sentence of Example 1 following §2635.705(b) be deleted. The Office of Government Ethics has not deleted the sentence. Where the arrangement is entirely voluntary, fair compensation is paid, and no use of official time or property is involved, we do not view the arrangement discussed in the example as improper. However, we have added a final sentence to the example to make it clear that, in the absence of appropriate compensation, the arrangement would involve an improper gift to the superior in violation of the standards in subpart C of this regulation.

## Subpart H-Outside Activities

### Section 2635.801 Overview

One agency suggested that the first sentence of §2635.801 be revised to indicate that the provisions in subpart H apply to outside activities "with or without compensation." The Office of Government Ethics rejected this recommendation because it is technically inaccurate. The outside earned income provisions of §2635.804, for example, apply only to compensated activities. Moreover, the second sentence of §2635.801 accurately states that several of the provisions in subpart H "apply to uncompensated as well as to compensated outside activities." Based on the recommendation of another agency, OGE has revised the synopses of 18 U.S.C. 203(a) and 205 now set forth in renumbered §§2635.801(c)(3) and (4) to more closely reflect the wording of those statutes.

Section 2635.802 Conflicting Outside Employment and Activities

One agency commented that §2635.802 "does not provide the Government with a sufficiently broad basis for refusing to permit certain outside employment and activities." The agency cited an example of outside employment that, though it would not require the employee's disqualification from his or her official duties, would create an appearance of use of public office for private gain. Because this and comments from two other agencies indicated that all three viewed §2635.802 as providing the only basis for precluding outside employment or other activities, OGE has revised §2635.801(c) to stress that the provisions in subpart H, including §2635.802, are in addition to the principles and standards set forth in other subparts of part 2635. To further highlight the applicability of principles and standards stated elsewhere in part 2635, specific mention of the appearance principle and the prohibition against use of public office for private gain have been included in §2635.801(c). In addition, language has been added to §2635.802 to make it clear that outside employment which is not "conflicting" within the meaning of that section, nevertheless may violate other principles or standards. We have added Example 2 following §2635.802 to further illustrate that outside employment that is not "conflicting" within the meaning of that section is nonetheless improper where it would give rise to an appearance of use of public office for private gain.

Two agencies recommended that §2635.802 be revised to include within the definition of "conflicting" activities any activities that tend to impair the employee's mental or physical capacity to perform Government duties or take the employee's time and attention during official work hours. The Office of Government Ethics has not adopted this recommendation. An employee whose outside employment or activities demand time and attention during official duty hours would violate the standard at §2635.705 that an employee shall not use official time other than as authorized or in an honest effort to perform official duties. An employee who devoted so much personal time and effort to an outside activity that it adversely affected his or her ability to perform official duties should be dealt with on the same basis as any other employee whose performance is inadequate. This, in turn, may mean that the employee will need to devote less time and effort to outside activities.

Section 2635.803 Prior Approval for Outside Employment and Activities

Two agencies urged OGE to revise §2635.803 to incorporate

a Governmentwide requirement for prior approval of outside employment. While one suggested a broad requirement for prior approval of all outside employment, the other suggested limiting the requirement to outside employment and activities that specifically focus on the employee's official duties or on the programs, activities and responsibilities of the employing agency. A third agency suggested, to the contrary, that agencies are in the best position to determine whether outside activities conflict with employees' duties or otherwise violate the standards of ethical conduct. Accordingly, that agency suggested that agencies be given total discretion to establish prohibitions and approval procedures without any requirement to incorporate those prohibitions or procedures in their supplemental agency regulations.

The absence from §2635.803 of an across-the-board requirement for prior approval of outside employment or activities reflects OGE's agreement with the premise that individual executive agencies are in the best position to determine whether, and to what extent, a requirement for approval of outside activities would be beneficial to the proper administration of their respective ethics programs. While we expect that an approval system of some type will be beneficial for many agencies, there may be agencies whose ethics programs are better served by identifying and specifically prohibiting, in their supplemental regulations, those outside activities that pose ethical problems. Those agencies may have no need for an approval system. Moreover, an executive branchwide requirement for approval of all outside activities would be unnecessarily intrusive and administratively wasteful. There are activities, such as hobbies, that should not require approval even though they may generate some income. The Office of Government Ethics believes that individual agencies are in the best position to identify and require approval for specific types of activities that pose potential ethics problems and, thus, to administer approval systems in the least intrusive manner.

While §2635.803 recognizes that agencies should be responsible for tailoring approval requirements to their particular needs, it does not adopt the recommendation that agencies be permitted to do so without incorporating those requirements in supplemental agency regulations. The Executive order requires a uniform set of standards of conduct regulations for the entire executive branch and provides for supplementation by individual agencies subject to requirements for OGE concurrence and co-signature and publication. Thus, any agency requirement for approval of outside employment or other activities must be included in its supplemental agency regulations.

One organization stated that the second sentence of §2635.803

could be read to permit an agency to require approval for "any" outside activity including serving as a Girl Scout troop leader or babysitting on an occasional Saturday night. One agency with similar concerns recommended that §2635.803 be revised to include a list of activities for which agencies could not require outside approval. The Office of Government Ethics has revised §2635.803 to delete the word "any" and to provide that agencies "shall" impose requirements for prior approval of outside activities, as necessary or desirable. We have not, however, listed specific activities for which agencies may not require prior approval. Under §2635.105, any agency requirement for prior approval of outside employment must be included in its supplemental agency regulations and those may be published only with OGE's concurrence and co-signature. OGE will exercise its concurrence function with a view, among other things, to ensuring that such requirements are not unnecessarily intrusive. We are not aware that any requirements for approval of outside activities now found in agency standards of conduct regulations extend beyond reasonable bounds.

Section 2635.805 Service as an Expert Witness

Four organizations and three individuals objected to §2635.805 as inappropriately restricting access to the expert testimony of Government employees by public interest or other groups suing the Government or otherwise opposing its policies. The courts have long recognized the right of an agency to exercise control over agency resources, including those sought for purposes of litigation. Touhy v. Ragan, 340 U.S. 462 (1951). Many departments and agencies have issued policies that restrict access to the expert or opinion testimony of their employees. Department of Defense Directive 5405.2 provides, for example, that Department personnel shall not provide opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. It provides for granting special authorization for Department of Defense personnel to appear and testify at no expense to the United States upon a showing by the requester of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States.

The basis for §2635.805 rests, however, not only on an agency's right to manage its resources and litigation in which it has an interest. It is based also upon the principle that an employee shall not engage in outside employment or activities that conflict with his or her official Government duties and the Government's

reasonable expectation that its employees will not use their official positions on behalf of those who bring legal and other proceedings against it. Contrary to the suggestion by one organization, it does not prohibit fact testimony or interfere with the statutory protections afforded whistleblowers. Nor does it prohibit an employee from using proper channels to make his or her opinions known. It only places constraints on the use of an employee's expert testimony in a manner adverse to the interests of the United States in proceedings before a court or agency of the United States when the United States is a party or has a direct and substantial interest.

One agency and one organization urged that §2635.805 be expanded to provide guidance for employees who wish to serve as expert witnesses in private litigation. The Office of Government Ethics has not expanded the scope of §2635.805 to cover service as an expert witness under circumstances where the United States is not a party or does not otherwise have a direct and substantial interest. The matter of compensation for expert testimony is addressed by the honoraria regulations at 5 CFR 2636.201-2636.205 which prohibit an employee's receipt of compensation for "an appearance," including an appearance as an expert witness in private litigation. At the suggestion of another agency, an introductory phrase has been added to §2635.805(c) to serve as a cross-reference to these regulations, which implement the statutory ban on receipt of honoraria.{1} Uncompensated service as an expert witness in private litigation, like any other outside activity, should be analyzed in light of the standards and principles set forth in part 2635, including §2635.702.

*{1} On March 19, 1992, the District Court for the District *of Columbia issued an opinion holding the honorarium *ban unconstitutional as applied to executive branch employees, *but stayed its injunction pending appeal. At the time *this part 2635 was submitted for publication, the Government *had filed a notice of appeal and, accordingly, this regulation *treats the statutory honorarium ban and the implementing *regulations at 5 CFR 2636.201-2635.205 as fully effective. *Appropriate modifications will be made to pertinent portions *of this part 2635 depending upon the disposition of the *appeal.

One agency suggested that §2635.805(a) be revised to clarify that the prohibition stated therein does not apply to an appearance on behalf of the United States. We have changed the first sentences of §2635.805 (a) and (b)(1) to provide that the prohibitions therein apply to service "other than on behalf of the United States." At the suggestion of another agency, OGE has added

a new §2635.805(d) to make it clear that the prohibitions stated in §2635.805 (a) and (b) do not prohibit an employee from serving as a fact witness when subpoenaed by an appropriate authority. We will not here undertake to address one organization's suggestion that the well-recognized distinction between fact and opinion testimony is illusory. See Fed. R. Evid. 701 and 702.

One agency sought guidance as to when the United States would be viewed as having a direct and substantial interest in litigation to which it is not a party. Because the same standard has long been used in 18 U.S.C. 203, 205 and 207, OGE has not undertaken to provide additional guidance in the context of §2635.805. Another agency suggested that the section be revised to specifically state whether it extends to testimony before Congress. The prohibition would not extend to testimony before Congress. Because §2635.805(a) states very specifically that it only prohibits expert testimony before a court or agency of the United States, OGE does not believe further clarification is necessary. The word "court" clearly excludes Congress and the term "agency," as defined at §2635.102(a), would not include Congress.

One organization felt that §2635.805 was overly broad in that it could be construed to prohibit an Internal Revenue Service clerk-typist who happened to be a pharmacologist from being called as an expert witness on pharmacology by a plaintiff in a malpractice suit filed against the Indian Health Service. The organization urged that §2635.805(c) be revised to provide for authorization to serve as an expert witness if the employee's credentials as an expert are unrelated to his or her Government employment. As suggested, §2635.805(c) has been revised to provide for approval when the subject matter of the testimony does not relate to the employee's official duties, even though it may not otherwise be in the interest of the Government. To ensure that the subject matter of proposed testimony is properly reviewed, the regulation requires this determination to be made by the designated agency ethics official.

One agency and one individual asked that §2635.805 be revised to include specific criteria to be used in determining when an employee's service is in the interest of the Government. One organization suggested that, in the absence of such criteria, §2635.805(c) would constitute an improper delegation of authority to designated agency ethics officials. The diversity of cases in which employees may be called to expert witness service makes it impractical to provide a regulatory checklist to determine in every case whether a particular employee's testimony will serve the Government's interest. Like the determination of agency interest required by §2635.204(g), this is a matter for determination

on a case-by-case basis.

Section 2635.806 Participation in Professional Associations

The proposed provisions of §2635.806 relating to participation in professional associations prompted comments from 980 agencies, organizations and individuals. Nearly all took exception to some aspect of proposed §2635.806. The overwhelming majority felt the proposed section was overly restrictive in limiting use of official time and Government property to administer the internal affairs of professional associations. As justification for permitting use of official time and Government property to run the internal affairs of these organizations, the commenters pointed to the many benefits that agencies and individual employees receive from employees' active participation in professional associations, from access to the latest technological information to opportunities to gain management skills and recognition through service as an officer. Many took exception to the proposed distinction between participation in substantive programs sponsored by professional organizations and participation in the internal and business affairs of those organizations. Some argued that the distinction is artificial, while others noted that substantive programs come about only through efforts, such as renting conference rooms and arranging for speakers, that might be characterized as "internal affairs."

The overwhelming consensus of those who commented is that proposed §2635.806 needs to be revisited. Accordingly, OGE has deleted the text of proposed §2635.806 from this final rule. We have reserved the section, however, and anticipate that we will issue a new proposed rule on participation in professional associations at a later date. In the meantime, any ethics issues relating to participation in professional associations should be addressed under the more general principles and standards stated in part 2635. Employees who are officers of professional organizations should continue to comply with the statutory restrictions, now to be implemented by §2635.402, on participating in their governmental capacities in particular matters affecting the financial interests of such organizations. Those who are not officers but who otherwise are actively involved in the affairs of professional organizations should comply with the impartiality provisions of §2635.502. As with any other activity, the respective standards relating to use of Government property and official time at §§2635.704 and 2635.705 would also apply. We have addressed the comments by those who urged that Government time and resources be made freely available for the support of professional organizations

in the discussion of other comments regarding those sections.

Section 2635.807 Teaching, Speaking and Writing

Twelve agencies, 23 organizations and 44 individuals commented on the proposed restrictions at §2635.807 on receipt of compensation for teaching, speaking or writing that relates to an employee's official duties. Most of the commenters were members of the scientific community and were specifically concerned with the impact of the provision on Government physicians and scientists, particularly those responsible for the conduct of Government research. All of the commenters expressed dissatisfaction with limitations on an employee's receipt of compensation for teaching, speaking and writing.

Seven individuals and five organizations believe that proposed §2635.807 is so restrictive that it will cause top scientists and other valued employees to leave Government service. Five individuals and four organizations stated that the proposed restrictions will diminish the reputation and prestige of Government programs and operations and hamper efforts to recruit and retain recognized experts in scientific fields. Three individuals and one organization believe that §2635.807 will further exacerbate the recruitment difficulties that result from Government salaries they believe lag behind those in the private sector. Seven organizations and ten individuals stated that restrictions on receipt of compensation for teaching, speaking, and writing will discourage efforts by Federal employees to enhance their expertise and communicate the results of their research. This, they believe, will place Federal employees at a disadvantage in terms of career development and peer recognition.

The Office of Government Ethics is sensitive to the concerns expressed. We have crafted the restrictions on receipt of compensation bearing in mind the competing considerations of, on the one hand, prohibiting the use of public office for private gain and outside activities that conflict with official duties and, on the other hand, avoiding unnecessary restrictions that would impair the recruitment and retention of valued employees. But OGE does not agree with those who have suggested that allowing employees to use their official positions as a means to generate outside earned income is a proper means of closing a perceived gap between Government salaries and those for comparable positions in the private sector.

Section 2635.807 does not bar any employee from teaching, speaking or writing on any subject. It is merely a prohibition on receipt of compensation. It prohibits the receipt of compensation

for teaching, speaking and writing performed as part of an employee's official duties or involving the use of nonpublic information and also prohibits receipt of compensation where the invitation is extended because of the employee's position or by certain prohibited sources. In addition to these prohibitions, the section establishes limitations of varying degree on the ability of different categories of employees to accept compensation for teaching, speaking and writing based on the subject matter involved. The prohibitions in §2635.807 derive from one or more of the principles of ethical conduct set forth in section 101 of Executive Order 12674, including the principle that an employee shall endeavor to avoid actions creating even the appearance of using public office for private gain. The prohibition on receipt of compensation for activities that are part of the employee's official duties, which flows from the definition at renumbered §2635.807(a)(2)(i)(A), addresses conduct that may also be prohibited by 18 U.S.C. 209. However, §2635.807 is not intended to implement or interpret section 209. The Office of Government Ethics intends to issue separate regulations interpreting 18 U.S.C. 209.

The most significant limitations imposed by §2635.807 are on noncareer employees. They are prohibited from accepting compensation for teaching, speaking and writing which deals in significant part with the subject matter area, industry or economic sector primarily affected by the programs and operations of their agencies. This limitation, for example, bars a noncareer employee of the SEC from accepting compensation for teaching, speaking or writing about the securities industry generally, not just the SEC's regulation of the industry.

Career employees are subject to narrower prohibitions. They are prohibited from accepting compensation when teaching, speaking and writing about agency policies, programs and operations, or on specific matters on which they work. This would not normally prohibit an employee from accepting compensation for an activity applying the employee's general area of expertise. For example, an engineer who works at NASA could receive compensation for writing a textbook on the general subject of aeronautics, but could not accept compensation for a book which specifically focuses on NASA's space shuttle program or on the specific aspects of rocket design to which he has been assigned.

Special Government employees are subject to the least restrictive standards. They are prohibited from accepting compensation only for teaching, speaking and writing which deals to a significant degree with the specific matters they are working on for the Government during the terms of their appointments. And, if they serve 60 or fewer days in a year, the limitation applies only

to particular matters involving specific parties in which they are involved. They are free to accept compensation when teaching, speaking or writing on other matters. We have modified §2635.807 to more clearly reflect these restrictions and have added a number of examples by way of illustration.

Nine individuals and six organizations believe that §2635.807 will stifle dissemination of information about important scientific or medical findings. Several of these commenters suggested that the Government lacks the resources or commitment to send employees to meetings and conferences to discuss their research. Others were concerned that the subject matter to be discussed may not be sufficiently related to an employee's official duties so that the Government would permit the work to be done on official time or at agency expense.

The Office of Government Ethics does not expect §2635.807 to impede the dissemination of scientific or medical information. Significant research is of interest to the Government and will most likely be disseminated as part of the Government's official operations. Under 42 U.S.C. 282(e)(3), for example, dissemination of such information is an important part of the mission of the National Institutes of Health. Moreover, scientific or medical findings which are related to an employee's official duties may be disseminated by the employee, without compensation, unless the information involved is nonpublic information within the meaning of §2635.703(b).

Concern that the Government has insufficient resources to send employees to meetings and conferences to discuss medical and scientific research can be addressed, in part, by the authority at 31 U.S.C. 1353 for agencies to accept travel expenses from non-Federal sources to facilitate employees' attendance at meetings or similar functions relating to their official duties. Additionally, when approved in accordance with applicable regulations implementing 5 U.S.C. 4111, an employee may be able to accept travel expenses to attend a meeting to discuss his research and writings if the offer is from a State or local government or an organization exempt from taxation under 26 U.S.C. 501(c)(3). Thus, OGE cannot agree with one individual who believes the rule will preclude even uncompensated teaching, speaking or writing because employees will not be able to cover associated travel expenses. We also do not agree with two individuals and one organization who suggested that §2635.807 would either waste Government travel funds or create an unwarranted paperwork burden to accept expenses from outside sources. Because the section codifies current practice at most agencies, it should not appreciably increase Government travel expenditures. In OGE's view, any administrative burden

associated with accepting travel expenses under the authorities cited above is less objectionable than a rule that would sanction use of public office for private gain.

Although three individuals and one organization felt that §2635.807 would violate the First Amendment protections for free speech, OGE believes the section will withstand scrutiny on constitutional grounds. It does not prohibit any form of expression and, to the extent it may incidentally burden an employee's ability to teach, speak or write, it serves a legitimate governmental purpose in ensuring that public office is not used for private gain.

Two individuals and two organizations stated that the rule is overbroad and does not correct any identified abuse. Most agencies are currently applying the guidance in OGE informal advisory memorandum 85 x 18 issued October 28, 1985, as published in the Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics (1979-1988). For this reason, OGE agrees that there ought to be few instances in which employees are now receiving compensation for teaching, speaking or writing that relates to their official duties. In translating that guidance into §2635.807, it is OGE's purpose to ensure that this continues to be the case and that application is consistent throughout the executive branch. While we do not agree with one individual who found the section too complex to be understood by those who would engage in outside teaching, speaking or writing, we have attempted to simplify the language and have added a number of examples to illustrate the section's application.

Although he offered no specific recommendation for revision, one individual stated that §2635.807 fails to recognize that the off-duty and official activities of some Government researchers and scientists are so intertwined that it may be impossible to distinguish one from the other. The Office of Government Ethics has not revised §2635.807 on the basis of this individual's observations. Rather, we would caution employees who have difficulty distinguishing between their personal activities and official duties to consult with their agency ethics official. Some of the commenters cited speaking and writing activities conducted as part of an employee's official duties as examples of activities that should be compensable. Under such circumstances, receipt of additional compensation would be prohibited by 18 U.S.C. 209 which bars an employee from accepting any supplementation of his or her Federal salary.

One individual and one organization suggested that §2635.807 be revised to apply to political appointees, and not to Government

scientists. Under section 201(a) of Executive Order 12674, it is OGE's responsibility to create a single set of standards of conduct implementing a single set of ethical principles that apply to all executive branch employees. We cannot create exceptions for certain classes of employees unless the exceptions relate to a legitimate governmental purpose. In this regard, we do not agree with those who suggest that Government employees involved in scientific research should be exempted from application of §2635.807 because university faculty are permitted to receive compensation for speaking and writing about research funded by their respective institutions. The salary structure and reasonable expectations associated with academic employment are not the same as those associated with Federal employment. Moreover, under §2635.804 and 5 CFR 2636.301 through 2636.307, Presidential appointees and other covered noncareer employees are subject to more stringent limitations on outside employment than apply to other employees.

One individual recommended that employees be allowed to accept compensation for teaching, speaking or writing that is related to the employing agency's policies, programs or operations, as long as the subject matter does not relate to the individual employee's assigned duties. A professional association recommended that teaching, speaking or writing that relates to the maintenance, development or application of an employee's general professional expertise and standing be exempted from §2635.807 unless it is directly related to the individual employee's duties. The Office of Government Ethics has not adopted either recommendation. In many cases, an employee may have, or may be perceived as having, access to official information available in other parts of the agency which would enhance his or her value as a speaker or writer. Use of agency information under these circumstances would amount to use of public office for private gain. Moreover, an employee is likely to be perceived as an official of his or her employing agency when speaking or writing about its policies, programs or operations and use of a disclaimer may not fully dispel the appearance that the employee is conveying an agency perspective. In addition, we believe the public should be able to obtain information about agency policies, programs and operations through agency channels, without paying an individual employee for making that information available. For these same reasons, we also rejected the recommendation by one individual to modify §2635.807 to permit receipt of compensation for teaching, speaking or writing subject only to a prohibition on disclosure of nonpublic information.

Two individuals and one organization stated that compensated

teaching should be permitted because it promotes better Government and greatly aids schools in carrying out their educational mission. We agree with the commenters' views that teaching is a desirable off-duty activity and note that the rule has an exception for teaching set forth in §2635.807(a)(3). One individual asked for a delayed effective date for the provision so that employees can fulfill prior commitments for compensated activities that were properly entered into under agency standards of conduct regulations then in effect. Because most agencies have been applying the guidance in OGE informal advisory memorandum 85 x 18, we do not expect this to be a problem for many employees. And, since the effective date of this final rule is 180 days after publication, most of those for whom it will be a problem should have sufficient time to fulfill any prior commitments which, though inconsistent with §2635.807, may have been consistent with agency regulations when undertaken. Legally binding commitments entered into before the publication of this final rule which cannot be fulfilled within the 180 day period should be brought to the attention of an agency ethics official.

The Office of Government Ethics did not adopt the recommendation by one individual to revise §2635.807 to permit employees to use a small amount of official duty time to engage in compensated outside activities. This agency has no authority to authorize such use of official time and views this particular recommendation as unreasonable.

Relationship to Other Limitations on Compensation

Three agencies, one organization and one individual found the relationship between §2635.807 and the statutory prohibition on the receipt of honoraria implemented at 5 CFR 2636.201 through 2636.205 confusing. Their recommendations to clarify the rule ranged from a suggestion to transfer the honoraria regulations from part 2636 into §2635.807 to a suggestion to give more prominence to proposed §2635.807(a)(3), which describes the relationship between the two sets of restrictions. We have adopted the latter suggestion and have moved proposed §2635.807(a)(3) to the beginning of the section where it appears renumbered as §2635.807(a)(1).{2} Succeeding provisions have been renumbered accordingly.

*{2} See Footnote 1.

Invitation Extended Because of Official Position

One agency and one organization commented on renumbered §2635.807(a)(2)(i)(B) which, as proposed, would have prohibited compensation where

the invitation to engage in teaching, speaking or writing was "extended to the employee because of his official position." Because it will sometimes be difficult to determine whether an employee has been invited to speak or write because of his or her official position or because of an expertise on the subject matter, both recommended that the paragraph be deleted. We agree that it may sometimes be difficult to discern the motivation behind an invitation to speak or write, but do not believe the provision should be deleted simply because it may be difficult to implement in a particular case. To clarify this issue, we have amended §2635.807(a)(2)(i)(B) to state that a covered activity relates to an employee's official duties if the "circumstances indicate that the invitation * * * was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter."

Source of Invitation

One agency recommended that renumbered §2635.807(a)(2)(i)(C) be deleted. In the agency's view, the source of an invitation to teach, speak or write is irrelevant and the restrictions on receipt of compensation from a prohibited source would more appropriately be covered in subpart D of this regulation dealing with conflicting financial interests. On the other hand, one individual suggested that this is the only definition of the phrase "related to official duties" that should be retained. Because deletion of the rest of the definition would be inconsistent with the principle prohibiting use of public office for private gain, we have not adopted the latter suggestion. We also do not agree that the restriction should be moved to subpart D. Although receipt of compensation certainly affects an employee's financial interests, subpart D imposes disqualification and divestiture requirements that would not deal as directly as does §2635.807 with the appearance problems associated with payments from prohibited sources. We have added a phrase to renumbered §2635.807(a)(2)(i)(C) to make it clear that the definition therein covers the case in which the offer of compensation to engage in the activity is extended, directly or indirectly, by someone affected by the employee's official duties, even though the actual invitation to engage in the activity may have been extended by another.

Nonpublic Information

Two agencies recommended that renumbered §2635.807(a)(2)(i)(D)

be amended to add language from current 5 CFR 735.203(c) concerning the use of nonpublic information. The provision at §735.203(c) permits an agency head to authorize an employee to use nonpublic information when that use is in the public interest. We have not adopted this suggestion. Although §2635.807(a)(2)(i)(D) does not specifically provide for agency authorization to use nonpublic information, much the same result can be accomplished by authorizing information to be made available to the public under §2635.703(b)(3), which is cross-referenced in the section. Moreover, the provision in 5 CFR 735.203(c) to which the agencies refer does not deal specifically with teaching, speaking or writing for compensation. We have no doubt that more extensive use of agency information may be appropriate when an individual is properly speaking on behalf of the agency and nothing in this part is intended to restrict the proper use of agency information in that context.

Special Government Employees

Two agencies, two organizations, and three individuals commented that proposed §2635.807(a)(1)(i)(E) was too restrictive as it would apply to special Government employees. In general, the commenters stated that the provision would discourage individuals in the private sector from volunteering to serve on Government boards and panels, particularly on those dealing with scientific or technical subject matter. Two of the commenters suggested restricting only the use of nonpublic information by special Government employees.

We agree that the proposed rule was capable of being interpreted so broadly that it could have created a disincentive for private individuals to volunteer their services on special boards and panels. Nevertheless, it is clear that Executive Order 12674 requires the promulgation of appropriate restrictions on the use of public office for private gain by all employees, including special Government employees. To accommodate the concerns expressed by the commenters, we have revised renumbered §2635.807(a)(2)(i)(E)(4) to make it clear that a special Government employee is barred from receiving compensation for teaching, speaking and writing only if the subject matter deals in significant part with the specific identifiable matter, such as a study or grant, to which the employee is assigned. The revised provision also clarifies that restrictions on the receipt of compensation exist only during the term of the special Government employee's current appointment.

For those who serve, or are expected to serve, for 60 days

or less during the first year or any subsequent one year period of their appointments, the restriction has been further revised to apply only to particular matters involving specific parties in which special Government employees have participated or are participating personally and substantially. A similar exclusion for special Government employees who serve no more than 60 days can be found in 18 U.S.C. 203 and 205. The term "particular matter involving specific parties" is defined at §2635.807(a)(2)(v) to have the meaning set forth in 5 CFR 2637.102(a)(7) and "personal and substantial" participation is defined at §2635.807(a)(2)(vi) to have the meaning set forth in §2635.402(b)(4).

As revised, §2635.807(a)(2)(i)(E)(4) clearly states that special Government employees are not subject to the prohibitions at revised §2635.807(a)(2)(i)(E) (2) and (3) on receipt of compensation for teaching, speaking or writing where the subject relates to agency policies, programs or operations or to the economic sector or industry affected by those operations. These revisions and clarifications, as well as the examples of application of §2635.807 to special Government employees, should ensure that special Government employees are not unnecessarily deterred from Government service, while at the same time promoting the integrity that the public expects of its officials.

Regular Employees

In addition to the general comments discussed above, five agencies and one organization submitted specific recommendations for revisions to renumbered §2635.807(a)(2)(i)(E)(2). One agency expressed the view that the language relating to agency policies, programs and operations engulfs the rest of the rule and should be deleted. One agency stated that employees should be permitted to accept compensation for any off-duty teaching, speaking or writing unless it involves a "specific issue" the employee worked on in his official capacity. The agency reasoned that such issues would normally involve privileged communications which could not be disclosed. Taken as a whole, these comments amount to a recommendation to permit employees to accept compensation for teaching, speaking or writing on agency policies, programs and operations unless they were personally assigned to a matter. For the reasons stated above in response to three general comments to much the same effect, OGE has not adopted this recommendation. We have, however, deleted the modifier "planned" before agency policies in proposed §2635.807(a)(1)(i)(E)(2). This deletion accommodates the concern expressed by one commenter that an employee could be found to have spoken or written on a planned

agency policy when he or she, in fact, had no knowledge that it was planned. Receipt of compensation for teaching, speaking or writing on policies in the planning stages by an employee with knowledge of those plans would, in all likelihood, be related to that employee's duties under renumbered §2635.807(a)(2)(i)(D). We have replaced the modifier "planned" with the word "ongoing" and have restructured the paragraph so that the dual modifiers "ongoing or announced" precede the phrase "policy, program or operation of the agency." Insertion of the word "ongoing" addesses the concern expressed by one commenter that the proposed regulations would limit teaching, speaking and writing on matters of historical significance.

Three other agencies and one organization suggested that the proposed restriction at renumbered §2635.807(a)(2)(i)(E)(1) on receipt of compensation for teaching, speaking or writing on a matter presently or formerly assigned be limited to matters to which the employee is currently assigned or to which the employee has been assigned in the last year. On the basis of these comments, OGE has revised renumbered §2635.807(a)(2)(i)(E)(1) to limit its coverage to matters assigned to the employee at the time the teaching, speaking or writing takes place and to other matters the employee worked on over the one-year period preceding the activity.

Two agencies asked that OGE clarify the meaning of the term "particular matter" as used in proposed §2635.807(a)(1)(i)(E)(2). Both suggested that we specifically adopt the definition of the term "particular matter" as used in subpart D of this regulation. Since it was not OGE's intention to limit the applicability of §2635.807(a)(2)(i)(E) to the types of particular matters described in subpart D, we deleted the word "particular" from §2635.807(a)(2)(i)(E). The types of matters covered in this section include those described in subpart D, as well as any other matter which comprises the employee's assigned duties, such as development of agency programs or the conduct of scientific research.

The Office of Government Ethics has added a note and a number of examples following §2635.807(a)(2)(i)(E) to clarify that an employee may accept compensation for teaching, speaking or writing about a matter within his or her general expertise and which relates generally to an agency's activities, as long as it does not deal in significant part with the specific matters to which the employee is or, within the past year, has been assigned, or to any ongoing or announced policy, program or operation of the agency.

Compensation

Renumbered §2635.807(a)(2)(ii) defines "compensation" to include reimbursement or other payment of transportation, lodgings and meal expenses incurred in carrying out an activity. Three organizations and three individuals specifically recommended that payment of such expenses not be considered compensation. Several of the commenters observed that agency budgets are often inadequate to permit payment of these expenses and that employees cannot afford the out-of-pocket costs involved. We cannot agree that payment of transportation expenses by a private source should not be considered compensation. Insofar as Congress intends to permit outside sources to pay employee travel expenses for activities related to official duties, it has provided specific authority at 5 U.S.C. 4111 and 7342 and 31 U.S.C. 1353.

One organization suggested that the term "compensation" exclude amounts paid to charitable organizations, as permitted in the honoraria rule at 5 CFR 2636.201 through 2636.205.{3} We decided not to adopt this suggestion since there is no statutory basis permitting payment of compensation to charitable organizations similar to that upon which the honoraria provision is based.

*{3} See Footnote 1.

Exceptions

Renumbered §2635.807(a)(3) contains an exception for receipt of compensation for teaching courses involving multiple presentations offered as part of the regularly established curricula of certain accredited educational institutions, or as part of a program of education or training sponsored and funded by the Federal Government, or by a State or local government. Two commenters suggested that the exception be modified to permit receipt of compensation for teaching courses sponsored by other organizations, including professional associations and private nonprofit or profit-making firms. One organization suggested that receipt of compensation for teaching should be permitted regardless of the sponsoring institution's identity. One individual stated that employees should be permitted to teach single-presentation courses sponsored by a university or professional association. The Office of Government Ethics has not adopted these suggestions. The intent of the exception at §2635.807(a)(3) is to permit compensation for teaching sponsored by recognized educational institutions and government entities. Receipt of compensation for teaching courses involving multiple presentations is not likely to raise concern that an employee has been invited to

teach for reasons other than his or her expertise in a particular field. One individual recommended that the exception for teaching not require any prior agency approval. Section 2635.807 contains no such requirement. While 5 CFR 2636.307 requires certain noncareer employees to obtain prior approval to engage in teaching for compensation, that requirement is imposed by statute and is merely cross-referenced in renumbered §2635.807(a)(1)(ii).

One agency recommended that OGE add another exception to the rule to permit receipt of compensation for writing books relating to an employee's official duties. An association made a similar suggestion for an exception for books, chapters of books and scholarly writings. The Office of Government Ethics has not adopted these recommendations. There does not appear to be any compelling reason to treat books or chapters of books differently than other forms of writing. Moreover, because there are no generally accepted standards for distinguishing between scholarly and other writings, an exception for scholarly writings would be difficult to implement.

Reference to Position

In response to an agency's concern that §2636.807(b)(2) is too restrictive, we have revised the section to permit an employee to use his or her title or position in connection with certain writings, provided that the writing has a "reasonably prominent disclaimer" stating that the author's views are his or her own and not necessarily those of the United States. The proposed rule had required that the disclaimer be on the same page as the employee's position or title. The final rule deletes this requirement. We also adopted the commenting agency's recommendation to delete the requirements that the writing be "scholarly" and published in a "recognized" journal. We agree that retaining these restrictions would place agency officials in the difficult position of evaluating the scholarship of an employee's off-duty writings and the reputation of the journal in which those writings would be published. The final rule permits use of an employee's title or position in connection with "an article published in a scientific or professional journal."

One agency recommended that supplemental agency regulations include a requirement that employees who use an official title or position in connection with any teaching, speaking or writing sign a disclaimer of official agency endorsement and that such endorsements be published by the agency. The Office of Government Ethics believes that such a publication requirement would impose a considerable administrative burden on those agencies that

have a large number of employees who engage in outside speaking, teaching and writing. Moreover, writings containing an official title or position would already have a "published" disclaimer. We do not find the recommendation meritorious.

Another agency suggested that language be added to §2635.807(b)(2) to make it clear that an employee will not be held responsible for use of his or her position and title by others, such as an organization sponsoring a conference at which the employee is speaking. As a general matter, we agree that an employee cannot be held responsible for use of his or her title and position by others without his knowledge and acquiescence. However, an employee does have the responsibility to take steps to ensure that his or her title and position are not misused by others with whom he or she has a relationship outside the Government. We believe that the prohibition against an employee "permitting" the use of his or her official position or title appropriately conveys this meaning, and therefore we have not revised this section.

One agency that viewed §2635.807(b)(2) as overly restrictive recommended that an employee participating on a panel be permitted to refer to his or her position if other participants are using their titles for purposes of identification. With certain limitations, nothing in §2635.807 would bar an employee from referring to his or her position or title under these circumstances. Section 2635.807(b)(1) permits reference to an employee's title or position, along with other biographical information, for identification in connection with teaching, speaking or writing.

Approval of Content

In response to comments made by four agencies and one organization, OGE has deleted proposed §2635.807(c) which stated that employees must comply with agency requirements for advance approval of the content of any speech, writing or similar product. Each of the commenters argued that the provision is overbroad and would violate the First Amendment. Consistent with our original intent, the final rule simply notes that some agencies may have policies requiring advance approval, review, or clearance of certain speeches or writings to determine whether they contain an appropriate disclaimer, disclose nonpublic information or otherwise comply with this part.

Consulting

Since the proposed rule was published for public comment,

it has come to OGE's attention that some employees have restructured or recharacterized teaching, speaking and writing activities as "consulting" in an effort to avoid application of the honorarium prohibitions in 5 CFR 2636.201 through 2636.205 and our informal opinion 85 x 18, supra.{4} Because consulting was not treated the same as teaching, speaking and writing in the proposed rule, we have not expanded §2635.807 to covering consulting. Any such extension would require notice and comment. Nevertheless, we believe it is appropriate to note that many of the same considerations applicable to teaching, speaking and writing apply as well to consulting activities. And, as noted by OGE's addition of a new Example 2 following §2635.802, consulting activities that involve use of public office for private gain or that otherwise violate part 2635 are improper even though not covered by §2635.807.

*{4} See Footnote 1.

Section 2635.808 Fundraising Activities

At the suggestion of one agency and one individual, OGE has revised the first section of §2635.808 to make it clear that employees' fundraising activities are to be in compliance with the restrictions in 5 CFR part 950 on fundraising in the Federal workplace as well as with the restrictions in §2635.808 (b) and (c). Part 950 is sometimes referred to as the Combined Federal Campaign rules. Because these rules are controlling as to charitable fundraising drives in the Federal workplace, we did not adopt the recommendation by one organization to give agencies discretion to approve fundraising in the workplace for local charities. One agency asked that language be added to make it clear that §2635.808 has no application to efforts to raise funds for the United States, as through the savings bond program. Because "fundraising" is specifically defined at §2635.808(a)(1) as the raising of funds for a nonprofit organization, OGE does not believe any further clarification is needed.

The Office of Government Ethics adopted the recommendation by one agency to revise the definition of the phrase "personally solicit" at §2635.808(a)(4) to make it clear that use of an employee's name by another constitutes personal solicitation only when that use is permitted by the employee. It would not include use of an employee's name without his or her knowledge and agreement or acquiescence.

Five agencies felt that the language of proposed §2635.808(b) was overly restrictive in limiting fundraising in an official capacity to that "specifically authorized by statute, Executive order or regulation." They recommended more flexibility to allow

official fundraising that is consistent with the agency's mission or otherwise furthers agency programs. As it is not OGE's purpose to interfere with any agency's prerogatives to determine the proper scope of its authority to engage in fundraising, we have revised §2635.808(b) to recognize that an agency may have authority to permit official fundraising notwithstanding that such authority is not expressly set forth in a statute, Executive order or regulation.

One agency endorsed the proposed special limitations on fundraising by officials holding Executive Level I and II positions, but three agencies objected to proposed §2635.808(c)(2) for unfairly singling out high-level officials. They believe these officials should have the same rights as other employees to engage in activities in their personal capacities. After reconsidering these limitations, we have deleted proposed §2635.808(c)(2). With this deletion, officials in Executive Level I and II positions will be subject to the same constraints as other employees on personal participation in fundraising, including the prohibitions on use of official title, position or authority. The examples have been revised to conform to this deletion and §2635.808(a)(2) has been revised to conform to the concept in §2635.204(g)(1).

One individual suggested that organizations will be placed at a disadvantage if they are prohibited from using Government employees' titles in their fundraising letters. He stated that Government titles "lend validity to non-profits in that responsible people have oversight of the affairs of the organization." Because §2635.808(c) will preclude use of official titles for all fundraising that employees undertake in their personal capacities, no one organization should be at a greater disadvantage than any other. Moreover, in prohibiting the use of official titles other than for fundraising properly undertaken in an official capacity, the regulation is specifically intended to preclude any suggestion that the Government endorses one organization over any other.

One organization expressed concern that §2635.808 would preclude a union member from asking employees to make contributions to the union's nonpartisan legislative action fund. The Hatch Act regulations at 5 CFR 733.122 prohibits soliciting, paying, collecting, or receiving a contribution at or in the Federal workplace from any employee for any political party or partisan political fund or other partisan recipient and, as noted in subpart I, there are other restrictions on political solicitations in title 18 of the U.S. Code. If the solicitation is not prohibited by any of these and if its purpose is to raise funds for a nonprofit organization that is not a political organization within the meaning of 26 U.S.C. 527(e), §2635.808(c) would apply and, as

a practical matter, would prohibit a union employee from personally soliciting from a subordinate and from using his or her official title, position or authority to collect funds from any employee. It would not otherwise preclude an employee from asking for a contribution to a union fund. The union argues that OGE has no statutory authority to impose constraints of this nature. However, the restrictions on personal fundraising imposed by §2635.808(c) are a proper implementation of the Executive order principle that an employee shall not use public office for private gain. As further implemented at §2635.702, this prohibition applies even though the gain does not accrue to the employee personally but accrues to a nonprofit organization with which he or she is affiliated.

Section 2635.809 Just Financial Obligations

One agency felt that the scope of §2635.809 should be limited to require only that employees meet tax obligations and such other obligations as have been reduced to court judgments. The Office of Government Ethics has not revised §2635.809. The first sentence of the section is a verbatim restatement of the principle set forth in the Executive order. The definition of a "just financial obligation" is essentially the same as has been applicable for many years under 5 CFR 735.207.

Two agencies and one individual asked that subpart H be expanded to include sections dealing specifically with sales activities, consulting and legal work. The Office of Government Ethics has not added the sections suggested and believes the standards set forth in part 2635 are adequate to address these as well as other outside activities. It should be clear from the general standards, for example, that employees should not engage in sales activities using official time or Government telephones. It should also be clear that sales to subordinates may present issues of use of public office for private gain and can raise gift issues under subpart C of this regulation. If, for reasons relating to the principles of ethical conduct, an agency believes that its employees should be prohibited from engaging in certain outside activities, such as consulting or the practice of law, they have authority to impose appropriate limitations by supplemental agency regulations issued in accordance with §2635.105. Where an outside employment relationship involves compensation and would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered, appropriate limitations may be imposed by individual agencies under §2635.403.

Subpart I-Related Statutory Authorities

Based on suggestions from two agencies, OGE has added the Foreign Gifts and Decorations Act (5 U.S.C. 7342), the Freedom of Information Act and Privacy Act (5 U.S.C. 552 and 552a) and the prohibitions on lobbying with public funds (18 U.S.C. 1913) to the list of statutes in §2635.902. Because the listing at §2635.902 is of statutory, rather than regulatory authorities, we did not adopt the suggestion by one agency to include a citation to the regulations at 41 CFR subpart 101-20.3, Conduct on Federal Property. Because it would erroneously suggest that every statute listed in §2635.902 had been incorporated into the standards of conduct, we did not adopt the recommendation by one agency and one organization to state in subpart I that administrative action may be taken by the employing agency based on a violation of any of the listed statutes. Such action could, of course, be taken to promote the efficiency of the service.

III. Revocation by OPM of Superseded Portions of 5 CFR Part 735 and by OGE of Current 5 CFR 2635.101

When this final rule takes effect on February 3, 1993, §2635.101 of this chapter will be superseded by the Office of Government Ethics' new 5 CFR part 2635. Effective that date, the Office of Personnel Management will simultaneously revoke all but §735.106 of subparts A through C of current part 735 of 5 CFR,{5} pursuant to a final rule that the agency intends to issue after this regulation is published in the Federal Register. That Office of Personnel Management regulation will also retain and reissue, as new sections of a residual 5 CFR part 735, the prohibitions relating to gambling, betting and lotteries, safeguarding the civil and foreign service examination process and conduct prejudicial to the Government currently found at 5 CFR 735.203(c), 735.208 and 735.209.

*{5} Section 735.106 and subpart D of 5 CFR part 735 will
*be removed effective October 5, 1992, see 57 FR 11800-
*11830 (April 7, 1992).

IV. Matters of Regulatory Procedure

E.O. 12291, Federal Regulation

As Director of the Office of Government Ethics, I have determined that this is not a major rule as defined under section 1(b)

of Executive Order 12291.

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 significant economic impact on a substantial number of small entities because it affects only Federal employees.

Paperwork Reduction Act

As Director of the Office of Government Ethics, I have determined that the Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain any information collection requirements that require the approval of the Office of Management and Budget thereunder.

List of Subjects in 5 CFR Part 2635

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

Approved: May 7, 1992.

Stephen D. Potts,
Director, Office of Government Ethics.

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

PART 2635-STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

Subpart A-General Provisions

Sec.

2635.101 Basic obligation of public service.
2635.102 Definitions.
2635.103 Applicability to members of the uniformed services.
2635.104 Applicability to employees on detail.
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Subpart B-Gifts From Outside Sources
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2635.202 General standards.
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2635.204 Exceptions.
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2635.501 Overview.
2635.502 Personal and business relationships.
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2635.603 Definitions.
2635.604 Disqualification while seeking employment.
2635.605 Waiver or authorization permitting participation while seeking employment.
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Subpart G-Misuse of Position
2635.701 Overview.
2635.702 Use of public office for private gain.
2635.703 Use of nonpublic information.
2635.704 Use of Government property.
2635.705 Use of official time.

Subpart H-Outside Activities
2635.801 Overview.
2635.802 Conflicting outside employment and activities.
2635.803 Prior approval for outside employment and activities.
2635.804 Outside earned income limitations applicable to certain

Presidential appointees and other noncareer employees.
2635.805 Service as an expert witness.
2635.806 Participation in professional associations. [Reserved]
2635.807 Teaching, speaking and writing.
2635.808 Fundraising activities.
2635.809 Just financial obligations.

Subpart I-Related Statutory Authorities
2635.901 General.
2635.902 Related statutes.

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 A-General Provisions

### §2635.101 Basic obligation of public service.

(a) Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) General principles. The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of

monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those-such as Federal, State, or local taxes-that are imposed by law.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

(c) Related statutes. In addition to the standards of ethical conduct set forth in this part, there are conflict of interest statutes that prohibit certain conduct. Criminal conflict of interest statutes of general applicability to all employees, 18 U.S.C. 201, 203, 205, 208, and 209, are summarized in the appropriate subparts of this part and must be taken into consideration in determining whether conduct is proper. Citations to other generally applicable statutes relating to employee conduct are set forth in subpart I and employees are further cautioned that there may be additional statutory and regulatory restrictions applicable to them generally or as employees of their specific agencies. Because an employee is considered to be on notice of the requirements of any statute, an employee should not rely

upon any description or synopsis of a statutory restriction, but should refer to the statute itself and obtain the advice of an agency ethics official as needed.

§2635.102 Definitions.

The definitions listed below are used throughout this part. Additional definitions appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) Agency means an executive agency as defined in 5 U.S.C. 105 and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office or the Government of the District of Columbia.

(b) Agency designee refers to any employee who, by agency regulation, instruction, or other issuance, has been delegated authority to make any determination, give any approval, or take any other action required or permitted by this part with respect to another employee. An agency may delegate these authorities to any number of agency designees necessary to ensure that determinations are made, approvals are given, and other actions are taken in a timely and responsible manner. Any provision that requires a determination, approval, or other action by the agency designee shall, where the conduct in issue is that of the agency head, be deemed to require that such determination, approval or action be made or taken by the agency head in consultation with the designated agency ethics official.

(c) Agency ethics official refers to the designated agency ethics official or to the alternate designated agency ethics official, referred to in §2638.202(b) of this chapter, and to any deputy ethics official, described in §2638.204 of this chapter, who has been delegated authority to assist in carrying out the responsibilities of the designated agency ethics official.

(d) Agency programs or operations refers to any program or function carried out or performed by an agency, whether pursuant to statute, Executive order, or regulation.

(e) Corrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution, change of assignment, disqualification, divestiture, termination of an activity, waiver, the creation of a qualified diversified or blind trust, or counseling.

(f) Designated agency ethics official refers to the official designated under §2638.201 of this chapter.

(g) Disciplinary action includes those disciplinary actions referred to in Office of Personnel Management regulations and instructions implementing provisions of title 5 of the United

States Code or provided for in comparable provisions applicable to employees not subject to title 5, including but not limited to reprimand, suspension, demotion, and removal. In the case of a military officer, comparable provisions may include those in the Uniform Code of Military Justice.

(h) Employee means any officer or employee of an agency, including a special Government employee. It includes officers but not enlisted members of the uniformed services. For purposes other than subparts B and C of this part, it does not include the President or Vice President. Status as an employee is unaffected by pay or leave status or, in the case of a special Government employee, by the fact that the individual does not perform official duties on a given day.

(i) Head of an agency means, in the case of an agency headed by more than one person, the chair or comparable member of such agency.

(j) He, his, and him include she, hers and her.

(k) Person means an individual, corporation and subsidiaries it controls, company, association, firm, partnership, society, joint stock company, or any other organization or institution, including any officer, employee, or agent of such person or entity. For purposes of this part, a corporation will be deemed to control a subsidiary if it owns 50 percent or more of the subsidiary's voting securities. The term is all-inclusive and applies to commercial ventures and nonprofit organizations as well as to foreign, State, and local governments, including the Government of the District of Columbia. It does not include any agency or other entity of the Federal Government or any officer or employee thereof when acting in his official capacity on behalf of that agency or entity.

(l) Special Government employee means those executive branch officers or employees specified in 18 U.S.C. 202(a). A special Government employee is retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.

(m) Supplemental agency regulation means a regulation issued pursuant to §2635.105.

## §2635.103 Applicability to members of the uniformed services.

The provisions of this part, except this section, are not applicable to enlisted members of the uniformed services. Each agency with jurisdiction over enlisted members of the uniformed services shall issue regulations defining the ethical conduct

obligations of enlisted members under its jurisdiction. Those regulations shall be consistent with Executive Order 12674, April 12, 1989, as modified, and may prescribe the full range of statutory and regulatory sanctions, including those available under the Uniform Code of Military Justice, for failure to comply with such regulations.

§2635.104 Applicability to employees on detail.

(a) Details to other agencies. Except as provided in paragraph (d) of this section, an employee on detail, including a uniformed officer on assignment, from his employing agency to another agency for a period in excess of 30 calendar days shall be subject to any supplemental agency regulations of the agency to which he is detailed rather than to any supplemental agency regulations of his employing agency.

(b) Details to the legislative or judicial branch. An employee on detail, including a uniformed officer on assignment, from his employing agency to the legislative or judicial branch for a period in excess of 30 calendar days shall be subject to the ethical standards of the branch or entity to which detailed. For the duration of any such detail or assignment, the employee shall not be subject to the provisions of this part, except this section, or, except as provided in paragraph (d) of this section, to any supplemental agency regulations of his employing agency, but shall remain subject to the conflict of interest prohibitions in title 18 of the United States Code.

(c) Details to non-Federal entities. Except to the extent exempted in writing pursuant to this paragraph, an employee detailed to a non-Federal entity remains subject to this part and to any supplemental agency regulation of his employing agency. When an employee is detailed pursuant to statutory authority to an international organization or to a State or local government for a period in excess of six months, the designated agency ethics official may grant a written exemption from subpart B of this part based on his determination that the entity has adopted written ethical standards covering solicitation and acceptance of gifts which will apply to the employee during the detail and which will be appropriate given the purpose of the detail.

(d) Applicability of special agency statutes. Notwithstanding paragraphs (a) and (b) of this section, an employee who is subject to an agency statute which restricts his activities or financial holdings specifically because of his status as an employee of that agency shall continue to be subject to any provisions in

the supplemental agency regulations of his employing agency that implement that statute.

§2635.105 Supplemental agency regulations.

In addition to the regulations set forth in this part, an employee shall comply with any supplemental agency regulations issued by his employing agency under this section.

(a) An agency that wishes to supplement this part shall prepare and submit to the Office of Government Ethics, for its concurrence and joint issuance, any agency regulations that supplement the regulations contained in this part. Supplemental agency regulations which the agency determines are necessary and appropriate, in view of its programs and operations, to fulfill the purposes of this part shall be:

(1) In the form of a supplement to the regulations in this part; and

(2) In addition to the substantive provisions of this part.

(b) After concurrence and co-signature by the Office of Government Ethics, the agency shall submit its supplemental agency regulations to the Federal Register for publication and codification at the expense of the agency in title 5 of the Code of Federal Regulations. Supplemental agency regulations issued under this section are effective only after concurrence and co-signature by the Office of Government Ethics and publication in the Federal Register.

(c) This section applies to any supplemental agency regulations or amendments thereof issued under this part. It does not apply to:

(1) A handbook or other issuance intended merely as an explanation of the standards contained in this part or in supplemental agency regulations;

(2) An instruction or other issuance the purpose of which is to:

(i) Delegate to an agency designee authority to make any determination, give any approval or take any other action required or permitted by this part or by supplemental agency regulations; or

(ii) Establish internal agency procedures for documenting or processing any determination, approval or other action required or permitted by this part or by supplemental agency regulations, or for retaining any such documentation; or

(3) Regulations or instructions that an agency has authority, independent of this part, to issue, such as regulations implementing an agency's gift acceptance statute, protecting categories of

nonpublic information or establishing standards for use of Government vehicles. Where the content of any such regulations or instructions was included in the agency's standards of conduct regulations issued pursuant to Executive Order 11222 and the Office of Government Ethics concurs that they need not be issued as part of an agency's supplemental agency regulations, those regulations or instructions may be promulgated separately from the agency's supplemental agency regulations.

§2635.106 Disciplinary and corrective action.

(a) Except as provided in §2635.107, a violation of this part or of supplemental agency regulations may be cause for appropriate corrective or disciplinary action to be taken under applicable Governmentwide regulations or agency procedures. Such action may be in addition to any action or penalty prescribed by law.

(b) It is the responsibility of the employing agency to initiate appropriate disciplinary or corrective action in individual cases. However, corrective action may be ordered or disciplinary action recommended by the Director of the Office of Government Ethics under the procedures at part 2638 of this chapter.

(c) A violation of this part or of supplemental agency regulations, as such, does not create any right or benefit, substantive or procedural, enforceable at law by any person against the United States, its agencies, its officers or employees, or any other person. Thus, for example, an individual who alleges that an employee has failed to adhere to laws and regulations that provide equal opportunity regardless of race, color, religion, sex, national origin, age, or handicap is required to follow applicable statutory and regulatory procedures, including those of the Equal Employment Opportunity Commission.

§2635.107 Ethics advice.

(a) As required by §§2638.201 and 2638.202(b) of this chapter, each agency has a designated agency ethics official who, on the agency's behalf, is responsible for coordinating and managing the agency's ethics program, as well as an alternate. The designated agency ethics official has authority under §2638.204 of this chapter to delegate certain responsibilities, including that of providing ethics counseling regarding the application of this part, to one or more deputy ethics officials.

(b) Employees who have questions about the application of this part or any supplemental agency regulations to particular

situations should seek advice from an agency ethics official. Disciplinary action for violating this part or any supplemental agency regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.

Subpart B-Gifts From Outside Sources

§2635.201 Overview.

This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

§2635.202 General standards.

(a) General prohibitions. Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

(1) From a prohibited source; or

(2) Given because of the employee's official position.

(b) Relationship to illegal gratuities statute. Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

(c) Limitations on use of exceptions. Notwithstanding any exception provided in this subpart, other than §2635.204(j), an employee shall not:

(1) Accept a gift in return for being influenced in the performance of an official act;

(2) Solicit or coerce the offering of a gift;

(3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain;

Example 1: A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than $6 and the aggregate value from any one manufacturer does not exceed the $50 aggregate limitation in §2635.204(a) on de minimis gifts of $20 or less, the practice of accepting even these modest gifts on a recurring basis is improper.

(4) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include:

(i) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials;

(ii) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality; and

(iii) 41 U.S.C. 423(b)(2), which prohibits a procurement official from seeking, accepting, or agreeing to receive any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of a competing contractor during the conduct of a Federal agency procurement. Implementing regulations, including exceptions to the gift prohibition, are contained in the Federal Acquisition Regulation, 48 CFR 3.104.

(5) Accept vendor promotional training contrary to applicable regulations, policies or guidance relating to the procurement

of supplies and services for the Government, except pursuant to §2635.204(l).

§2635.203 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) Agency has the meaning set forth in §2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include:

(1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

(3) Loans from banks and other financial institutions on terms generally available to the public;

(4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties;

(6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer;

(7) Anything which is paid for by the Government or secured by the Government under Government contract;

Note: Some airlines encourage those purchasing tickets to join programs that award free flights and other benefits to frequent fliers. Any such benefit earned on the basis of Government-financed travel belongs to the agency rather than to the employee and may be accepted only insofar as provided under 41 CFR 301-

1.6(b).

(8) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to his official duties which takes place away from his duty station. The agency's acceptance must be in accordance with the implementing regulations at 41 CFR part 304-1; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; or

(9) Anything for which market value is paid by the employee.

(c) Market value means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.

Example 1: An employee who has been given an acrylic paperweight embedded with the corporate logo of a prohibited source may determine its market value based on her observation that a comparable acrylic paperweight, not embedded with a logo, generally sells for about $20.

Example 2: A prohibited source has offered an employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only $20, the market value of the ticket is its $250 face value.

(d) Prohibited source means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

(e) A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given had the

employee not held his position as a Federal employee.

Note: Gifts between employees are subject to the limitations set forth in subpart C of this part.

Example 1: Where free season tickets are offered by an opera guild to all members of the Cabinet, the gift is offered because of their official positions.

(f) A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee, or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except as permitted for the disposition of perishable items by §2635.205(a)(2) or for payments made to charitable organizations in lieu of honoraria under §2636.204 of this chapter.

Example 1: An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

(g) Vendor promotional training means training provided by any person for the purpose of promoting its products or services. It does not include training provided under a Government contract or by a contractor to facilitate use of products or services it furnishes under a Government contract.

## §2635.204 Exceptions.

The prohibitions set forth in §2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (l) of this section and a gift accepted in accordance with one of those paragraphs will not be deemed to violate the principles set forth in §2635.101(b). Even though acceptance of a gift may be permitted by one of the exceptions contained in paragraphs (a) through (l) of this section, it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position.

(a) Gifts of $20 or less. An employee may accept unsolicited gifts having an aggregate market value of $20 or less per occasion,

provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph shall not exceed $50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds $20, the employee may not pay the excess value over $20 in order to accept that portion of the gift or those gifts worth $20. Where the aggregate value of tangible items offered on a single occasion exceeds $20, the employee may decline any distinct and separate item in order to accept those items aggregating $20 or less.

Example 1: An employee of the Securities and Exchange Commission and his spouse have been invited by a representative of a regulated entity to a Broadway play, tickets to which have a face value of $30 each. The aggregate market value of the gifts offered on this single occasion is $60, $40 more than the $20 amount that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. He and his spouse may attend the play only if he pays the full $60 value of the two tickets.

Example 2: An employee of the Defense Mapping Agency has been invited by an association of cartographers to speak about his agency's role in the evolution of missile technology. At the conclusion of his speech, the association presents the employee a framed map with a market value of $18 and a book about the history of cartography with a market value of $15. The employee may accept the map or the book, but not both, since the aggregate value of these two tangible items exceeds $20.

Example 3: On four occasions during the calendar year, an employee of the Defense Logistics Agency was given gifts worth $10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly $50 limitation on gifts of $20 or less from any one person, the four gifts must be aggregated because a person is defined at §2635.102(k) to mean not only the corporate entity, but its officers and employees as well. However, for purposes of applying the $50 aggregate limitation, the employee would not have to include the value of a birthday present received from his cousin, who is employed by the same corporation, if he can accept the birthday present under the exception at §2635.204(b) for gifts based on a personal relationship.

Example 4: Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental

Protection Agency has accepted an association's gift of travel expenses and conference fees for an employee of its Office of Radiation Programs to attend an international conference on "The Chernobyl Experience." While at the conference, the employee may accept a gift of $20 or less from the association or from another person attending the conference even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the only authority under which an agency may accept gifts from certain non-Federal sources in connection with its employees' attendance at such functions, a gift of $20 or less accepted under §2635.204(a) is a gift to the employee rather than to his employing agency.

Example 5: A Navy contracting officer is participating in a procurement for environmental cleanup services at a Navy installation that has recently been closed. She is presently involved in negotiations with three competing contractors, one of whom has offered her a fancy ballpoint pen embossed with its corporate logo. Even though the pen has a market value of $18 and could be accepted under the $20 de minimis exception at §2635.204(a), the contracting officer cannot accept the competing contractor's gift. Under the procurement integrity provisions at 41 U.S.C. 423, she is a "procurement official" for that contract and, except as specifically permitted by the regulations implementing that statute, she is prohibited prior to award from accepting a gift from a competing contractor for that contract. The Federal Acquisition Regulation at 48 CFR 3.104 contains an exception for gifts with a market value of $10 or less.

(b) Gifts based on a personal relationship. An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

Example 1: An employee of the Federal Deposit Insurance Corporation has been dating a secretary employed by a member bank. For Secretary's Week, the bank has given each secretary 2 tickets to an off-Broadway musical review and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept his girlfriend's invitation to the theater. Even though the tickets were initially purchased by the member bank, they were given without reservation to the secretary to use as she wished, and her invitation to the employee was motivated by their personal friendship.

Example 2: Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission to join them in a golf tournament at a private club at the firm's expense. The entry fee is $500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

(c) Discounts and similar benefits. In addition to those opportunities and benefits excluded from the definition of a gift by §2635.203(b)(4), an employee may accept:

(1) Reduced membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and

(2) Opportunities and benefits, including favorable rates and commercial discounts not precluded by paragraph (c)(3) of this section:

(i) Offered to members of a group or class in which membership is unrelated to Government employment;

(ii) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay; provided, however, that

(3) An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds.

Example 1: An employee of the Consumer Product Safety Commission may accept a discount of $50 on a microwave oven offered by the manufacturer to all members of the CPSC employees' association. Even though the CPSC is currently conducting studies on the safety of microwave ovens, the $50 discount is a standard offer that the manufacturer has made broadly available through a number of similar organizations to large segments of the public.

Example 2: An Assistant Secretary may not accept a local country club's offer of membership to all members of Department Secretariats which includes a waiver of its $5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer discriminates in favor of higher ranking officials.

Example 3: The administrative officer for a district office of the Immigration and Naturalization Service has signed an INS order to purchase 50 boxes of photocopy paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with INS funds, the administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

(d) Awards and honorary degrees. (1) An employee may accept gifts, other than cash or an investment interest, with an aggregate market value of $200 or less if such gifts are a bona fide award or incident to a bona fide award that is given for meritorious public service or achievement by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties or by an association or other organization the majority of whose members do not have such interests. Gifts with an aggregate market value in excess of $200 and awards of cash or investment interests offered by such persons as awards or incidents of awards that are given for these purposes may be accepted upon a written determination by an agency ethics official that the award is made as part of an established program of recognition:

(i) Under which awards have been made on a regular basis or which is funded, wholly or in part, to ensure its continuation on a regular basis; and

(ii) Under which selection of award recipients is made pursuant to written standards.

(2) An employee may accept an honorary degree from an institution of higher education as defined at 20 U.S.C. 1141(a) based on a written determination by an agency ethics official that the timing of the award of the degree would not cause a reasonable person to question the employee's impartiality in a matter affecting the institution.

(3) An employee who may accept an award or honorary degree pursuant to paragraph (d)(1) or (2) of this section may also accept meals and entertainment given to him and to members of his family at the event at which the presentation takes place.

Example 1: Based on a determination by an agency ethics official

that the prize meets the criteria set forth in §2635.204(d)(1), an employee of the National Institutes of Health may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

Example 2: Prestigious University wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that the timing of the award of the degree would not cause a reasonable person to question the Secretary's impartiality in a matter affecting the university.

Example 3: An ambassador selected by a nonprofit organization as recipient of its annual award for distinguished service in the interest of world peace may, together with his wife, and children, attend the awards ceremony dinner and accept a crystal bowl worth $200 presented during the ceremony. However, where the organization has also offered airline tickets for the ambassador and his family to travel to the city where the awards ceremony is to be held, the aggregate value of the tickets and the crystal bowl exceeds $200 and he may accept only upon a written determination by the agency ethics official that the award is made as part of an established program of recognition.

(e) Gifts based on outside business or employment relationships. An employee may accept meals, lodgings, transportation and other benefits:

(1) Resulting from the business or employment activities of an employee's spouse when it is clear that such benefits have not been offered or enhanced because of the employee's official position;

Example 1: A Department of Agriculture employee whose husband is a computer programmer employed by an Agriculture Department contractor may attend the company's annual retreat for all of its employees and their families held at a resort facility. However, under §2635.502, the employee may be disqualified from performing official duties affecting her husband's employer.

Example 2: Where the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency whose wife is a clerical worker at a defense contractor may not attend the contractor's annual retreat in Hawaii for corporate officers and members of the board of directors, even though his wife received a special invitation for herself and her spouse.

(2) Resulting from his outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of his official status; or

Example 1: The members of an Army Corps of Engineers environmental advisory committee that meets 6 times per year are special Government employees. A member who has a consulting business may accept an invitation to a $50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the committee.

(3) Customarily provided by a prospective employer in connection with bona fide employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties, acceptance is permitted only if the employee first has complied with the disqualification requirements of subpart F of this part applicable when seeking employment.

Example 1: An employee of the Federal Communications Commission with responsibility for drafting regulations affecting all cable television companies wishes to apply for a job opening with a cable television holding company. Once she has properly disqualified herself from further work on the regulations as required by subpart F of this part, she may enter into employment discussions with the company and may accept the company's offer to pay for her airfare, hotel and meals in connection with an interview trip.

(4) For purposes of paragraphs (e)(1) through (3) of this section, employment shall have the meaning set forth in §2635.603(a).

(f) Gifts from a political organization. An employee who is exempt under 5 U.S.C. 7324(d) from the Hatch Act prohibitions against active participation in political management or political campaigns may accept meals, lodgings, transportation and other benefits, including free attendance at events, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employee, such as a security officer, whose official duties require him to accompany an exempt employee to a political event may accept meals, free attendance and entertainment provided at the event by such a political organization.

Example 1: The Secretary of the Department of Health and Human Services is exempt from the noted Hatch Act restrictions. He may accept an airline ticket and hotel accommodations furnished

by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) Widely attended gatherings and other events-(1) Speaking and similar engagements. When an employee is assigned to participate as a speaker or panel participant or otherwise to present information on behalf of the agency at a conference or other event, his acceptance of an offer of free attendance at the event on the day of his presentation is permissible when provided by the sponsor of the event. The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency.

(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 or operations, an employee may accept a sponsor's unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties. 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. 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 sponsor is a person who has interests that may be substantially affected by the performance or nonperformance of an employee's official duties or 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 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 sponsor of the event, the significance of the employee's role in any such matter, the purpose of the event, the identity of other

expected participants and the monetary 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 a 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 sponsor or 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.

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 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. When others in attendance will generally be accompanied by spouses, the agency designee may authorize an employee to accept a sponsor's invitation to an accompanying spouse 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 a seminar for which it charges a fee of $100. An Air Force contractor pays $500 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 $500 to the association in order that it 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.

Example 2: An employee of the Department of the Treasury authorized to participate in a panel discussion of economic issues as part of a one-day conference may accept the sponsor's waiver of the conference fee. Under the separate authority of §2635.204(a), he may accept a token of appreciation for his speech having a market value of $20 or less.

Example 3: An Assistant U.S. Attorney is invited to attend a luncheon meeting of a local bar association to hear a distinguished judge lecture on cross-examining expert witnesses. Although members of the bar association are assessed a $15 fee for the meeting, the Assistant U.S. Attorney may accept the bar association's offer to attend for free, even without a determination of agency interest. The gift can be accepted under the $20 de minimis exception at §2635.204(a).

Example 4: An employee of the Department of the Interior authorized to speak on the first day of a four-day conference on endangered species may accept the sponsor's waiver of the conference fee for the first day of the conference. If the conference is widely attended, he may be authorized, based on a determination that his attendance is in the agency's interest, to accept the sponsor's offer to waive the attendance fee for the remainder of the conference.

(h) Social invitations from persons other than prohibited sources. An employee may accept food, refreshments and entertainment, not including travel or lodgings, at a social event attended by several persons where:

(1) The invitation is from a person who is not a prohibited source; and

(2) No fee is charged to any person in attendance.

Example 1: Along with several other Government officials and a number of individuals from the private sector, the Administrator of the Environmental Protection Agency has been invited to the premier showing of a new adventure movie about industrial espionage. The producer is paying all costs of the showing. The Administrator

may accept the invitation since the producer is not a prohibited source and no attendance fee is being charged to anyone who has been invited.

Example 2: An employee of the White House Press Office has been invited to a cocktail party given by a noted Washington hostess who is not a prohibited source. The employee may attend even though he has only recently been introduced to the hostess and suspects that he may have been invited because of his official position.

(i) Meals, refreshments and entertainment in foreign areas. An employee assigned to duty in, or on official travel to, a foreign area as defined in 41 CFR 301-7.3(c) may accept food, refreshments or entertainment in the course of a breakfast, luncheon, dinner or other meeting or event provided:

(1) The market value in the foreign area of the food, refreshments or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State's Maximum Per Diem Allowances for Foreign Areas, Per Diem Supplement Section 925 to the Standardized Regulations (GC,FA) available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities;

(3) Attendance at the meeting or event is part of the employee's official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and

(4) The gift of meals, refreshments or entertainment is from a person other than a foreign government as defined in 5 U.S.C. 7342(a)(2).

Example 1: A number of local businessmen in a developing country are anxious for a U.S. company to locate a manufacturing facility in their province. An official of the Overseas Private Investment Corporation may accompany the visiting vice president of the U.S. company to a dinner meeting hosted by the businessmen at a province restaurant where the market value of the food and refreshments does not exceed the per diem rate for that country.

(j) Gifts to the President or Vice President. Because of

considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on his own behalf or on behalf of any family member, provided that such acceptance does not violate §2635.202(c)(1) or (2), 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(k) Gifts authorized by supplemental agency regulation. An employee may accept any gift the acceptance of which is specifically authorized by a supplemental agency regulation.

(l) Gifts accepted under specific statutory authority. The prohibitions on acceptance of gifts from outside sources contained in this subpart do not apply to any item, receipt of which is specifically authorized by statute. Gifts which may be received by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111 from an organization with tax-exempt status under 26 U.S.C. 501(c)(3) or from a person to whom the prohibitions in 18 U.S.C. 209 do not apply. The employee's acceptance must be approved by the agency in accordance with §410.701 through §410.706 of this title; or

Note: 26 U.S.C. 501(c)(3) is authority for tax-exempt treatment of a limited class of nonprofit organizations, including those organized and operated for charitable, religious or educational purposes. Many nonprofit organizations are not exempt from taxation under this section.

(2) Gifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by the agency's regulations or procedures implementing that Act.

§2635.205 Proper disposition of prohibited gifts.

(a) An employee who has received a gift that cannot be accepted under this subpart shall, unless the gift is accepted by an agency acting under specific statutory authority:

(1) Return any tangible item to the donor or pay the donor its market value. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference

to the retail cost of similar items of like quality. See §2635.203(c).

Example 1: To avoid public embarrassment to the seminar sponsor, an employee of the National Park Service did not decline a barometer worth $200 given at the conclusion of his speech on Federal lands policy. The employee must either return the barometer or promptly reimburse the sponsor $200.

(2) When it is not practical to return a tangible item because it is perishable, the item may, at the discretion of the employee's supervisor or an agency ethics official, be given to an appropriate charity, shared within the recipient's office, or destroyed.

Example 1: With approval by the recipient's supervisor, a floral arrangement sent by a disability claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

(3) For any entertainment, favor, service, benefit or other intangible, reimburse the donor the market value. Subsequent reciprocation by the employee does not constitute reimbursement.

Example 1: A Department of Defense employee wishes to attend a charitable event to which he has been offered a $300 ticket by a prohibited source. Although his attendance is not in the interest of the agency under §2635.204(g), he may attend if he reimburses the donor the $300 face value of the ticket.

(4) Dispose of gifts from foreign governments or international organizations in accordance with 41 CFR part 101-49, and dispose of materials received in conjunction with official travel in accordance with 41 CFR 101-25.103.

(b) An agency may authorize disposition or return of gifts at Government expense. Employees may use penalty mail to forward reimbursements required or permitted by this section.

(c) An employee who, on his own initiative, promptly complies with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. An employee who promptly consults his agency ethics official to determine whether acceptance of an unsolicited gift is proper and who, upon the advice of the ethics official, returns the gift or otherwise disposes of the gift in accordance with this section, will be considered to have complied with the requirements of this section on his own initiative.

## Subpart C-Gifts Between Employees

### §2635.301 Overview.

This subpart contains standards that prohibit an employee from giving, donating to, or soliciting contributions for, a gift to an official superior and from accepting a gift from an employee receiving less pay than himself, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

### §2635.302 General standards.

(a) Gifts to superiors. Except as provided in this subpart, an employee may not:

(1) Directly or indirectly, give a gift to or make a donation toward a gift for an official superior; or

(2) Solicit a contribution from another employee for a gift to either his own or the other employee's official superior.

(b) Gifts from employees receiving less pay. Except as provided in this subpart, an employee may not, directly or indirectly, accept a gift from an employee receiving less pay than himself unless:

(1) The two employees are not in a subordinate-official superior relationship; and

(2) There is a personal relationship between the two employees that would justify the gift.

(c) Limitation on use of exceptions. Notwithstanding any exception provided in this subpart, an official superior shall not coerce the offering of a gift from a subordinate.

### §2635.303 Definitions.

For purposes of this subpart, the following definitions shall apply:

(a) Gift has the meaning set forth in §2635.203(b). For purposes of that definition an employee will be deemed to have paid market value for any benefit received as a result of his participation in any carpool or other such mutual arrangement involving another employee or other employees if he bears his fair proportion of the expense or effort involved.

(b) Indirectly, for purposes of §2635.302(b), has the meaning set forth in §2635.203(f). For purposes of §2635.302(a), it includes a gift:

(1) Given with the employee's knowledge and acquiescence

by his parent, sibling, spouse, child, or dependent relative; or

(2) Given by a person other than the employee under circumstances where the employee has promised or agreed to reimburse that person or to give that person something of value in exchange for giving the gift.

(c) Subject to paragraph (a) of this section, market value has the meaning set forth in §2635.203(c).

(d) Official superior means any other employee, other than the President and the Vice President, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. For purposes of this subpart, an employee is considered to be the subordinate of any of his official superiors.

(e) Solicit means to request contributions by personal communication or by general announcement.

(f) Voluntary contribution means a contribution given freely, without pressure or coercion. A contribution is not voluntary unless it is made in an amount determined by the contributing employee, except that where an amount for a gift is included in the cost for a luncheon, reception or similar event, an employee who freely chooses to pay a proportionate share of the total cost in order to attend will be deemed to have made a voluntary contribution. Except in the case of contributions for a gift included in the cost of a luncheon, reception or similar event, a statement that an employee may choose to contribute less or not at all shall accompany any recommendation of an amount to be contributed for a gift to an official superior.

Example 1: A supervisory employee of the Agency for International Development has just been reassigned from Washington, DC to Kabul, Afghanistan. As a farewell party, 12 of her subordinates have decided to take her out to lunch at the Khyber Repast. It is understood that each will pay for his own meal and that the cost of the supervisor's lunch will be divided equally among the twelve. Even though the amount they will contribute is not determined until the supervisor orders lunch, the contribution made by those who choose to participate in the farewell lunch is voluntary.

## §2635.304 Exceptions.

The prohibitions set forth in §2635.302(a) and (b) do not apply to a gift given or accepted under the circumstances described

in paragraph (a) or (b) of this section. A contribution or the solicitation of a contribution that would otherwise violate the prohibitions set forth in §2635.302(a) and (b) may only be made in accordance with paragraph (c) of this section.

(a) General exceptions. On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) Items, other than cash, with an aggregate market value of $10 or less per occasion;

(2) Items such as food and refreshments to be shared in the office among several employees;

(3) Personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends;

(4) Items given in connection with the receipt of personal hospitality if of a type and value customarily given on such occasions; and

(5) Leave transferred under subpart I of part 630 of this title to an employee who is not an immediate supervisor, unless obtained in violation of §630.912 of this title.

Example 1: Upon returning to work following a vacation at the beach, a claims examiner with the Department of Veterans Affairs may give his supervisor, and his supervisor may accept, a bag of saltwater taffy purchased on the boardwalk for $8.

Example 2: An employee of the Federal Deposit Insurance Corporation whose bank examination responsibilities require frequent travel may not bring her supervisor, and her supervisor may not accept, souvenir coffee mugs from each of the cities she visits in the course of performing her duties, even though each of the mugs costs less than $5. Gifts given on this basis are not occasional.

Example 3: The Secretary of Labor has invited the agency's General Counsel to a dinner party at his home. The General Counsel may bring a $15 bottle of wine to the dinner party and the Secretary may accept this customary hostess gift from his subordinate, even though its cost is in excess of $10.

Example 4: For Christmas, a secretary may give his supervisor, and the supervisor may accept, a poinsettia plant purchased for $10 or less. The secretary may also invite his supervisor to a Christmas party in his home and the supervisor may attend.

(b) Special, infrequent occasions. A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child; or

(2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

Example 1: The administrative assistant to the personnel director of the Tennessee Valley Authority may send a $30 floral arrangement to the personnel director who is in the hospital recovering from surgery. The personnel director may accept the gift.

Example 2: A chemist employed by the Food and Drug Administration has been invited to the wedding of the lab director who is his official superior. He may give the lab director and his bride, and they may accept, a place setting in the couple's selected china pattern purchased for $70.

Example 3: Upon the occasion of the supervisor's retirement from Federal service, an employee of the Fish and Wildlife Service may give her supervisor a book of wildlife photographs which she purchased for $19. The retiring supervisor may accept the book.

(c) Voluntary contributions. An employee may solicit voluntary contributions of nominal amounts from fellow employees for an appropriate gift to an official superior and an employee may make a voluntary contribution of a nominal amount to an appropriate gift to an official superior:

(1) On a special, infrequent occasion as described in paragraph (b) of this section; or

(2) On an occasional basis, for items such as food and refreshments to be shared in the office among several employees.

An employee may accept such gifts to which a subordinate or other employee receiving less pay than himself has contributed.

Example 1: To mark the occasion of his retirement, members of the immediate staff of the Under Secretary of the Army would like to give him a party and provide him with a gift certificate. They may distribute an announcement of the party and include a nominal amount for a retirement gift in the fee for the party.

Example 2: The General Counsel of the National Endowment for the Arts may not collect contributions for a Christmas gift for the Chairman. Christmas occurs annually and is not an occasion of personal significance.

Example 3: Subordinates may not take up a collection for a gift to an official superior on the occasion of the superior's

swearing in or promotion to a higher grade position within the supervisory chain of that organization. These are not events that mark the termination of the subordinate-official superior relationship, nor are they events of personal significance within the meaning of §2635.304(b). However, subordinates may take up a collection and employees may contribute $3 each to buy refreshments to be consumed by everyone in the immediate office to mark either such occasion.

Example 4: Subordinates may each contribute a nominal amount to a fund to give a gift to an official superior upon the occasion of that superior's transfer or promotion to a position outside the organization.

Example 5: An Assistant Secretary at the Department of the Interior is getting married. His secretary has decided that a microwave oven would be a nice gift from his staff and has informed each of the Assistant Secretary's subordinates that they should contribute $5 for the gift. Her method of collection is improper. Although she may recommend a $5 contribution, the recommendation must be coupled with a statement that the employee whose contribution is solicited is free to contribute less or nothing at all.

## Subpart D-Conflicting Financial Interests

### §2635.401 Overview.

This subpart contains two provisions relating to financial interests. One is a disqualification requirement and the other is a prohibition on acquiring or continuing to hold specific financial interests. An employee may acquire or hold any financial interest not prohibited by §2635.403. Notwithstanding that his acquisition or holding of a particular interest is proper, an employee is prohibited in accordance with §2635.402 of this subpart from participating in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

### §2635.402 Disqualifying financial interests.

(a) Statutory prohibition. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest,

if the particular matter will have a direct and predictable effect on that interest.

Note: Standards applicable when seeking non-Federal employment are contained in subpart F of this part and, if followed, will ensure that an employee does not violate 18 U.S.C. 208(a) or this section when he is negotiating for or has an arrangement concerning future employment. In all other cases where the employee's participation would violate 18 U.S.C. 208(a), an employee shall disqualify himself from participation in the matter in accordance with paragraph (c) of this section or obtain a waiver, as described in paragraph (d) of this section.

(b) Definitions. For purposes of this section, the following definitions shall apply:

(1) Direct and predictable effect. (i) A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.

(ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

Note: If a particular matter involves a specific party or parties, generally the matter will at most only have a direct and predictable effect, for purposes of this subpart, on a financial interest of the employee in or with a party, such as the employee's interest by virtue of owning stock. There may, however, be some situations in which, under the above standards, a particular matter will have a direct and predictable effect on an employee's financial interests in or with a nonparty. For example, if a party is a corporation, a particular matter may also have a direct and predictable effect on an employee's financial interests through ownership of stock in an affiliate, parent, or subsidiary

of that party. Similarly, the disposition of a protest against the award of a contract to a particular company may also have a direct and predictable effect on an employee's financial interest in another company listed as a subcontractor in the proposal of one of the competing offerors.

Example 1: An employee of the National Library of Medicine at the National Institutes of Health has just been asked to serve on the technical evaluation panel to review proposals for a new library computer search system. DEF Computer Corporation, a closely held company in which he and his wife own a majority of the stock, has submitted a proposal. Because award of the systems contract to DEF or to any other offeror will have a direct and predictable effect on both his and his wife's financial interests, the employee cannot participate on the technical evaluation team unless his disqualification has been waived.

Example 2: Upon assignment to the technical evaluation panel, the employee in the preceding example finds that DEF Computer Corporation has not submitted a proposal. Rather, LMN Corp., with which DEF competes for private sector business, is one of the six offerors. The employee is not disqualified from serving on the technical evaluation panel. Any effect on the employee's financial interests as a result of the agency's decision to award or not award the systems contract to LMN would be at most indirect and speculative.

(2) Imputed interests. For purposes of 18 U.S.C. 208(a) and this subpart, the financial interests of the following persons will serve to disqualify an employee to the same extent as if they were the employee's own interests:

(i) The employee's spouse;

(ii) The employee's minor child;

(iii) The employee's general partner;

(iv) An organization or entity which the employee serves as officer, director, trustee, general partner or employee; and

(v) A person with whom the employee is negotiating for or has an arrangement concerning prospective employment. (Employees who are seeking other employment should refer to and comply with the standards in subpart F of this part).

Example 1: An employee of the Department of Education serves without compensation on the board of directors of Kinder World, Inc., a nonprofit corporation that engages in good works. Even though her personal financial interests will not be affected,

the employee must disqualify herself from participating in the review of a grant application submitted by Kinder World. Award or denial of the grant will affect the financial interests of Kinder World and its financial interests are imputed to her as a member of its board of directors.

Example 2: The spouse of an employee of the Food and Drug Administration has obtained a position with a well established biomedical research company. The company has developed an artificial limb for which it is seeking FDA approval and the employee would ordinarily be asked to participate in the FDA's review and approval process. The spouse is a salaried employee of the company and has no direct ownership interest in the company. Nor does she have an indirect ownership interest, as would be the case, for example, if she were participating in a pension plan that held stock in the company. Her position with the company is such that the granting or withholding of FDA approval will not have a direct and predictable effect on her salary or on her continued employment with the company. Since the FDA approval process will not affect his spouse's financial interests, the employee is not disqualified under §2635.402 from participating in that process. Nevertheless, the financial interests of the spouse's employer may be disqualifying under the impartiality principle, as implemented at §2635.502.

(3) Particular matter. The term particular matter encompasses only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. The particular matters covered by this subpart include a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation or arrest.

Example 1: The Internal Revenue Service's amendment of its regulations to change the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants.

Example 2: Consideration by the Interstate Commerce Commission

of regulations establishing safety standards for trucks on interstate highways involves a particular matter.

(4) Personal and substantial. To participate personally means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter. To participate substantially means that the employee's involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. Personal and substantial participation may occur when, for example, an employee participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

(c) Disqualification. Unless the employee is authorized to participate in the particular matter by virtue of a waiver described in paragraph (d) of this section or because the interest has been divested in accordance with paragraph (e) of this section, an employee shall disqualify himself from participating in a particular matter in which, to his knowledge, he or a person whose interests are imputed to him has a financial interest, if the particular matter will have a direct and predictable effect on that interest. Disqualification is accomplished by not participating in the particular matter.

(1) Notification. An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(2) Documentation. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee

may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: An Assistant Secretary of the Department of the Interior owns recreational property that borders on land which is being considered for annexation to a national park. Annexation would directly and predictably increase the value of her vacation property and, thus, she is disqualified from participating in any way in the Department's deliberations or decisions regarding the annexation. Because she is responsible for determining which matters she will work on, she may accomplish her disqualification merely by ensuring that she does not participate in the matter. Because of the level of her position, however, the Assistant Secretary might be wise to establish a record that she has acted properly by providing a written disqualification statement to an official superior and by providing written notification of the disqualification to subordinates to ensure that they do not raise or discuss with her any issues related to the annexation.

(d) Waiver of disqualification. An employee who would otherwise be disqualified by 18 U.S.C. 208(a) may be permitted to participate in a particular matter where the otherwise disqualifying financial interest is the subject of a regulatory or individual waiver described in this paragraph, or results from certain Indian birthrights as described in 18 U.S.C. 208(b)(4).

(1) Regulatory waivers. Under 18 U.S.C. 208(b)(2), regulatory waivers of general applicability may be issued by the Office of Government Ethics based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of the employees to whom the waivers apply. Pending issuance of superseding regulatory waivers under this authority, agency regulatory waivers issued under 18 U.S.C. 208(b)(2) as in effect prior to November 30, 1989 continue to apply.

(2) Individual waivers. An individual waiver enabling the employee to participate in one or more particular matters may be issued under 18 U.S.C. 208(b)(1) if, in advance of the employee's participation:

(i) The employee:

(A) Advises the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated) about the nature and circumstances of the particular matter or matters; and

(B) Makes full disclosure to such official of the nature

and extent of the disqualifying financial interest; and

(ii) Such official determines, in writing, that the employee's financial interest in the particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee.

(3) Federal advisory committee member waivers. An individual waiver may be issued under 18 U.S.C. 208(b)(3) to a special Government employee serving on, or under consideration for appointment to, an advisory committee within the meaning of the Federal Advisory Committee Act if the Government official responsible for the employee's appointment (or other Government official to whom authority to issue such a waiver for the employee has been delegated):

(i) Reviews the financial disclosure report filed by the special Government employee pursuant to the Ethics in Government Act of 1978; and

(ii) Certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest created by the otherwise disqualifying financial interest.

(4) Consultation and notification regarding waivers. When practicable, an official is required to consult formally or informally with the Office of Government Ethics prior to granting a waiver referred to in paragraph (d)(2) or (3) of this section. A copy of each such waiver is to be forwarded to the Director of the Office of Government Ethics.

(e) Divestiture of a disqualifying financial interest. Upon sale or other divestiture of the asset or other interest that causes his disqualification from participation in a particular matter, 18 U.S.C. 208(a) and paragraph (c) of this section will no longer prohibit the employee's participation in the matter.

(1) Voluntary divestiture. An employee who would otherwise be disqualified from participation in a particular matter may voluntarily sell or otherwise divest himself of the interest that causes the disqualification.

(2) Directed divestiture. An employee may be required to sell or otherwise divest himself of the disqualifying financial interest if his continued holding of that interest is prohibited by statute or by agency supplemental regulation issued in accordance with §2635.403(a), or if the agency determines in accordance with §2635.403(b) that a substantial conflict exists between the financial interest and the employee's duties or accomplishment of the agency's mission.

(3) Eligibility for special tax treatment. An employee who is directed to divest an interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634

of this chapter. An employee who divests before obtaining a certificate of divestiture will not be eligible for this special tax treatment.

(f) Official duties that give rise to potential conflicts. Where an employee's official duties create a substantial likelihood that the employee may be assigned to a particular matter from which he is disqualified, the employee should advise his supervisor or other person responsible for his assignments of that potential so that conflicting assignments can be avoided, consistent with the agency's needs.

§2635.403 Prohibited financial interests.

An employee shall not acquire or hold any financial interest that he is prohibited from acquiring or holding by statute, by agency regulation issued in accordance with paragraph (a) of this section or by reason of an agency determination of substantial conflict under paragraph (b) of this section.

Note: There is no statute of Governmentwide applicability prohibiting employees from holding or acquiring any financial interest. Statutory restrictions, if any, are contained in agency statutes which, in some cases, may be implemented by agency regulations issued independent of this part.

(a) Agency regulation prohibiting certain financial interests. An agency may, by supplemental agency regulation, prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees, and the spouses and minor children of those employees, based on the agency's determination that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered. Where the agency restricts or prohibits the holding of certain financial interests by its employees' spouses or minor children, any such prohibition or restriction shall be based on a determination that there is a direct and appropriate nexus between the prohibition or restriction as applied to spouses and minor children and the efficiency of the service.

Note: Any prohibition on acquiring or holding a specific financial interest contained in an agency regulation, instruction or other issuance in effect prior to the effective date of this part shall, for employees of that agency, constitute a prohibited

financial interest for purposes of this paragraph for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

(b) Agency determination of substantial conflict. An agency may prohibit or restrict an individual employee from acquiring or holding a financial interest or a class of financial interests based upon the agency designee's determination that the holding of such interest or interests will:

(1) Require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired; or

(2) Adversely affect the efficient accomplishment of the agency's mission because another employee cannot be readily assigned to perform work from which the employee would be disqualified by reason of the financial interest.

Example 1: An Air Force employee who owns stock in a major aircraft engine manufacturer is being considered for promotion to a position that involves responsibility for development of a new fighter airplane. If the agency determined that engineering and other decisions about the Air Force's requirements for the fighter would directly and predictably affect his financial interests, the employee could not, by virtue of 18 U.S.C. 208(a), perform these significant duties of the position while retaining his stock in the company. The agency can require the employee to sell his stock as a condition of being selected for the position rather than allowing him to disqualify himself in particular matters.

(c) Definition of financial interest. For purposes of this section:

(1) Except as provided in paragraph (c)(2) of this section, the term financial interest is limited to financial interests that are owned by the employee or by the employee's spouse or minor children. However, the term is not limited to only those financial interests that would be disqualifying under 18 U.S.C. 208(a) and §2635.402. The term includes any current or contingent ownership, equity, or security interest in real or personal property or a business and may include an indebtedness or compensated employment relationship. It thus includes, for example, interests in the nature of stocks, bonds, partnership interests, fee and leasehold interests, mineral and other property rights, deeds of trust, and liens, and extends to any right to purchase or

acquire any such interest, such as a stock option or commodity future. It does not include a future interest created by someone other than the employee, his spouse, or dependent child or any right as a beneficiary of an estate that has not been settled.

Example 1: A regulatory agency has concluded that ownership by its employees of stock in entities regulated by the agency would significantly diminish public confidence in the agency's performance of its regulatory functions and thereby interfere with the accomplishment of its mission. In its supplemental agency regulations, the agency may prohibit its employees from acquiring or continuing to hold stock in regulated entities.

Example 2: An agency that insures bank deposits may, by supplemental agency regulation, prohibit its employees who are bank examiners from obtaining loans from banks they examine. Examination of a member bank could have no effect on an employee's fixed obligation to repay a loan from that bank and, thus, would not affect an employee's financial interests so as to require disqualification under §2635.402. Nevertheless, a loan from a member bank is a discrete financial interest within the meaning of §2635.403(c) that may, when appropriate, be prohibited by supplemental agency regulation.

(2) The term financial interest includes service, with or without compensation, as an officer, director, trustee, general partner or employee of any person, including a nonprofit entity, whose financial interests are imputed to the employee under §2635.402(b)(2)(iii) or (iv).

Example 1. The Foundation for the Preservation of Wild Horses maintains herds of horses that graze on public and private lands. Because its costs are affected by Federal policies regarding grazing permits, the Foundation routinely comments on all proposed rules governing use of Federal grasslands issued by the Bureau of Land Management. BLM may require an employee to resign his uncompensated position as Vice President of the Foundation as a condition of his promotion to a policy-level position within the Bureau rather than allowing him to rely on disqualification in particular cases.

(d) Reasonable period to divest or terminate. Whenever an agency directs divestiture of a financial interest under paragraph (a) or (b) of this section, the employee shall be given a reasonable period of time, considering the nature of his particular duties and the nature and marketability of the interest, within which

to comply with the agency's direction. Except in cases of unusual hardship, as determined by the agency, a reasonable period shall not exceed 90 days from the date divestiture is first directed. However, as long as the employee continues to hold the financial interest, he remains subject to any restrictions imposed by this subpart.

(e) Eligibility for special tax treatment. An employee required to sell or otherwise divest a financial interest may be eligible to defer the tax consequences of divestiture under subpart J of part 2634 of this chapter.

## Subpart E-Impartiality in Performing Official Duties

### §2635.501 Overview.

(a) This subpart contains two provisions intended to ensure that an employee takes appropriate steps to avoid an appearance of loss of impartiality in the performance of his official duties. Under §2635.502, unless he receives prior authorization, an employee should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter. An employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in §2635.502 to determine whether he should or should not participate in a particular matter.

(b) Under §2635.503, an employee who has received an extraordinary severance or other payment from a former employer prior to entering Government service is subject, in the absence of a waiver, to a two-year period of disqualification from participation in particular matters in which that former employer is or represents a party.

Note: Questions regarding impartiality necessarily arise when an employee's official duties impact upon the employee's own financial interests or those of certain other persons, such as the employee's spouse or minor child. An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he, his spouse, general partner or minor child has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

The statutory prohibition also extends to an employee's participation in a particular matter in which, to his knowledge, an organization in which the employee is serving as officer, director, trustee, general partner or employee, or with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest. Where the employee's participation in a particular matter would affect any one of these financial interests, the standards set forth in subparts D or F of this part apply and only a statutory waiver, as described respectively in §§2635.402(d) and 2635.605(a), will enable the employee to participate in that matter. The authorization procedures in §2635.502(d) may not be used to authorize an employee's participation in any such matter. Where the employee complies with all terms of the waiver, the granting of a statutory waiver will be deemed to constitute a determination that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of agency programs and operations.

§2635.502 Personal and business relationships.

(a) Consideration of appearances by the employee. Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

(1) In considering whether a relationship would cause a reasonable person to question his impartiality, an employee may seek the assistance of his supervisor, an agency ethics official or the agency designee.

(2) An employee who is concerned that circumstances other than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter.

(b) Definitions. For purposes of this section:

(1) An employee has a covered relationship with:

(i) A person, other than a prospective employer described

in §2635.603(c), with whom the employee has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction;

Note: An employee who is seeking employment within the meaning of §2635.603 shall comply with subpart F of this part rather than with this section.

(ii) A person who is a member of the employee's household, or who is a relative with whom the employee has a close personal relationship;

(iii) A person for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee;

(iv) Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or

(v) An organization, other than a political party described in 26 U.S.C. 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization. In other cases, significant time devoted to promoting specific programs of the organization, including coordination of fundraising efforts, is an indication of active participation. Payment of dues or the donation or solicitation of financial support does not, in itself, constitute active participation.

Note: Nothing in this section shall be construed to suggest that an employee should not participate in a matter because of his political, religious or moral views.

(2) Direct and predictable effect has the meaning set forth in §2635.402(b)(1).

(3) Particular matter involving specific parties has the meaning set forth in §2637.102(a)(7) of this chapter.

Example 1: An employee of the General Services Administration has made an offer to purchase a restaurant owned by a local developer. The developer has submitted an offer in response to a GSA solicitation for lease of office space. Under the circumstances, she would be correct in concluding that a reasonable person would be likely to question her impartiality if she

were to participate in evaluating that developer's or its competitor's lease proposal.

Example 2: An employee of the Department of Labor is providing technical assistance in drafting occupational safety and health legislation that will affect all employers of five or more persons. His wife is employed as an administrative assistant by a large corporation that will incur additional costs if the proposed legislation is enacted. Because the legislation is not a particular matter involving specific parties, the employee may continue to work on the legislation and need not be concerned that his wife's employment with an affected corporation would raise a question concerning his impartiality.

Example 3: An employee of the Defense Logistics Agency who has responsibilities for testing avionics being produced by an Air Force contractor has just learned that his sister-in-law has accepted employment as an engineer with the contractor's parent corporation. Where the parent corporation is a conglomerate, the employee could reasonably conclude that, under the circumstances, a reasonable person would not be likely to question his impartiality if he were to continue to perform his test and evaluation responsibilities.

Example 4: An engineer has just resigned from her position as vice president of an electronics company in order to accept employment with the Federal Aviation Administration in a position involving procurement responsibilities. Although the employee did not receive an extraordinary payment in connection with her resignation and has severed all financial ties with the firm, under the circumstances she would be correct in concluding that her former service as an officer of the company would be likely to cause a reasonable person to question her impartiality if she were to participate in the administration of a DOT contract for which the firm is a first-tier subcontractor.

Example 5: An employee of the Internal Revenue Service is a member of a private organization whose purpose is to restore a Victorian-era railroad station and she chairs its annual fundraising drive. Under the circumstances, the employee would be correct in concluding that her active membership in the organization would be likely to cause a reasonable person to question her impartiality if she were to participate in an IRS determination regarding the tax-exempt status of the organization.

(c) Determination by agency designee. Where he has information concerning a potential appearance problem arising from the financial interest of a member of the employee's household in a particular matter involving specific parties, or from the role in such matter of a person with whom the employee has a covered relationship,

the agency designee may make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter. Ordinarily, the agency designee's determination will be initiated by information provided by the employee pursuant to paragraph (a) of this section. However, at any time, including after the employee has disqualified himself from participation in a matter pursuant to paragraph (e) of this section, the agency designee may make this determination on his own initiative or when requested by the employee's supervisor or any other person responsible for the employee's assignment.

(1) If the agency designee determines that the employee's impartiality is likely to be questioned, he shall then determine, in accordance with paragraph (d) of this section, whether the employee should be authorized to participate in the matter. Where the agency designee determines that the employee's participation should not be authorized, the employee will be disqualified from participation in the matter in accordance with paragraph (e) of this section.

(2) If the agency designee determines that the employee's impartiality is not likely to be questioned, he may advise the employee, including an employee who has reached a contrary conclusion under paragraph (a) of this section, that the employee's participation in the matter would be proper.

(d) Authorization by agency designee. Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:

(1) The nature of the relationship involved;

(2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;

(3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;

(4) The sensitivity of the matter;

(5) The difficulty of reassigning the matter to another employee; and

(6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable

person would question the employee's impartiality.

Authorization by the agency designee shall be documented in writing at the agency designee's discretion or when requested by the employee. An employee who has been authorized to participate in a particular matter involving specific parties may not thereafter disqualify himself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.

Example 1: The Deputy Director of Personnel for the Department of the Treasury and an attorney with the Department's Office of General Counsel are general partners in a real estate partnership. The Deputy Director advises his supervisor, the Director of Personnel, of the relationship upon being assigned to a selection panel for a position for which his partner has applied. If selected, the partner would receive a substantial increase in salary. The agency designee cannot authorize the Deputy Director to participate on the panel under the authority of this section since the Deputy Director is prohibited by criminal statute, 18 U.S.C. 208(a), from participating in a particular matter affecting the financial interest of a person who is his general partner. See §2635.402.

Example 2: A new employee of the Securities and Exchange Commission is assigned to an investigation of insider trading by the brokerage house where she had recently been employed. Because of the sensitivity of the investigation, the agency designee may be unable to conclude that the Government's interest in the employee's participation in the investigation outweighs the concern that a reasonable person may question the integrity of the investigation, even though the employee has severed all financial ties with the company. Based on consideration of all relevant circumstances, the agency designee might determine, however, that it is in the interest of the Government for the employee to pass on a routine filing by the particular brokerage house.

Example 3: An Internal Revenue Service employee involved in a long and complex tax audit is advised by her son that he has just accepted an entry-level management position with a corporation whose taxes are the subject of the audit. Because the audit is essentially complete and because the employee is the only one with an intimate knowledge of the case, the agency designee might determine, after considering all relevant circumstances, that it is in the Government's interest for the employee to complete the audit, which is subject to additional levels of review.

(e) Disqualification. Unless the employee is authorized to participate in the matter under paragraph (d) of this section, an employee shall not participate in a particular matter involving specific parties when he or the agency designee has concluded, in accordance with paragraph (a) or (c) of this section, that the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.

(1) Notification. An employee who becomes aware of the need to disqualify himself from participation in a particular matter involving specific parties to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a particular matter involving specific parties from which he is disqualified.

(2) Documentation. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

(f) Relevant considerations. An employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section.

## §2635.503 Extraordinary payments from former employers.

(a) Disqualification requirement. Except as provided in paragraph (c) of this section, an employee shall be disqualified for two years from participating in any particular matter in which a former employer is a party or represents a party if he received an extraordinary payment from that person prior to entering Government service. The two-year period of disqualification begins to run on the date that the extraordinary payment is received.

Example 1: Following his confirmation hearings and one month

before his scheduled swearing in, a nominee to the position of Assistant Secretary of a department received an extraordinary payment from his employer. For one year and 11 months after his swearing in, the Assistant Secretary may not participate in any particular matter to which his former employer is a party.

Example 2: An employee received an extraordinary payment from her former employer, a coal mine operator, prior to entering on duty with the Department of the Interior. For two years thereafter, she may not participate in a determination regarding her former employer's obligation to reclaim a particular mining site, because her former employer is a party to the matter. However, she may help to draft reclamation legislation affecting all coal mining operations because this legislation does not involve any parties.

(b) Definitions. For purposes of this section, the following definitions shall apply:

(1) Extraordinary payment means any item, including cash or an investment interest, with a value in excess of $10,000, which is paid:

(i) On the basis of a determination made after it became known to the former employer that the individual was being considered for or had accepted a Government position; and

(ii) Other than pursuant to the former employer's established compensation, partnership, or benefits program. A compensation, partnership, or benefits program will be deemed an established program if it is contained in bylaws, a contract or other written form, or if there is a history of similar payments made to others not entering into Federal service.

Example 1: The vice president of a small corporation is nominated to be an ambassador. In recognition of his service to the corporation, the board of directors votes to pay him $50,000 upon his confirmation in addition to the regular severance payment provided for by the corporate bylaws. The regular severance payment is not an extraordinary payment. The gratuitous payment of $50,000 is an extraordinary payment, since the corporation had not made similar payments to other departing officers.

(2) Former employer includes any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.

(c) Waiver of disqualification. The disqualification requirement of this section may be waived based on a finding that the amount of the payment was not so substantial as to cause a reasonable person to question the employee's ability to act impartially

in a matter in which the former employer is or represents a party. The waiver shall be in writing and may be given only by the head of the agency or, where the recipient of the payment is the head of the agency, by the President or his designee. Waiver authority may be delegated by agency heads to any person who has been delegated authority to issue individual waivers under 18 U.S.C. 208(b) for the employee who is the recipient of the extraordinary payment.

Subpart F-Seeking Other Employment

§2635.601 Overview.

This subpart contains a disqualification requirement that applies to employees when seeking employment with persons who otherwise would be affected by the performance or nonperformance of the employees' official duties. Specifically, it addresses the requirement of 18 U.S.C. 208(a) that an employee disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person "with whom he is negotiating or has any arrangement concerning prospective employment." Beyond this statutory requirement, it also addresses the issues of lack of impartiality that require disqualification from particular matters affecting the financial interests of a prospective employer when an employee's actions in seeking employment fall short of actual employment negotiations.

§2635.602 Applicability and related considerations.

To ensure that he does not violate 18 U.S.C. 208(a) or the principles of ethical conduct contained in §2635.101(b), an employee who is seeking employment or who has an arrangement concerning prospective employment shall comply with the applicable disqualification requirements of §§2635.604 and 2635.606 if the employee's official duties would affect the financial interests of a prospective employer or of a person with whom he has an arrangement concerning prospective employment. Compliance with this subpart also will ensure that the employee does not violate subpart D or E of this part.

Note: An employee who is seeking employment with a person whose financial interests are not affected by the performance or nonperformance of his official duties has no obligation under this subpart. An employee may, however, be subject to other statutes which impose restrictions on employment contacts

or discussions, such as 41 U.S.C. 423(b)(1), applicable to procurement officials, and 10 U.S.C. 2397a, applicable to certain employees of the Department of Defense.

(a) Related employment restrictions-(1) Outside employment while a Federal employee. An employee who is contemplating outside employment to be undertaken concurrently with his Federal employment must abide by any limitations applicable to his outside activities under subparts G and H of this part. He must also comply with any disqualification requirement that may be applicable under subpart D or E of this part as a result of his outside employment activities.

(2) Post-employment restrictions. An employee who is contemplating employment to be undertaken following the termination of his Federal employment should consult an agency ethics official to obtain advice regarding any post-employment restrictions that may be applicable. Regulations implementing the Governmentwide post-employment statute, 18 U.S.C. 207, are contained in parts 2637 and 2641 of this chapter. Employees are cautioned that they may be subject to additional statutory restrictions on their post-employment activities, such as 41 U.S.C. 423(f) applicable to procurement officials, 10 U.S.C. 2397b applicable to certain Department of Defense personnel and special statutes applicable to certain retired officers.

(b) Interview trips and entertainment. Where a prospective employer who is a prohibited source as defined in §2635.203(d) offers to reimburse an employee's travel expenses, or provide other reasonable amenities incident to employment discussions, the employee may accept such amenities in accordance with §2635.204(e)(3).

§2635.603 Definitions.

For purposes of this subpart:

(a) Employment means any form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee.

Example 1: An employee of the Bureau of Indian Affairs who has announced her intention to retire is approached by tribal representatives concerning a possible consulting contract with the tribe. The independent contractual relationship the tribe

wishes to negotiate is employment for purposes of this subpart.

Example 2: An employee of the Department of Health and Human Services is invited to a meeting with officials of a nonprofit corporation to discuss the possibility of his serving as a member of the corporation's board of directors. Service, with or without compensation, as a member of the board of directors constitutes employment for purposes of this subpart.

(b) An employee is seeking employment once he has begun seeking employment within the meaning of paragraph (b)(1) of this section and until he is no longer seeking employment within the meaning of paragraph (b)(2) of this section.

(1) An employee has begun seeking employment if he has directly or indirectly:

(i) Engaged in negotiations for employment with any person. For these purposes, as for 18 U.S.C. 208(a), the term negotiations means discussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position;

(ii) Made an unsolicited communication to any person, or such person's agent or intermediary, regarding possible employment with that person. However, the employee has not begun seeking employment if that communication was:

(A) For the sole purpose of requesting a job application; or

(B) For the purpose of submitting a resume or other employment proposal to a person affected by the performance or nonperformance of the employee's duties only as part of an industry or other discrete class. The employee will be considered to have begun seeking employment upon receipt of any response indicating an interest in employment discussions; or

(iii) Made a response other than rejection to an unsolicited communication from any person, or such person's agent or intermediary, regarding possible employment with that person.

(2) An employee is no longer seeking employment when:

(i) The employee or the prospective employer rejects the possibility of employment and all discussions of possible employment have terminated; or

(ii) Two months have transpired after the employee's dispatch of an unsolicited resume or employment proposal, provided the employee has received no indication of interest in employment discussions from the prospective employer.

(3) For purposes of this definition, a response that defers

discussions until the foreseeable future does not constitute rejection of an unsolicited employment overture, proposal, or resume nor rejection of a prospective employment possibility.

Example 1: An employee of the Health Care Financing Administration is complimented on her work by an official of a State Health Department who asks her to call if she is ever interested in leaving Federal service. The employee explains to the State official that she is very happy with her job at HCFA and is not interested in another job. She thanks him for his compliment regarding her work and adds that she'll remember his interest if she ever decides to leave the Government. The employee has rejected the unsolicited employment overture and has not begun seeking employment.

Example 2: The employee in the preceding example responds by stating that she cannot discuss future employment while she is working on a project affecting the State's health care funding but would like to discuss employment with the State when the project is completed. Because the employee has merely deferred employment discussions until the foreseeable future, she has begun seeking employment with the State Health Department.

Example 3: An employee of the Defense Contract Audit Agency is auditing the overhead accounts of an Army contractor. While at the contractor's headquarters, the head of the contractor's accounting division tells the employee that his division is thinking about hiring another accountant and asks whether the employee might be interested in leaving DCAA. The DCAA employee says he is interested in knowing what kind of work would be involved. They discuss the duties of the position the accounting division would like to fill and the DCAA employee's qualifications for the position. They do not discuss salary. The head of the division explains that he has not yet received authorization to fill the particular position and will get back to the employee when he obtains the necessary approval for additional staffing. The employee and the contractor's official have engaged in negotiations regarding possible employment. The employee has begun seeking employment with the Army contractor.

Example 4: An employee of the Occupational Safety and Health Administration helping to draft safety standards applicable to the textile industry has mailed his resume to 25 textile manufacturers. He has not begun seeking employment with any of the twenty-five. If he receives a response from one of the resume recipients indicating an interest in employment discussions, the employee will have begun seeking employment with the respondent at that time.

Example 5: A special Government employee of the Federal Deposit Insurance Corporation is serving on an advisory committee formed for the purpose of reviewing rules applicable to all member banks. She mails an unsolicited letter to a member bank offering her services as a contract consultant. She has not begun seeking employment with the bank until she receives some response indicating an interest in discussing her employment proposal. A letter merely acknowledging receipt of the proposal is not an indication of interest in employment discussions.

Example 6: A geologist employed by the U.S. Geological Survey has been working as a member of a team preparing the Government's case in an action brought by the Government against six oil companies. The geologist sends her resume to an oil company that is a named defendant in the action. The geologist has begun seeking employment with that oil company and will be seeking employment for two months from the date the resume was mailed. However, if she withdraws her application or is notified within the two-month period that her resume has been rejected, she will no longer be seeking employment with the oil company as of the date she makes such withdrawal or receives such notification.

(c) Prospective employer means any person with whom the employee is seeking employment. Where contacts that constitute seeking employment are made by or with an agent or other intermediary, the term prospective employer includes:

(1) A person who uses that agent or other intermediary for the purpose of seeking to establish an employment relationship with the employee if the agent identifies the prospective employer to the employee; and

(2) A person contacted by the employee's agent or other intermediary for the purpose of seeking to establish an employment relationship if the agent identifies the prospective employer to the employee.

Example 1: An employee of the Federal Aviation Administration has overall responsibility for airport safety inspections in a three-state area. She has retained an employment search firm to help her find another job. The search firm has just reported to the FAA employee that it has given her resume to and had promising discussions with two airport authorities within her jurisdiction. Even though the employee has not personally had employment discussions with either, each airport authority is her prospective employer. She began seeking employment with each upon learning its identity and that it has been given her resume.

(d) Direct and predictable effect and particular matter have the respective meanings set forth in §2635.402(b) (1) and (3).

§2635.604 Disqualification while seeking employment.

(a) Obligation to disqualify. Unless the employee's participation is authorized in accordance with §2635.605, the employee shall not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a prospective employer with whom he is seeking employment within the meaning of §2635.603(b). Disqualification is accomplished by not participating in the particular matter.

(b) Notification. An employee who becomes aware of the need to disqualify himself from participation in a particular matter to which he has been assigned should notify the person responsible for his assignment. An employee who is responsible for his own assignment should take whatever steps are necessary to ensure that he does not participate in the matter from which he is disqualified. Appropriate oral or written notification of the employee's disqualification may be made to coworkers by the employee or a supervisor to ensure that the employee is not involved in a matter from which he is disqualified.

(c) Documentation. An employee need not file a written disqualification statement unless he is required by part 2634 of this chapter to file written evidence of compliance with an ethics agreement with the Office of Government Ethics or is specifically asked by an agency ethics official or the person responsible for his assignment to file a written disqualification statement. However, an employee may elect to create a record of his actions by providing written notice to a supervisor or other appropriate official.

Example 1: An employee of the Department of Veterans Affairs is participating in the audit of a contract for laboratory support services. Before sending his resume to a lab which is a subcontractor under the VA contract, the employee should disqualify himself from participation in the audit. Since he cannot withdraw from participation in the contract audit without the approval of his supervisor, he should disclose his intentions to his supervisor in order that appropriate adjustments in his work assignments can be made.

Example 2: An employee of the Food and Drug Administration is contacted in writing by a pharmaceutical company concerning possible employment with the company. The employee is involved in testing a drug for which the company is seeking FDA approval. Before making a response that is not a rejection, the employee

should disqualify himself from further participation in the testing. Where he has authority to ask his colleague to assume his testing responsibilities, he may accomplish his disqualification by transferring the work to that coworker. However, to ensure that his colleague and others with whom he had been working on the recommendations do not seek his advice regarding testing or otherwise involve him in the matter, it may be necessary for him to advise those individuals of his disqualification.

Example 3: The General Counsel of a regulatory agency wishes to engage in discussions regarding possible employment as corporate counsel of a regulated entity. Matters directly affecting the financial interests of the regulated entity are pending within the Office of General Counsel, but the General Counsel will not be called upon to act in any such matter because signature authority for that particular class of matters has been delegated to an Assistant General Counsel. Because the General Counsel is responsible for assigning work within the Office of General Counsel, he can in fact accomplish his disqualification by simply avoiding any involvement in matters affecting the regulated entity. However, because it is likely to be assumed by others that the General Counsel is involved in all matters within the cognizance of the Office of General Counsel, he would be wise to file a written disqualification statement with the Commissioners of the regulatory agency and provide his subordinates with written notification of his disqualification, or he may be specifically asked by an agency ethics official or the Commissioners to file a written disqualification statement.

Example 4: A scientist is employed by the National Science Foundation as a special Government employee to serve on a panel that reviews grant applications to fund research relating to deterioration of the ozone layer. She is discussing possible employment as a member of the faculty of a university that several years earlier received an NSF grant to study the effect of fluorocarbons, but has no grant application pending. As long as the university does not submit a new application for the panel's review, the employee would not have to take any action to effect disqualification.

(d) Agency determination of substantial conflict. Where the agency determines that the employee's action in seeking employment with a particular person will require his disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired, the agency may allow the employee to take annual leave or leave without pay while seeking employment, or may take other appropriate administrative

action.

§2635.605 Waiver or authorization permitting participation while seeking employment.

(a) Waiver. Where, as defined in §2635.603(b)(1)(i), an employee is engaged in discussions that constitute employment negotiations for purposes of 18 U.S.C. 208(a), the employee may participate in a particular matter that has a direct and predictable effect on the financial interests of a prospective employer only after receiving a written waiver issued under the authority of 18 U.S.C. 208(b)(1) or (b)(3). These waivers are described in §2635.402(d).

Example 1: An employee of the Department of Agriculture has had two telephone conversations with an orange grower regarding possible employment. They have discussed the employee's qualifications for a particular position with the grower, but have not yet discussed salary or other specific terms of employment. The employee is negotiating for employment within the meaning of 18 U.S.C. 208(a) and §2635.603(b)(1)(i). In the absence of a written waiver issued under 18 U.S.C. 208(b)(1), she may not take official action on a complaint filed by a competitor alleging that the grower has shipped oranges in violation of applicable quotas.

(b) Authorization by agency designee. Where an employee is seeking employment within the meaning of §2635.603(b)(1) (ii) or (iii), a reasonable person would be likely to question his impartiality if he were to participate in a particular matter that has a direct and predictable effect on the financial interests of any such prospective employer. The employee may participate in such matters only where the agency designee has authorized his participation in accordance with the standards set forth in §2635.502(d).

Example 1: Within the past month, an employee of the Education Department mailed her resume to a university. She is thus seeking employment with the university within the meaning of §2635.603(b)(1)(ii) even though she has received no reply. In the absence of specific authorization by the agency designee in accordance with §2635.502(d), she may not participate in an assignment to review a grant application submitted by the university.

§2635.606 Disqualification based on an arrangement concerning prospective employment or otherwise after negotiations.

(a) Employment or arrangement concerning employment. An employee shall be disqualified from taking official action in a particular matter that has a direct and predictable effect on the financial interests of the person by whom he is employed or with whom he has an arrangement concerning future employment, unless authorized to participate in the matter by a written waiver issued under the authority of 18 U.S.C. 208 (b)(1) or (b)(3). These waivers are described in §2635.402(d).

Example 1: A military officer has accepted a job with a defense contractor to begin in six months, after his retirement from military service. During the period that he remains with the Government, the officer may not participate in the administration of a contract with that particular defense contractor unless he has received a written waiver under the authority of 18 U.S.C. 208(b)(1).

Example 2: An accountant has just been offered a job with the Comptroller of the Currency which involves a two-year limited appointment. Her private employer, a large corporation, believes the job will enhance her skills and has agreed to give her a two-year unpaid leave of absence at the end of which she has agreed to return to work for the corporation. During the two-year period she is to be a COC employee, the accountant will have an arrangement concerning future employment with the corporation that will require her disqualification from participation in any particular matter that will have a direct and predictable effect on the corporation's financial interests.

(b) Offer rejected or not made. The agency designee for the purpose of §2635.502(c) may, in an appropriate case, determine that an employee not covered by the preceding paragraph who has sought but is no longer seeking employment nevertheless shall be subject to a period of disqualification upon the conclusion of employment negotiations. Any such determination shall be based on a consideration of all the relevant factors, including those listed in §2635.502(d), and a determination that the concern that a reasonable person may question the integrity of the agency's decisionmaking process outweighs the Government's interest in the employee's participation in the particular matter.

Example 1: An employee of the Securities and Exchange Commission was relieved of responsibility for an investigation of a broker-dealer while seeking employment with the law firm representing the broker-dealer in that matter. The firm did not offer her the partnership position she sought. Even though she is no longer

seeking employment with the firm, she may continue to be disqualified from participating in the investigation based on a determination by the agency designee that the concern that a reasonable person might question whether, in view of the history of the employment negotiations, she could act impartially in the matter outweighs the Government's interest in her participation.

Subpart G-Misuse of Position

§2635.701 Overview.

This subpart contains provisions relating to the proper use of official time and authority, and of information and resources to which an employee has access because of his Federal employment. This subpart sets forth standards relating to:

(a) Use of public office for private gain;

(b) Use of nonpublic information;

(c) Use of Government property; and

(d) Use of official time.

§2635.702 Use of public office for private gain.

An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. The specific prohibitions set forth in paragraphs (a) through (d) of this section apply this general standard, but are not intended to be exclusive or to limit the application of this section.

(a) Inducement or coercion of benefits. An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person, including a subordinate, to provide any benefit, financial or otherwise, to himself or to friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity.

Example 1: Offering to pursue a relative's consumer complaint over a household appliance, an employee of the Securities and Exchange Commission called the general counsel of the manufacturer and, in the course of discussing the problem, stated that he worked at the SEC and was responsible for reviewing the company's

filings. The employee violated the prohibition against use of public office for private gain by invoking his official authority in an attempt to influence action to benefit his relative.

Example 2: An employee of the Department of Commerce was asked by a friend to determine why his firm's export license had not yet been granted by another office within the Department of Commerce. At a department-level staff meeting, the employee raised as a matter for official inquiry the delay in approval of the particular license and asked that the particular license be expedited. The official used her public office in an attempt to benefit her friend and, in acting as her friend's agent for the purpose of pursuing the export license with the Department of Commerce, may also have violated 18 U.S.C. 205.

(b) Appearance of governmental sanction. Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by §2635.807(b). He may sign a letter of recommendation using his official title only in response to a request for an employment recommendation or character reference based upon personal knowledge of the ability or character of an individual with whom he has dealt in the course of Federal employment or whom he is recommending for Federal employment.

Example 1: An employee of the Department of the Treasury who is asked to provide a letter of recommendation for a former subordinate on his staff may provide the recommendation using official stationery and may sign the letter using his official title. If, however, the request is for the recommendation of a personal friend with whom he has not dealt in the Government, the employee should not use official stationery or sign the letter of recommendation using his official title, unless the recommendation is for Federal employment. In writing the letter of recommendation for his personal friend, it may be appropriate for the employee to refer to his official position in the body of the letter.

(c) Endorsements. An employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise

except:

(1) In furtherance of statutory authority to promote products, services or enterprises; or

(2) As a result of documentation of compliance with agency requirements or standards or as the result of recognition for achievement given under an agency program of recognition for accomplishment in support of the agency's mission.

Example 1: A Commissioner of the Consumer Product Safety Commission may not appear in a television commercial in which she endorses an electrical appliance produced by her former employer, stating that it has been found by the CPSC to be safe for residential use.

Example 2: A Foreign Commercial Service officer from the Department of Commerce is asked by a United States telecommunications company to meet with representatives of the Government of Spain, which is in the process of procuring telecommunications services and equipment. The company is bidding against five European companies and the statutory mission of the Department of Commerce includes assisting the export activities of U.S. companies. As part of his official duties, the Foreign Commercial Service officer may meet with Spanish officials and explain the advantages of procurement from the United States company.

Example 3: The Administrator of the Environmental Protection Agency may sign a letter to an oil company indicating that its refining operations are in compliance with Federal air quality standards even though he knows that the company has routinely displayed letters of this type in television commercials portraying it as a "trustee of the environment for future generations."

Example 4: An Assistant Attorney General may not use his official title or refer to his Government position in a book jacket endorsement of a novel about organized crime written by an author whose work he admires. Nor may he do so in a book review published in a newspaper.

(d) Performance of official duties affecting a private interest. To ensure that the performance of his official duties does not give rise to an appearance of use of public office for private gain or of giving preferential treatment, an employee whose duties would affect the financial interests of a friend, relative or person with whom he is affiliated in a nongovernmental capacity shall comply with any applicable requirements of §2635.502.

(e) Use of terms of address and ranks. Nothing in this section prohibits an employee who is ordinarily addressed using a general term of address, such as "The Honorable", or a rank, such as

a military or ambassadorial rank, from using that term of address or rank in connection with a personal activity.

§2635.703 Use of nonpublic information.

(a) Prohibition. An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

(b) Definition of nonpublic information. For purposes of this section, nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know:

(1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation;

(2) Is designated as confidential by an agency; or

(3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

Example 1: A Navy employee learns in the course of her duties that a small corporation will be awarded a Navy contract for electrical test equipment. She may not take any action to purchase stock in the corporation or its suppliers and she may not advise friends or relatives to do so until after public announcement of the award. Such actions could violate Federal securities statutes as well as this section.

Example 2: A General Services Administration employee involved in evaluating proposals for a construction contract cannot disclose the terms of a competing proposal to a friend employed by a company bidding on the work. Prior to award of the contract, bid or proposal information is nonpublic information specifically protected by 41 U.S.C. 423.

Example 3: An employee is a member of a source selection team assigned to review the proposals submitted by several companies in response to an Army solicitation for spare parts. As a member of the evaluation team, the employee has access to proprietary information regarding the production methods of Alpha Corporation, one of the competitors. He may not use that information to assist Beta Company in drafting a proposal to compete for a Navy spare parts contract. The Federal Acquisition Regulation in 48 CFR

parts 3, 14 and 15 restricts the release of information related to procurements and other contractor information that must be protected under 18 U.S.C. 1905 and 41 U.S.C. 423.

Example 4: An employee of the Nuclear Regulatory Commission inadvertently includes a document that is exempt from disclosure with a group of documents released in response to a Freedom of Information Act request. Regardless of whether the document is used improperly, the employee's disclosure does not violate this section because it was not a knowing unauthorized disclosure made for the purpose of furthering a private interest.

Example 5: An employee of the Army Corps of Engineers is actively involved in the activities of an organization whose goals relate to protection of the environment. The employee may not, other than as permitted by agency procedures, give the organization or a newspaper reporter nonpublic information about long-range plans to build a particular dam.

## §2635.704 Use of Government property.

(a) Standard. An employee has a duty to protect and conserve Government property and shall not use such property, or allow its use, for other than authorized purposes.

(b) Definitions. For purposes of this section:

(1) Government property includes any form of real or personal property in which the Government has an ownership, leasehold, or other property interest as well as any right or other intangible interest that is purchased with Government funds, including the services of contractor personnel. The term includes office supplies, telephone and other telecommunications equipment and services, the Government mails, automated data processing capabilities, printing and reproduction facilities, Government records, and Government vehicles.

(2) Authorized purposes are those purposes for which Government property is made available to members of the public or those purposes authorized in accordance with law or regulation.

Example 1: Under regulations of the General Services Administration at 41 CFR 201-21.601, an employee may make a personal long distance call charged to her personal calling card.

Example 2: An employee of the Commodity Futures Trading Commission whose office computer gives him access to a commercial service providing information for investors may not use that service for personal investment research.

Example 3: In accordance with chapter 252 of the Federal Personnel Manual, an attorney employed by the Department of

Justice may be permitted to use her office word processor and agency photocopy equipment to prepare a paper to be presented at a conference sponsored by a professional association of which she is a member.

§2635.705 Use of official time.

(a) Use of an employee's own time. Unless authorized in accordance with law or regulations to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. An employee not under a leave system, including a Presidential appointee exempted under 5 U.S.C. 6301(2), has an obligation to expend an honest effort and a reasonable proportion of his time in the performance of official duties.

Example 1: An employee of the Social Security Administration may use official time to engage in certain representational activities on behalf of the employee union of which she is a member. Under 5 U.S.C. 7131, this is a proper use of her official time even though it does not involve performance of her assigned duties as a disability claims examiner.

Example 2: A pharmacist employed by the Department of Veterans Affairs has been granted excused absence to participate as a speaker in a conference on drug abuse sponsored by the professional association to which he belongs. Although excused absence granted by an agency in accordance with guidance in chapter 630 of the Federal Personnel Manual allows an employee to be absent from his official duties without charge to his annual leave account, such absence is not on official time.

(b) Use of a subordinate's time. An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

Example 1: An employee of the Department of Housing and Urban Development may not ask his secretary to type his personal correspondence during duty hours. Further, directing or coercing a subordinate to perform such activities during nonduty hours constitutes an improper use of public office for private gain in violation of §2635.702(a). Where the arrangement is entirely voluntary and appropriate compensation is paid, the secretary may type the correspondence at home on her own time. Where the compensation is not adequate, however, the arrangement would involve a gift to the superior in violation of the standards in subpart C of

this part.

## Subpart H-Outside Activities

### §2635.801 Overview.

(a) This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) An employee who wishes to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activities;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other noncareer employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on participation in professional organizations;

(6) The limitations on paid and unpaid teaching, speaking, and writing; and

(7) The limitations on fundraising activities.

(c) Outside employment and other outside activities of an employee must also comply with applicable provisions set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

(d) In addition to the provisions of this and other subparts of this part, an employee who wishes to engage in outside employment or other outside activities must comply with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take

any action in violation of his official duty;

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act;

(3) 18 U.S.C. 203(a), which prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction;

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restrictions;

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability;

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits anyone holding an office of profit or trust under the United States from accepting any gift, office, title or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any public official from being or acting as an agent of a foreign principal, including a foreign government, corporation or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 et seq;

(7) The Hatch Act, 5 U.S.C. 7321 through 7328, which prohibits most employees from engaging in certain partisan political activities and prohibits all employees from interfering with elections and conducting political activities in the Federal workplace;

(8) The honorarium prohibition, 5 U.S.C. App. (Ethics in

Government Act of 1978), which prohibits an employee, other than a special Government employee, from receiving any compensation for an appearance, speech or article. Implementing regulations are contained in §§2636.201 through 2636.205 of this chapter; and

(9) The limitations on outside employment, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibit a covered noncareer employee's receipt of compensation for specified activities and provide that he shall not allow his name to be used by any firm or other entity which provides professional services involving a fiduciary relationship. Implementing regulations are contained in §§2636.305 through 2636.307 of this chapter.

§2635.802 Conflicting outside employment and activities.

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties:

(a) If it is prohibited by statute or by an agency supplemental regulation; or

(b) If, under the standards set forth in §§2635.402 and 2635.502, it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to disqualify himself from participation in certain particular matters under either subpart D or subpart E of this part.

Example 1: An employee of the Environmental Protection Agency has just been promoted. His principal duty in his new position is to write regulations relating to the disposal of hazardous waste. The employee may not continue to serve as president of a nonprofit environmental organization that routinely submits comments on such regulations. His service as an officer would require his disqualification from duties critical to the performance of his official duties on a basis so frequent as to materially impair his ability to perform the duties of his position.

Example 2: An employee of the Occupational Safety and Health Administration who was and is expected again to be instrumental in formulating new OSHA safety standards applicable to manufacturers that use chemical solvents has been offered a consulting contract

to provide advice to an affected company in restructuring its manufacturing operations to comply with the OSHA standards. The employee should not enter into the consulting arrangement even though he is not currently working on OSHA standards affecting this industry and his consulting contract can be expected to be completed before he again works on such standards. Even though the consulting arrangement would not be a conflicting activity within the meaning of §2635.802, it would create an appearance that the employee had used his official position to obtain the compensated outside business opportunity and it would create the further appearance of using his public office for the private gain of the manufacturer.

§2635.803 Prior approval for outside employment and activities.

When required by agency supplemental regulation, an employee shall obtain prior approval before engaging in outside employment or activities. Where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment.

Note: Any requirement for prior approval of employment or activities contained in any agency regulation, instruction, or other issuance in effect prior to the effective date of this part shall constitute a requirement for prior approval for purposes of this section for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

§2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.

(a) Presidential appointees to full-time noncareer positions. A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment. This limitation does not apply to any outside earned income received for outside employment, or for any other outside activity, carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989.

(b) Covered noncareer employees. Covered noncareer employees, as defined in §2636.303(a) of this chapter, may not, in any calendar year, receive outside earned income attributable to

that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. Employees should consult the regulations implementing this limitation, which are contained in §§2636.301 through 2636.304 of this chapter.

Note: In addition to the 15 percent limitation on outside earned income, covered noncareer employees are prohibited from receiving any compensation for: practicing a profession which involves a fiduciary relationship; affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; serving as an officer or member of the board of any association, corporation or other entity; or teaching without prior approval. Implementing regulations are contained in §§2636.305 through 2636.307 of this chapter.

(c) Definitions. For purposes of this section:

(1) Outside earned income has the meaning set forth in §2636.303(b) of this chapter, except that §2636.303(b)(8) shall not apply.

(2) Presidential appointee to a full-time noncareer position means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transition;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.

Example 1: A career Department of Justice employee who is detailed to a policy-making position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

Example 2: A Department of Energy employee appointed under §213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a Presidential appointee to a full-time noncareer position.

§2635.805 Service as an expert witness.

(a) Restriction. An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) Additional restriction applicable to certain special Government employees. (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

(i) Is appointed by the President;

(ii) Serves on a commission established by statute; or

(iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) Authorization to serve as an expert witness. Provided that the employee's testimony will not result in compensation for an appearance in violation of §2636.201 of this chapter or violate any of the principles or standards set forth in this part, authorization to provide expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of §2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving

as a fact witness when subpoenaed by an appropriate authority.

§2635.806 Participation in professional associations. [Reserved]

§2635.807 Teaching, speaking and writing.

(a) Compensation for teaching, speaking or writing. Except as permitted by paragraph (a)(3) of the section, an employee, including a special Government employee, shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties.

(1) Relationship to other limitations on receipt of compensation. The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this chapter, including:

(i) The honorarium prohibition on receipt of compensation for an appearance, speech or article, which is implemented in §§2636.201 through 2636.205 of this chapter;

(ii) The requirement contained in §2636.307 of this chapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(iii) The prohibitions and limitations in §2635.804 and in §2636.304 of this chapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered noncareer employees.

Example 1. A personnel specialist employed by the Department of Labor has been asked by the publisher of a magazine to write an article on his hobby of collecting arrowheads. Even though the subject matter is unrelated to his official duties, he may not accept the publisher's offer of $200 for the article. Because the compensation offered is for an article, its receipt would violate the honorarium prohibition contained in §§2636.201 through 2636.205 of this chapter.

(2) Definitions. For purposes of this paragraph:

(i) Teaching, speaking or writing relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter;

(C) The invitation to engage in the activity or the offer

of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are nonpublic information as defined in §2635.703(b); or

(E) Except as provided in paragraph (a)(2)(i)(E)(4) of this section, the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of a noncareer employee as defined in §2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency.

(4) The restrictions in paragraphs (a)(2)(i)(E) (2) and (3) of this section do not apply to a special Government employee. The restriction in paragraph (a)(2)(i)(E)(1) of this section applies only during the current appointment of a special Government employee; except that if the special Government employee has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to particular matters involving specific parties in which the special Government employee has participated or is participating personally and substantially.

Note: Section 2635.807(a)(2)(i)(E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for teaching, speaking or writing on a subject within the employee's discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency's areas of responsibility.

Example 1: The Director of the Division of Enforcement at the Commodity Futures Trading Commission has a keen interest in stamp collecting and has spent years developing his own collection as well as studying the field generally. He is asked by an international society of philatelists to give a series of four lectures on how to assess the value of American stamps. Because the subject does not relate to his official duties, the Director may accept

compensation for the lecture series. He could not, however, accept a similar invitation from a commodities broker.

Example 2: A scientist at the National Institutes of Health, whose principal area of Government research is the molecular basis of the development of cancer, could not be compensated for writing a book which focuses specifically on the research she conducts in her position at NIH, and thus, relates to her official duties. However, the scientist could receive compensation for writing or editing a textbook on the treatment of all cancers, provided that the book does not focus on recent research at NIH, but rather conveys scientific knowledge gleaned from the scientific community as a whole. The book might include a chapter, among many other chapters, which discusses the molecular basis of cancer development. Additionally, the book could contain brief discussions of recent developments in cancer treatment, even though some of those developments are derived from NIH research, as long as it is available to the public.

Example 3: On his own time, a National Highway Traffic Safety Administration employee prepared a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. He may not receive royalties or any other form of compensation for the guide. The guide deals in significant part with the programs or operations of NHTSA and, therefore, relates to the employee's official duties. On the other hand, the employee could receive royalties from the sale of a consumer's guide to values in used automobiles even though it contains a brief, incidental discussion of automobile safety standards developed by NHTSA.

Example 4: An employee of the Securities and Exchange Commission may not receive compensation for a book which focuses specifically on the regulation of the securities industry in the United States, since that subject concerns the regulatory programs or operations of the SEC. The employee may, however, write a book about the advantages of investing in various types of securities as long as the book contains only an incidental discussion of any program or operation of the SEC.

Example 5: An employee of the Department of Commerce who works in the Department's employee relations office is an acknowledged expert in the field of Federal employee labor relations, and participates in Department negotiations with employee unions. The employee may receive compensation from a private training institute for a series of lectures which describe the decisions of the Federal Labor Relations Authority concerning unfair labor practices, provided that her lectures do not contain any significant discussion of labor relations cases handled at the Department

of Commerce, or the Department's labor relations policies. Federal Labor Relations Authority decisions concerning Federal employee unfair labor practices are not a specific program or operation of the Department of Commerce and thus do not relate to the employee's official duties. However, an employee of the FLRA could not give the same presentations for compensation.

Example 6: A program analyst employed at the Environmental Protection Agency may receive royalties and other compensation for a book about the history of the environmental movement in the United States even though it contains brief references to the creation and responsibilities of the EPA. A covered noncareer employee of the EPA, however, could not receive compensation for writing the same book because it deals with the general subject matter area affected by EPA programs and operations. Neither employee could receive compensation for writing a book that focuses on specific EPA regulations or otherwise on its programs and operations.

Example 7: An attorney in private practice has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of surveying and recommending modification of procurement regulations that deter small businesses from competing for Government contracts. Because his service under that appointment is not expected to exceed 60 days, the attorney may accept compensation for an article about the anticompetitive effects of certain regulatory certification requirements even though those regulations are being reviewed by the advisory committee. The regulations which are the focus of the advisory committee deliberations are not a particular matter involving specific parties. Because the information is nonpublic, he could not, however, accept compensation for an article which recounts advisory committee deliberations that took place in a meeting closed to the public in order to discuss proprietary information provided by a small business.

Example 8: A biologist who is an expert in marine life is employed for more than 60 days in a year as a special Government employee by the National Science Foundation to assist in developing a program of grants by the Foundation for the study of coral reefs. The biologist may continue to receive compensation for speaking, teaching and writing about marine life generally and coral reefs specifically. However, during the term of her appointment as a special Government employee, she may not receive compensation for an article about the NSF program she is participating in developing. Only the latter would concern a matter to which the special Government employee is assigned.

Example 9: An expert on international banking transactions

has been given a one-year appointment as a special Government employee to assist in analyzing evidence in the Government's fraud prosecution of owners of a failed savings and loan association. It is anticipated that she will serve fewer than 60 days under that appointment. Nevertheless, during her appointment, the expert may not accept compensation for an article about the fraud prosecution, even though the article does not reveal nonpublic information. The prosecution is a particular matter that involves specific parties.

(ii) Agency has the meaning set forth in §2635.102(a), except that any component of a department designated as a separate agency under §2635.203(a) shall be considered a separate agency.

(iii) Compensation includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's teaching, speaking or writing activities. Unless accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111 or 7342, or an agency gift acceptance statute, it includes transportation, lodgings and meals, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement after the expense has been incurred. It does not include:

(A) Items offered by any source that could be accepted from a prohibited source under subpart B of this part;

(B) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place; or

(C) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking or writing activity.

(iv) Receive means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative.

(v) Particular matter involving specific parties has the meaning set forth in §2637.102(a)(7) of this chapter.

(vi) Personal and substantial participation has the meaning set forth in §2635.402(b)(4).

(3) Exception for teaching certain courses. Notwithstanding

that the activity would relate to his official duties under paragraphs (a)(2)(i) (B) or (E) of this section, an employee may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1141(a);

(B) An elementary school as defined at 20 U.S.C. 2891(8); or

(C) A secondary school as defined at 20 U.S.C. 2891(21); or

(ii) A program of education or training sponsored and funded by the Federal Government or by a State or local government which is not offered by an entity described in paragraph (a)(3)(i) of this section.

Example 1: An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though a substantial portion of the course deals with cost accounting principles applicable to contracts with the Government. Moreover, his receipt of a salary or other compensation for teaching this course does not violate the honorarium prohibition on receipt of compensation for any speech, which is implemented in §§2636.201 through 2636.205 of this chapter.

Example 2: An attorney employed by the Equal Employment Opportunity Commission may accept compensation for teaching a course at a state college on the subject of Federal employment discrimination law. The attorney could not accept compensation for teaching the same seminar as part of a continuing education program sponsored by her bar association because the subject of the course is focused on the operations or programs of the EEOC and the sponsor of the course is not an accredited educational institution.

Example 3: An employee of the National Endowment for the Humanities is invited by a private university to teach a course that is a survey of Government policies in support of artists, poets and writers. As part of his official duties, the employee administers a grant that the university has received from the NEH. The employee may not accept compensation for teaching the course because the university has interests that may be substantially affected by the performance or nonperformance of the employee's duties. Likewise, an employee may not receive compensation for any teaching that is undertaken as part of his official duties

or that involves the use of nonpublic information.

(b) Reference to official position. An employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) An employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with his teaching, speaking or writing.

Note: Some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.

Example 1: A meteorologist employed with the National Oceanic and Atmospheric Administration is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about his education and previous employment in course materials setting forth biographical data on all teachers involved in the graduate program. However, his title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under his name. In contrast, his title may be used in this manner when the meteorologist is authorized by NOAA to speak in his official capacity.

Example 2: A doctor just employed by the Centers for Disease Control has written a paper based on his earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the article also contains a disclaimer, concurred in by the CDC, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the CDC.

Example 3: An employee of the Federal Deposit Insurance Corporation has been asked to give a speech in his private capacity, without compensation, to the annual meeting of a committee of the American Bankers Association on the need for banking reform. The employee may be described in his introduction at the meeting as an employee of the Federal Deposit Insurance Corporation provided that other pertinent biographical details are mentioned as well.

§2635.808 Fundraising activities.

An employee may engage in fundraising only in accordance with the restrictions in part 950 of this title on the conduct of charitable fundraising in the Federal workplace and in accordance with paragraphs (b) and (c) of this section.

(a) Definitions. For purposes of this section: (1) Fundraising means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) Participation in the conduct of an event means active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, his attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech. Waiver of a fee for attendance at an event by a participant in the conduct of that event does not constitute a gift for

purposes of subpart B of this part.

Note: This section does not prohibit fundraising for political parties. However, there are statutory restrictions that apply to political fundraising. Employees, other than those exempt under 5 U.S.C. 7324(d), are prohibited by the Hatch Act, 5 U.S.C. 7321 through 7328, from soliciting or collecting contributions or other funds for a partisan political purpose or in connection with a partisan election. In addition, all employees are prohibited by 18 U.S.C. 602 from knowingly soliciting contributions for any political purpose from other employees and by 18 U.S.C. 607 from soliciting such contributions in the Federal workplace.

Example 1: The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost $150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

(3) Official speech means a speech given by an employee in his official capacity on a subject matter that relates to his official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the responsibilities, programs, or operations of the employee's agency as described in §2635.807(a)(2)(i)(E), or on matters of Administration policy on which the employee has been authorized to speak.

Example 1: The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a nonprofit organization that assists homeless families. She devotes a major portion of her speech to the Administration's Points of Light initiative, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because she is authorized to speak on Administration policy, her remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if she were to conclude her official speech with a request for donations to the nonprofit organization.

Example 2: A charitable organization is sponsoring a two-day tennis tournament at a country club in the Washington, DC

area to raise funds for recreational programs for learning disabled children. The organization has invited the Secretary of Education to give a speech on federally funded special education programs at the awards dinner to be held at the conclusion of the tournament and a determination has been made that the dinner is an appropriate forum for the particular speech. The Secretary may speak at the dinner and, under §2635.204(g)(1), he may partake of the meal provided to him at the dinner.

(4) Personally solicit means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of §2635.203(d). It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

Example 1: An employee of the Department of Energy who signs a letter soliciting funds for a local private school does not "personally solicit" funds when 500 copies of the letter, which makes no mention of his DOE position and title, are mailed to members of the local community, even though some individuals who are employed by Department of Energy contractors may receive the letter.

(b) Fundraising in an official capacity. An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties. When authorized to participate in an official capacity, an employee may use his official title, position and authority.

Example 1: Because participation in his official capacity is authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

(c) Fundraising in a personal capacity. An employee may engage

in fundraising in his personal capacity provided that he does not:

(1) Personally solicit funds or other support from a subordinate or from any person:

(i) Known to the employee, if the employee is other than a special Government employee, to be a prohibited source within the meaning of §2635.203(d); or

(ii) Known to the employee, if the employee is a special Government employee, to be a prohibited source within the meaning of §2635.203(d)(4) that is a person whose interests may be substantially affected by performance or nonperformance of his official duties.

(2) Use or permit the use of his official title, position or any authority associated with his public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(3) Engage in any action that would otherwise violate this part.

Example 1: A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy.

Example 2: An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for her son's private school. Such use of the photocopier would violate the standards at §2635.704 regarding use of Government property.

Example 3: An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as "John Doe, Assistant Attorney General." He also may not sign a letter with just his signature, "John Doe," soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group where the solicitation is not known to him to be targeted at persons who are either prohibited sources or subordinates.

## §2635.809 Just financial obligations.

Employees shall satisfy in good faith their obligations as

citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

Subpart I-Related Statutory Authorities

§2635.901 General.

In addition to the standards of ethical conduct set forth in subparts A through H of this part, there are a number of statutes that establish standards to which an employee's conduct must conform. The list set forth in §2635.902 references some of the more significant of those statutes. It is not comprehensive and includes only references to statutes of general applicability. While it includes references to several of the basic conflict of interest statutes whose standards are explained in more detail throughout this part, it does not include references to statutes of more limited applicability, such as statutes that apply only to officers and employees of the Department of Defense.

§2635.902 Related statutes.

(a) The prohibition against solicitation or receipt of bribes (18 U.S.C. 201(b)).
(b) The prohibition against solicitation or receipt of illegal gratuities (18 U.S.C. 201(c)).
(c) The prohibition against seeking or receiving compensation for certain representational services before the Government (18 U.S.C. 203).
(d) The prohibition against assisting in the prosecution of claims against the Government or acting as agent or attorney before the Government (18 U.S.C. 205).
(e) The post-employment restrictions applicable to former employees (18 U.S.C. 207, with implementing regulations at parts 2637 and 2641 of this chapter).
(f) The post-employment restrictions applicable to former procurement officials (41 U.S.C. 423(f)).
(g) The prohibition against participating in matters affecting

an employee's own financial interests or the financial interests of other specified persons or organizations (18 U.S.C. 208).

(h) The prohibition on a procurement official's negotiating for employment with competing contractors (41 U.S.C. 423(b)(1)).

(i) The prohibition against receiving salary or any contribution to or supplementation of salary as compensation for Government service from a source other than the United States (18 U.S.C. 209).

(j) The prohibition against gifts to superiors (5 U.S.C. 7351).

(k) The prohibition against solicitation or receipt of gifts from specified prohibited sources (5 U.S.C. 7353).

(l) The prohibition against solicitation or receipt of gifts from competing contractors (41 U.S.C. 423(b)(2)).

(m) The provisions governing receipt and disposition of foreign gifts and decorations (5 U.S.C. 7342).

(n) The Code of Ethics for Government Service (Pub. L. 96-303, 94 Stat. 855).

(o) The prohibitions against certain political activities (5 U.S.C. 7321 et seq. and 18 U.S.C. 602, 603, 606 and 607).

(p) The prohibitions against disloyalty and striking (5 U.S.C. 7311 and 18 U.S.C. 1918).

(q) The general prohibition against acting as the agent of a foreign principal required to register under the Foreign Agents Registration Act (18 U.S.C. 219).

(r) The prohibition against employment of a person convicted of participating in or promoting a riot or civil disorder (5 U.S.C. 7313).

(s) The prohibition against employment of an individual who habitually uses intoxicating beverages to excess (5 U.S.C. 7352).

(t) The prohibition against misuse of a Government vehicle (31 U.S.C. 1344).

(u) The prohibition against misuse of the franking privilege (18 U.S.C. 1719).

(v) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(w) The prohibition against concealing, mutilating or destroying a public record (18 U.S.C. 2071).

(x) The prohibition against counterfeiting or forging transportation requests (18 U.S.C. 508).

(y) The restrictions on disclosure of certain sensitive Government information under the Freedom of Information Act and the Privacy Act (5 U.S.C. 552 and 552a).

(z) The prohibitions against disclosure of classified information (18 U.S.C. 798 and 50 U.S.C. 783(b)).

(aa) The prohibition against disclosure of proprietary information and certain other information of a confidential nature (18 U.S.C. 1905).

(bb) The prohibition against unauthorized disclosure of certain procurement sensitive information, including proprietary or source selection information (41 U.S.C. 423(b) (3) and (d)).

(cc) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(dd) The prohibition against certain personnel practices (5 U.S.C. 2302).

(ee) The prohibition against interference with civil service examinations (18 U.S.C. 1917).

(ff) The restrictions on use of public funds for lobbying (18 U.S.C. 1913).

(gg) The prohibition against participation in the appointment or promotion of relatives (5 U.S.C. 3110).

(hh) The prohibition against solicitation or acceptance of anything of value to obtain public office for another (18 U.S.C. 211).

(ii) The prohibition against conspiracy to commit an offense against or to defraud the United States (18 U.S.C. 371).

(jj) The prohibition against embezzlement or conversion of Government money or property (18 U.S.C. 641).

(kk) The prohibition against failing to account for public money (18 U.S.C. 643).

(ll) The prohibition against embezzlement of the money or property of another person that is in the possession of an employee by reason of his employment (18 U.S.C. 654).

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