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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 (OGE).

ACTION: Proposed rule; amendments.

SUMMARY: The Office of Government Ethics is proposing minor amendments to the regulation governing standards of ethical conduct for executive branch employees, to conform with interpretive advice and to improve clarity concerning gifts from outside sources.

DATES: Comments are invited and must be received before October 5, 1998.

ADDRESSES: Send comments to the Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: G. Sid Smith.

FOR FURTHER INFORMATION CONTACT: G. Sid Smith, Senior Associate General Counsel, Office of Government Ethics; telephone: 202-208-8000; TDD: 202-208-8025; FAX: 202-208-8037; Internet E-mail address: usoge@oge.gov (for E-mail messages, the subject line should include the following sentence—Rulemaking to amend standards of ethical conduct sections on gifts).

SUPPLEMENTARY INFORMATION:

I. Background

Some six years ago, the Office of Government Ethics (OGE) issued a final rule establishing the standards of ethical conduct, under authority of section 201(a) of Executive Order 12674 (57 FR 35006-35067, August 7, 1992). These standards and the examples therein, as amended and codified at 5 CFR part 2635, are the primary source of guidance for ethics officials and employees throughout the executive branch in applying the fourteen fundamental principles of ethical conduct contained in the Executive order. By final rule published at 62 FR

48746-48748 (September 17, 1997), OGE amended the standards of ethical conduct regulation, which removed superseded references to the former honorarium bar, reflected statutory changes on procurement integrity, added references to a new regulation on conflicts of interest (5 CFR part 2640), and made other minor corrections and updates.

Based on feedback from the ethics community, OGE believes that the standards of ethical conduct are generally fulfilling the intended goals of the Executive order in establishing useful, practical guidelines for the executive branch. Over the past six years, OGE has provided interpretive advice to ethics officials on the application of these standards, as specific fact patterns have arisen. As a result, OGE has determined that selected provisions in the standards should now be amended, in order to codify some of that advice and to clarify the intended meaning of the regulatory language. Minor amendments proposed herein will accomplish that with respect to certain provisions in subpart B (Gifts From Outside Sources). The Office of Government Ethics will separately propose minor amendments to other sections of the standards of ethical conduct, to further codify interpretive advice and to improve clarity.

II. Analysis of Proposed Amendments

Section 2635.203

Sections 2635.202 and 2635.203 of the standards of ethical conduct regulation (5 CFR part 2635), published as a final rule in 1992, implemented the general ban on soliciting or accepting gifts from prohibited sources described in 5 U.S.C. 7353 and section 101(d) of Executive Order 12674. In addition, § 2635.202(a)(2) included a general ban on soliciting or accepting gifts from outside sources if given because of the employee's official position. As indicated in the preamble to the proposed standards of conduct regulation in 1991 (56 FR 33780), this latter provision was intended to codify OGE's longstanding interpretation that employees must avoid actions that might result in or create the appearance of using public office for private gain, a principle that was reinvigorated in 1989 by sections 101(g) and 101(n) of Executive Order 12674.

Gifts given "because of the employee's official position" are, as defined in § 2635.203(e), those which would not have been solicited, offered, or given had the employee not held his position as a Federal employee. This definition has been applied too broadly by some, in OGE's view, to encompass gifts based on the mere happenstance that the recipient is a Government employee, rather than confining it to situations where gifts are motivated by Federal employment status, position, or the authority and duties related thereto.

Therefore, in order to fully effectuate the intent of this prohibition, OGE proposes to amend the definition of gifts given because of the employee's official position at § 2635.203(e), by clarifying that it applies only where the gift would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position. New Example 2 further illustrates this intended meaning.

Section 2635.204

Section 2635.204 of the standards of ethical conduct regulation established certain exemptions from the gift prohibitions discussed above, as authorized by 5 U.S.C. 7353 and Executive Order 12674. The introductory text of that section currently notes that a gift accepted under one of the exceptions will not be deemed to violate the fourteen general principles of ethical behavior contained in § 2635.101(b) and Executive Order 12674. Some ethics officials and employees have misunderstood the primary intent of this statement, which is that appearance concerns will not preclude use of the gift exceptions or require an employee to reject a gift which falls within one of the exceptions.

The proposed revision to the introductory text of § 2635.204 highlights the appearance standard as the primary principle among the fourteen that are deemed not to override acceptance of a gift under one of the exceptions. As indicated in the 1992 preamble to the final standards of ethical conduct regulation at 57 FR 35012, this primacy of the gift exceptions over appearance concerns helps promote consistency in application of the gift provisions. Also, as that preamble indicated, appearance

concerns are already built into the conditions required for use of the various gift exceptions, which should allay any concerns that the appearance standard might be ignored. Moreover, a cautionary statement in the introductory text of § 2635.204 remains, to alert employees that it may sometimes be prudent not to accept gifts even though permitted, and § 2635.202(c)(3) limits the over-frequent acceptance of gifts under the exceptions because of the appearance of using public office for private gain.

Section 2635.204(a)

The exception for gifts aggregating \$20 or less per occasion has caused confusion for some ethics officials and employees as to whether all gifts at a particular event must be aggregated or only gifts from each source. A review of the preambles to the proposed and final standards of ethical conduct regulation has led to OGE's interpretation that only gifts from the same source must be aggregated in determining whether the value is \$20 or less (see 56 FR 33781 and 57 FR 35015-35016). Therefore, the proposed amendment to § 2635.204(a) specifies that the de minimis exception allows gifts aggregating \$20 or less "per source per occasion," and provides a new example.

To interpret the rule otherwise could unnecessarily restrict acceptance of de minimis gifts to those from the first source that happens to reach a particular employee at an event or occasion. Furthermore, applying the \$20 maximum to gifts from all sources per occasion would thwart the intent of the de minimis exception, which otherwise focuses on each source. Thus, the term "per occasion" was intended to apply in the same manner as the term "in a calendar year," for which an aggregate \$50 limit from each source applies under § 2635.204(a).

This proposed amendment effectuating OGE's interpretation that the \$20 limit applies per source per occasion will not permit an employee to accept an inappropriately high total value of gifts at a particular occasion or event, as § 2635.202(c)(3) still restricts acceptance from the same or different sources on so frequent a basis that it creates an appearance of using public office for private gain. Nor will it permit an employee to accept a gift worth more than \$20 toward which several sources have each contributed \$20 or less, because a gift is not divisible for acceptance purposes unless it consists of distinct and separate items. This applies equally to a meal, which OGE does not consider to be divisible.

III. Matters of Regulatory Procedure

Executive Order 12866

In promulgating these proposed rule amendments, OGE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. These proposed amendments have also been reviewed by the Office of Management and Budget under that Executive order.

Regulatory Flexibility Act

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

Paperwork Reduction Act

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

List of Subjects in Part 2635

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

Approved: July 29, 1998.

F. Gary Davis,

Deputy Director, Office of Government Ethics.

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

PART 2635—[AMENDED]

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

Authority: 5 U.S.C. 7301, 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.

2. Section 2635.203 is amended by revising paragraph (e) and adding a new Example 2 after that paragraph to read as follows:

§ 2635.203 Definitions.

* * * * *

(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 the status, authority or duties associated with his Federal position.

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Example 2: Employees at a regional office of the Department of Justice (DOJ) work in Government-leased space at a private office building, along with various private business tenants. A major fire in the building during normal office hours causes a traumatic experience for all occupants of the building in making their escape, and it is the subject of widespread news coverage. A corporate hotel chain, which does not meet the definition of a prohibited source for DOJ, seizes the moment and announces that it will give a free night's lodging to all building occupants and their families, as a public goodwill gesture. Employees of DOJ may accept, as this gift is not being given because of their Government positions. The donor's motivation for offering this gift is unrelated to the DOJ employees' status, authority or duties associated with their Federal position, but instead is based on their mere presence in the building as occupants at the time of the fire.

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3. The undesignated introductory text of § 2635.204 is amended by revising the first sentence to read as follows:

§ 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 an employee's acceptance of a gift in accordance with one of those paragraphs will be deemed not to violate the principles set forth in § 2635.101(b), including appearances.

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4. Paragraph (a) of § 2635.204 is amended by adding the words "per source" before the words "per occasion" in the first sentence, and by adding a new Example 5 after paragraph (a) to read as follows:

§ 2635.204 Exceptions.

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(a) * * *

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Example 5: During off-duty time, an employee of the Department of Defense (DOD) attends a trade show involving companies that are DOD contractors. He is offered a \$15 computer program disk at X Company's booth, a \$12 appointments calendar at Y Company's booth, and a deli lunch worth \$8 from Z Company. The employee may accept all three of these items because they do not exceed \$20 per source, even though they total more than \$20 at this single occasion.

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