

Understanding The Amended Executive Branch Gift Rules

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The ethical principles that govern the conduct of federal officials have received more media attention over the past several months than at any time in recent memory. This article addresses the most pertinent rules that govern the acceptance of gifts by members of the executive branch in light of recent changes to the Office of Government Ethics (OGE) regulations that took effect earlier this year.[1]

These rules are important for both federal employees and the companies and individuals that interact with them on a personal or professional basis.

In general, the executive branch gift rules prohibit employees from accepting “gifts” from a “prohibited source,” unless the gift fits into one of the enumerated exceptions to the rule.

A “gift” includes anything of monetary value, including entertainment, meals, or attendance at events. A “prohibited source” is generally any person or organization that is seeking official action by the employee’s agency, whose business is regulated or affected by the agency, or that does business or seeks to do business with the agency.

Admonition Not to Accept Gifts that Create an Appearance of Impropriety

As amended effective Jan. 1, 2017, the rules now contain a section that admonishes employees not to accept a gift if doing so would create an appearance of impropriety — even if the gift is otherwise allowed under the rules.

As explained by the OGE, “employees and ethics officials sometimes focus on whether a regulatory exception permits the acceptance of an otherwise impermissible gift, and not on whether acceptance of the gift could affect the perceived integrity of the employee or the credibility and legitimacy of the agency’s programs.” 80 Fed. Reg. 74004 (Nov. 27, 2015). The OGE’s amendment was designed to address this perceived deficiency in the rules.

The new section explains that “every employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee’s actions should promote the public’s trust that this responsibility is being met. For this reason, employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality as a result of accepting the gift.” 5 C.F.R. § 2635.201(b)(1).

In deciding whether a gift is appropriate under this standard, the new section provides that employees should consider such factors as whether: “(i) The gift has a high market value; (ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action; (iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee’s official duties; and (iv) Acceptance of the gift would provide the donor with significantly disproportionate access.” 5 C.F.R. § 2635.201(b)(2).

Importantly, this section is hortatory rather than mandatory — it says what employees should do, not what they must do — but the effect is that federal employees with any concerns about a particular gift now have an additional reason to decline it.

Free Attendance at Widely Attended Gatherings

One of the most frequently used provisions of the gift rules allows federal employees to accept an offer of free attendance at “widely attended gatherings and other events” if certain requirements are met. 5 C.F.R. § 2635.204(g).

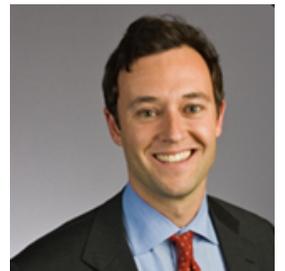
The OGE’s recent amendments preserve this important provision, though they tighten its application in a number of respects.



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First, the rules now require that for an event to qualify under this exception, it must include “an opportunity to exchange ideas and views among invited persons.” 5 C.F.R. § 2635.204(g)(2). The OGE explained that this change does not limit the exception solely to “roundtable or panel events,” but “the event must present an opportunity for an ‘exchange’ or ‘interchange’ of ideas among attendees.” 81 Fed. Reg. 81646 (Nov. 16, 2016).

This change codifies previous OGE guidance that an event does not qualify under this exception if it provides “little opportunity to exchange views with a large and diverse number of persons.” In particular, “some social events may well provide sufficient opportunities for exchange to be considered [widely attended gatherings], but most sporting, theatrical, and musical events do not.” OGE Informal Advisory Op. 07 x 14 at 5.

Second, the amended rules will require employees to get written authorization from their agencies before accepting free attendance at widely attended gatherings. Previously, the authorization could be either oral or written. 5 C.F.R. § 2635.204(g)(1), (3).

Third, agency ethics designees, when deciding whether to approve an employee’s attendance, must consider the risk that it will create an appearance of improper influence, or result in actual improper influence. Previously, the employee’s agency was required to consider simply whether the employee’s attendance “is in the interest of the agency because it will further agency programs and operations.”

Now, before authorizing free attendance, the agency must also find that its “interest in the employee’s attendance outweighs the concern that the employee may be, or may appear to be, improperly influenced in the performance of official duties.” 5 C.F.R. § 2635.204(g)(3)(iii).

Fourth, the rule now includes an example that makes clear that the “widely attended gathering” exception does not cover free travel to the event. 5 C.F.R. § 2635.204(g), Ex. 8. Notably, however, the federal travel regulations, which are separate from the federal gift rules, may allow the employee to accept free travel with appropriate agency approval. 41 C.F.R. § 304.

Finally, it bears noting that President Trump — like President Obama before him — has prohibited political appointees in his administration from accepting free attendance at widely attended gatherings sponsored by lobbying firms or by companies with in-house lobbyists registered under the Lobbying Disclosure Act, unless the appointee is speaking at the event. Executive Order No. 13770.

Free Attendance by Employee and Guest at Event Where Employee Is a Speaker

The amended rules contain an exclusion from the definition of “gift” that allows free attendance at an event where the employee will speak on behalf of his or her agency.

In proposing the amendment, the OGE explained that it “views the employee’s attendance in these circumstances as customary and necessary to allow the employee to carry out his or her assignment, and therefore views such offers of free attendance as not constituting a gift to either the agency or the employee.” 80 Fed. Reg. 74005.

Notably, an employee’s free attendance is limited to the day on which the employee is speaking. Under this exclusion, the employee may bring a spouse or other guest so long as others in attendance are doing so, and may also bring another employee of the agency — such as an assistant — if that other employee’s presence “is deemed to be essential by the agency to the employee’s participation in the event.” 5 C.F.R. § 2635.203(b)(8).

In addition, an employee may take part in a “speakers’ meal” provided by the sponsor of the event. 5 C.F.R. § 2635.203(g).

Personal Friendship Gifts

A federal employee may accept gifts based on personal friendships and family relationships. Employees may, among other things, enjoy food, refreshments, and entertainment at the home of someone with whom they have a personal relationship.

This exception has been amended to codify the OGE’s long-standing interpretation that for a gift to fall within the exception, it must be given “by an individual” rather than a company or organization.

The revised rules include an illustrative example involving a federal employee and a contractor who meet through official activities and become connected through personal social media, but do not interact regularly on a personal level.

The example explains that under these circumstances, the federal employee cannot accept a gift from the contractor because “the circumstances do not demonstrate that the gift was clearly motivated by a personal relationship, rather than the position of the employee.” 5 C.F.R. § 2635.204(b).

Alcoholic Beverages

The gift rules have been amended to make clear that while the definition of “gift” excludes “modest items of food and refreshments,” that exclusion does not cover alcoholic beverages. The exception will now encompass “modest items of food and nonalcoholic refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal.” 5 C.F.R. § 2635.203(b)(1).

This change does not, by its terms, affect the ability of government employees to accept alcoholic beverages under recognized exceptions to the gift rules (e.g., wine served with dinner at a gala event under the “widely attended gathering” exception, or drinks with a friend under the “personal friendship” exception).

Events Held by Former Employers

The revised rules contain an exception that allows federal employees to attend holiday parties and other events held by their former private employers. The exception provides that a federal employee may attend “a reception or similar event” held by a former private employer, so long as other former employees have also been invited and the invitation is not based on the federal employee’s current official position. 5 C.F.R. § 2635.204(e)(4).

Notably, President Trump’s Executive Order No. 13770 does not make this exception available to political appointees in his administration with respect to events hosted by lobbying firms or organizations with in-house lobbyists.

Social Invitations

The gift rules allow a federal employee to accept “social invitations” to events where “no fee is charged to any person in attendance” and the invitation is not from a prohibited source. The rules have been amended to provide that the invitation cannot be solicited by the employee, and to allow the employee to bring a spouse or other guests to the event.

The amended rules also require the employee to get written authorization to accept a social invitation if the sponsor of the event or the sender of the invitation is an organization rather than an individual. 5 C.F.R. § 2635.204(h)(3).

Presentation Items

The amended gift rules exclude from the definition of “gift” “items with little intrinsic value, such as plaques, certificates, and trophies, which are intended primarily for presentation.” This exclusion slightly loosens the previous rule, which covered only items that were “solely for presentation.”

The amended rules also add several examples that make clear that for an item to fall within this exclusion, it must not have significant utility beyond its presentational value. Under this standard, presenting a federal employee with a “glass paperweight” or an engraved “block of granite” after the employee gives a speech is not a gift.

But “an inexpensive portable music player” presented to an employee is a gift because it “has a significant independent use as a music player rather than being intended primarily for presentation.” 5 C.F.R. § 2635.203(b)(2).

No Change to the \$20 Threshold for Prohibited Gifts

Despite requests to do so in light of inflation, the OGE decided not to raise the minimum dollar value of prohibited gifts. The rules provide that an employee may accept a gift worth \$20 or less so long as the employee does not accept multiple gifts from the same person totaling a value of more than \$50 in the same year. 5 C.F.R. § 2635.204(a).

Notably, President Trump’s Executive Order No. 13770 does not make this exception available to political appointees in his administration with respect to gifts from lobbying firms or organizations with in-house lobbyists.

How To Cure Potential Violations

The amended rules preserve as an exception to the gift prohibition “[a]nything for which market value is paid by the employee.” 5 C.F.R. § 2635.203(b)(10).

Thus, an employee who wishes to enjoy a meal or attend an event that would not otherwise qualify under one of the exceptions above may arrange to pay the market value in order to take part.

Conclusion

While the above rules are directed at government employees, those in the private sector should avoid putting their government counterparts in compromising positions by offering anything of value that falls outside one of the recognized exceptions to the gift rules, or where the timing of the gift could raise questions about the government employee’s impartiality in performing his or her duties.

Any private individual or organization with questions about the applicability of the gift rules to a particular circumstance should consult with counsel. Any federal employees with questions about the gift rules should consult with their agency ethics officer, or with the OGE.

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[1] In addition to the OGE regulations, agency political appointees are also subject to President Trump’s Executive Order No. 13770 (Jan. 28, 2017), requiring them to sign an ethics pledge. Among other things, the pledge commits the appointee not to “accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.” The Executive Order is more stringent than the OGE regulations with respect to the permissible gifts that political appointees may accept from lobbyists or the organizations that employ them.