

Office of Government Ethics

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Letter to the Executive Director of a Federal Agency dated March 10, 1993

This is in response to your letter of February 23, 1993, regarding the \$20 de minimis exception to the gift prohibitions at 5 C.F.R. § 2635.204(a) in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) (57 Fed. Reg. 35006-35067 (August 7, 1992)). You express several concerns regarding use of the de minimis exception to permit employees to accept meals from prohibited sources. These include the concern that it will affect public confidence in Government, create a potential for appearance problems, and be generally unenforceable.

In July of 1991, when this Office issued the proposed rule that would become the Standards of Conduct, we recognized that the \$20 de minimis rule would be one of the more controversial provisions. Nevertheless, we had concluded that an across-the-board de minimis rule was preferable to a special rule to deal with meals that would, at a minimum, preserve the exception most agencies have had for years permitting modest meals in the course of a business meeting. Our reasons for that decision are stated in the preamble that accompanied the proposed rule. Of more than 1,000 comments we received in response to the proposed rule, 40 were addressed to the de minimis exception, and a number reflected concerns similar to your own. The preamble to the final rule explains why we retained the de minimis exception. The preamble also explains that we modified the de minimis gift exception by reducing the de minimis amount to \$20 from \$25 and the annual cap to \$50 from \$100. These modifications were intended to balance the concerns of agencies expressing views similar to yours and the need for a de minimis exception. Having taken into account the varying positions of agencies, the final rule was designed to preclude agencies from using concerns such as those that you have raised as a basis for seeking an exception from the \$20 de minimis exception. Our concern was that all employees in the executive branch be subject to the same set of reasonable gift rules and that they have at least one all-purpose exception that is easy to learn, remember and apply.

Your letter suggests that access to a Federal employee can be bought for the price of a meal that costs \$20 or less. You seem

to assume that Federal employees will go to lunches that they would not otherwise go to because some prohibited source has offered to pay and that prohibited sources will thereby gain access to employee time and attention they might not otherwise have. We fully considered this argument in the process of issuing the final rule. We do not agree with your implicit assessment that the ethics rules should be built on, as a foundation, the assumption that the official activities of employees will be swayed by gifts of an infrequent meal worth \$20 or less or by the time employees and prohibited sources share over such meals. This assumption gives very little credit to Federal employees who, on the whole, have proven themselves to be trustworthy and fair-minded. We believe that most employees will exercise sound judgment in accepting gifts and that, within the \$20 limit, little harm will result when their judgment proves less than perfect. Our belief is reflected in the following admonition that appears at 5 C.F.R. § 2635.204 as a preface to the list of exceptions to the gift prohibitions:

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.

There are a number of limitations on the use of the \$20 gift exception. Employees are prohibited from accepting an aggregate of more than \$50 of gifts from any one source in a year. Employees may not accept any gift in return for an official act. An employee may not solicit a gift. And an employee may not accept a gift so often that a reasonable person would believe that the employee is using public office for public gain. See 5 C.F.R. § 2635.204(a) and 202(c). We believe that the restrictions on the use of the exception protect Federal interests.

Contrary to your concern that the de minimis rule is unenforceable, we believe that the current system will be easier to enforce than the old system. Both systems rely on Federal employees' knowledge and application of applicable regulations. Given the ease associated with education of a uniform standard both to employees and the public, understanding of the rules will be greatly facilitated by the uniform rule. We believe employees will be more likely to abide by rules that attempt to be reasonable, fair and workable than rules that trivialize ethics by being overly restrictive and technical. We do not think that

an employee should be subject to disciplinary action for accepting, within the de minimis amount, a pen, a glass paperweight or a lunch bought for him or her by a party with whom he or she is conducting Government business. Excepting these inconsequential types of cases should relieve enforcement burdens and should not add any burden to the investigation of suspected abuses of the rule.

Reasonable persons may differ on these matters, and we recognize that you are not alone in being troubled by the departure from your agency gift rules represented by the new de minimis exception. The Office of Government Ethics is responsible, however, for administering an ethics program that applies a uniform set of rules to all executive branch personnel. Because we cannot ensure uniformity by letting individual agencies opt out of the de minimis rule, it is our policy to decline to concur in any agency supplemental regulation that would eliminate or modify the \$20 de minimis rule. That rule will adequately protect employees of [your agency] from any argument that acceptance of de minimis gifts would constitute a breach of any fiduciary duty they may have.

Sincerely,

Stephen D. Potts
Director