

Memorandum dated December 5, 2007,
from Robert I. Cusick, Director,
to Designated Agency Ethics Officials
Regarding Widely Attended Gatherings

The Office of Government Ethics (OGE) is issuing this memorandum to provide ethics officials with guidance on what kinds of events are covered by the widely attended gathering (WAG) exception to the gift prohibitions in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct).

Unless an exception applies, employees may not accept a gift from a prohibited source or a gift given because of their official position. 5 C.F.R. § 2635.202(a). One of the most commonly used exceptions is for gifts of free attendance at a "widely attended gathering of interest to a number of parties." 5 C.F.R. § 2635.204(g)(2). This exception also may generate more questions for OGE and agency ethics officials than any other exception. One of the most frequently asked questions is what does or does not constitute a WAG? The discussion below explains the general criteria for answering this question in a given case and provides several examples of recurring types of events that OGE has evaluated over the years. The memorandum concludes with a reminder concerning the financial disclosure requirements applicable to gifts accepted under the WAG exception.

A. OVERVIEW OF THE WAG EXCEPTION

The WAG exception has several elements. Not only must the event be "widely attended," under the criteria described more fully below, but a number of other requirements must be met. First, an agency designee must determine that the employee's attendance at the event "is in the interest of the agency because it will further agency programs and operations." 5 C.F.R. § 2635.204(g)(3). Although this standard leaves considerable discretion with the agency designee, sometimes it may be more difficult to make a determination of agency interest with respect to certain types of events, as noted below.

Also, a higher standard must be met if the donor has interests that may be substantially affected by the performance of the employee's official duties, or if the donor is an organization a majority of whose members have such interests. In such cases, the agency designee must make a written finding that the agency's interest outweighs any concern that the gift of free attendance may appear to influence the employee's performance improperly. *Id.*

Further criteria must be met if the cost of the employee's attendance is provided by someone other than the sponsor of the event. § 2635.204(g)(5)(explaining circumstances in which cost is not provided by sponsor). Such gifts from a nonsponsor may be accepted only if more than 100 attendees are expected and the cost of the employee's attendance does not exceed \$305. 5 C.F.R. § 2635.204(g)(2).¹

There also are important limits on the kinds of benefits or items that an employee may accept under this provision. The exception permits a waiver of all or part of any attendance fee, as well as food, refreshments, entertainment, instruction and materials "furnished to all attendees as an integral part of the event." § 2635.204(g)(4). The exception does not cover "entertainment collateral to the event, or meals taken other than in a group setting with all other attendees." *Id.* Nor does the exception cover travel and lodging.

Additionally, the rule provides criteria concerning the status of the employee during attendance at a WAG. Specifically, if the employee is subject to a personnel leave system, the employee generally must attend the event on personal time. However, an employee may be authorized to attend on excused absence or otherwise without charge to the employee's leave account, pursuant to any applicable guidelines.

Finally, like all of the exceptions to the gift prohibitions, the WAG exception is subject to the general limitations found in 5 C.F.R. § 2635.202(c). Thus, an employee may not coerce, or even solicit, an offer of free attendance at a WAG. Nor may an employee accept free attendance in return for being influenced in the performance of an official act.

¹OGE periodically revises this rule to increase the dollar amount, consistent with comparable adjustments to other regulations. See 70 *Federal Register* 12111 (March 11, 2005).

Moreover, it bears emphasizing that employees may not accept gifts of free attendance "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." 5 C.F.R. § 2635.202(c)(3).²

B. WHAT IS A WAG?

In order to understand what constitutes a widely attended gathering, it is helpful to understand a little history about the origin and purposes of the WAG exception.

As OGE stated when it first proposed the Standards of Conduct in 1991, the "exception for widely-attended gatherings . . . is one that has been incorporated into the standards of conduct regulations of many agencies." 56 *Federal Register* 33777, 33782 (July 23, 1991).³ OGE previously had explained the basic purposes of such a provision: "We believe that there are certain instances where an agency may have a legitimate interest

²Section 2635.202(c)(5) provides one further limitation: employees may not accept "vendor promotional training," as defined in section 2635.203(g), in violation of any applicable procurement regulations, policies or guidance. OGE added this limitation to ensure that any gift would be consistent with the guidelines on vendor promotional training in the Federal Information Resources Management Regulation, which was issued by the General Services Administration (GSA). 57 *Federal Register* 35006, 35012-13 (August 7, 1992). However, the GSA regulation was rescinded in 1996, and OGE is aware of no Governmentwide regulation, policy or guidance that has taken its place. To the extent that any agency has its own procurement regulations, policies or guidance regarding vendor promotional training, employees may not rely on the OGE gift exceptions to accept a gift that would be inconsistent with such guidelines. See also the discussion of "Contractor-Sponsored Seminars and Similar Events" below.

³Before OGE promulgated the final Standards of Conduct in 1992, each agency had its own standards of conduct regulations, including gift exceptions, subject to approval by OGE (originally the Civil Service Commission). The OGE WAG exception in 5 C.F.R. § 2635.204(g)(2) was modeled on similar WAG exceptions that were already found in some of these agency standards of conduct regulations.

in permitting attendance at certain *group events* where food is served so that employees may be able to meet on a less formal basis and have an *interchange of ideas with a variety of individuals*, including members of nongovernmental groups, legislators and other Government agency personnel, who are interested in but may have divergent positions on the same issues." OGE Informal Advisory Memorandum 87 x 13 (emphasis added). OGE emphasized that the focus was on "the *larger group gathering* where the invitees and/or the hosts are more *diverse*." *Id.* at fn. 1 (emphasis added).

These same purposes are still embodied in section 2635.204(g)(2). In defining a WAG, the rule provides a two-part standard that emphasizes both the size of the gathering and the diversity of views or interests represented: "[a] gathering is widely attended if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present." 5 C.F.R. § 2635.204(g)(2).⁴ The rule does not use any numerical standards to define the necessary size or diversity of a WAG.⁵ However,

⁴The version first promulgated in 1992 did not explicitly require that the event be attended by a "large" and "diverse" group, but OGE amended the rule in 1996 to make this intention plain. As explained in the preamble to the proposed amendment, OGE always had viewed "the normal meaning of the phrase 'widely attended' as encompassing those attended by many," but some interpreters had incorrectly applied section 2635.204(g)(2) to relatively small gatherings. 60 *Federal Register* 31415, 31417 (June 15, 1995). OGE also sought to clarify its intention that the size of the group is only one part of the test, and that a second requirement, diversity of viewpoints or interests represented, must be satisfied as well. See 61 *Federal Register* 42965, 42966 (August 20, 1996).

⁵As OGE stated in connection with the 1996 amendments: "While a specific minimum number or a range of numbers might, in some ways, facilitate agency administration of the rule and even possibly reduce employee inquiries, OGE believes that setting such numbers for sponsor gifts would unduly limit the flexibility that agencies require to administer this rule effectively." 61 *Federal Register* at 42966. Note, however, that the rule does specify a minimum number of attendees (more than 100) where the gift of free attendance is from someone other than the sponsor of the event. 5 C.F.R. § 2635.204(g)(2).

the examples following section 2635.204(g) illustrate the concepts; example 3, in particular, indicates that a small dinner party is not a WAG, that an event attended primarily by the personnel of a particular company is not a WAG regardless of the number of attendees, and that the presence of a token representative of a divergent interest group will not cure an otherwise non-diverse gathering. In any case, the rule plainly contemplates that the agency designee will make sufficient inquiry into the number and diversity of expected attendees at a given event before an employee is permitted to rely on the exception.

OGE also still considers it fundamental that a WAG must provide the opportunity for "an exchange of ideas" with a large and diverse group. OGE Informal Advisory Letter 99 x 2; see OGE 87 x 13 ("interchange of ideas"). If an event is so structured that an employee has little opportunity to exchange views with a large and diverse number of persons, then the very purpose of the exception would be defeated. In fact, the requirement that attendees represent "a diversity of views or interests" would be irrelevant if the employee had no meaningful opportunity actually to exchange views with those other attendees. OGE does not consider such events to be WAGs. As described below, some social events may well provide sufficient opportunities for exchange to be considered WAGs, but most sporting, theatrical, and musical events do not.

C. RECURRING TYPES OF EVENTS

Over the years, employees and ethics officials have raised questions about certain recurring scenarios, so OGE thought it would be useful to summarize its advice with respect to the following general categories of events. Of course, a particular event may raise unique issues that need to be evaluated on a case-by-case basis, but the general guidance below should help ethics officials determine whether many proposed events actually qualify as WAGs.

1. "Social" Events Generally

Although many of the events that fall within the WAG exception have a substantive or educational component, such as conferences and seminars, OGE long has held that some events that are primarily social in nature also can qualify as WAGs. See OGE Informal Advisory Letters 99 x 2; 97 x 15; 94 x 2; 93 x 15. Thus, agencies have applied the exception to a range of receptions, gala celebrations, and similar social events over

the years. This should not be surprising, considering the genesis of the rule: as described above, the original impetus for this and similar exceptions under the former agency standards of conduct was the desire to afford employees the opportunity to meet with a variety of persons in less formal settings than official working meetings.

Of course, many social gatherings are not WAGs. For example, small dinner parties, whether held in a restaurant or a more private setting, simply are not widely attended, even though the guests may have the opportunity to exchange views. See 5 C.F.R. § 2635.204(g)(example 3); OGE 87 x 13, fn. 1. Likewise, some of the specific types of events discussed below are social occasions, such as sporting and theatrical events, that OGE generally does not consider to be WAGs.

Even where a social event is widely attended, the agency still must make a determination that the employee's attendance is in the interest of the agency. OGE has stated that it can be more difficult to find that an employee's attendance is in the agency's interest "when the event is primarily social as opposed to when the event is in the nature of a conference or seminar." OGE 93 x 15; see OGE 94 x 2 (same). Likewise, OGE has indicated that some social events may be more conducive than others to the exchange of ideas. See OGE 99 x 2. Therefore, agencies are advised to evaluate the circumstances of any social event carefully, including the identity of likely attendees and the expectation of exchanges that actually "will further agency programs and operations." 5 C.F.R. § 2635.204(g)(2).

2. *Charity Fundraisers*

Fundraising events can be viewed as "one type of social gathering." OGE 99 x 2. OGE has advised that nothing in the WAG rule bars its application to fundraisers per se. *Id.*⁶ One might argue that a fundraising event does not reflect a sufficient diversity of attendees, because all attendees are united by their common support of the same charity. However, OGE does not read the diversity requirement in

⁶Although OGE raised certain concerns about attendance of employees at fundraisers in an opinion issued prior to the Standards of Conduct, see OGE Informal Advisory Letter 89 x 2, OGE later concluded that fundraisers could be covered by the WAG exception in appropriate cases. OGE 99 x 2.

section 2635.204(g)(2) to require this result. In OGE's experience, fundraisers may bring together persons with diverse interests and views on broader public policy concerns that are related to the particular charitable mission. For instance, a fundraiser for a nonprofit health organization might bring together public health advocates, academic researchers, health industry representatives, and state and Federal health officials, all of whom are interested in health policy but have diverse perspectives. Indeed, the Standards of Conduct elsewhere recognize that a fundraiser can be "an appropriate forum for the dissemination of information." 5 C.F.R. § 2635.808(a)(3).

Nevertheless, agencies still need to determine that attendance by an employee at any fundraiser really furthers agency interests. In connection with fundraising events, OGE has noted that "concerns about appearances and preferential treatment . . . may still provide relevant considerations for an agency's use in evaluating whether to approve an employee's acceptance of free participation at widely attended gatherings as being in the agency's interest." OGE 99 x 2; see also OGE 89 x 2. In other words, ethics officials appropriately may consider whether it is truly in the agency's interest for employees to accept free attendance at a function devoted to singling out a particular organization for special recognition and largesse.⁷ Moreover, as always, it is important to consider whether an employee's attendance is likely to result in the kinds of interaction in which the agency is truly interested, given the structure and content of the event and the identity of the other attendees.

3. *Sporting Events*

OGE has received many questions from agency ethics officials and others concerning the application of the WAG exception to sporting events, such as baseball games, horse races, and golf tournaments. OGE has concluded that such events

⁷Note that if an employee is not merely an attendee, but a participant in the conduct of a fundraising event, other limitations pertaining to employee fundraising activities will apply. See 5 C.F.R. § 2635.808. In such cases, however, the waiver of any fee for attendance at the fundraiser by a participant in the conduct of the event does not constitute a gift, under the OGE gift rules. 5 C.F.R. § 2635.808(a)(2).

typically do not qualify as WAGs. Sporting events generally are not structured in a way that facilitates the exchange of ideas among a large and diverse group of attendees, which is the purpose of the WAG exception. Employees in these settings typically do not have sufficient freedom to mix and converse with all other attendees.

Occasionally, OGE has been asked whether a sporting event can be characterized as a WAG if there is a reception, either before, during, or after the event. Some have argued that a reception, where attendees can move about and converse more freely, provides an adequate opportunity for interaction with other attendees. OGE does not agree that the mere availability of a reception is sufficient to convert an entire sporting event into a WAG. It is true that the exception permits employees to accept free "entertainment" furnished to all WAG attendees "as an integral part of the event." 5 C.F.R. § 2635.204(g)(4). In most cases, however, the real "event" is the sporting activity, not the reception, which is simply ancillary to the main attraction. It would be a case of the "tail wagging the dog" to say that free attendance at the main sporting event is justified because it is "integral" to a clearly subsidiary reception.⁸

4. *Theatrical and Musical Events*

OGE generally treats plays, operas, concerts, and similar performances in the same way as sporting events. Like sporting events, performing arts presentations usually are not structured

⁸Arguably, some of these receptions may be large and diverse enough to be characterized as WAGs in their own right, apart from the sporting event. However, this would not permit free entry to the actual sporting event on the theory that it is somehow "integral" to the reception. For one thing, this would open the door to gifts of lavish entertainment that do not particularly further the regulatory purpose of promoting the "exchange of views." Moreover, if one chooses to view the reception as a discrete WAG in the first place, OGE does not think it makes much sense to say that the sporting event is "integral" to the reception in the sense of being "essential or necessary for completeness." *The American Heritage Dictionary of the English Language* (2006). Basically, the WAG rule may not be manipulated to cover a reception or other function that serves mainly as an excuse for employees to accept free admission to a sporting event.

to foster the kind of interchange among attendees envisioned by the WAG rule. Therefore, such performances ordinarily would not constitute WAGs. A possible exception might be a play or a movie screening where attendees are invited to participate in a group discussion of issues raised by the presentation as a significant part of an overall event. As with sporting events, OGE generally would not view the availability of a reception as sufficient reason to characterize an artistic or theatrical performance as a WAG.

5. *Company Parties*

Regulated companies, Government contractors, law firms and other business entities sometimes invite agency employees to attend private company parties, often during the holiday season. In the case where the expected attendance at these parties includes individuals from a variety of types of organizations with a diversity of view points such as clients, legislative branch employees, executive branch employees from different agencies, employees of non-Governmental organizations, suppliers, customers, and others, OGE would view the event to be sufficiently diverse to be a widely attended gathering. However, if the expected attendance at a party is limited to the company's employees and a few executive branch employees from the same agency, or to a similar group lacking a diversity of view points, OGE generally would not view such a party as being sufficiently widely attended. These latter events often are largely for the benefit of the company's own employees and do not permit the opportunity for an exchange of ideas among participants with adequately varied points of view. See OGE Informal Advisory Memorandum 06 x 7 (example following question 27). Of course, an agency must still determine that the employee's attendance at the party is in the agency's interest. See the discussion of "'Social' Events Generally" in Section C, paragraph (1) above.

6. *Contractor-Sponsored Seminars and Similar Events*

Government contractors occasionally invite agency employees to attend seminars and similar events devoted to various subjects. Depending on the circumstances, these contractor-sponsored events may or may not be WAGs. Usually, the question turns on the diversity of the attendees, which in turn may depend on the focus of the event.

On the one hand, an event that is primarily focused on promoting a given company's products and services to current or

prospective customers is not a WAG. The intended audience for such an event is generally confined to those who have an actual or potential commercial relationship with a single company. This is not the kind of opportunity for exchange among persons with diverse interests and views at which the rule is directed.⁹ Compare 5 C.F.R. § 2635.204(g)(2)(gathering is diverse "for example, if it is open to members from *throughout the interested industry*").

On the other hand, OGE has advised that the WAG exception may apply to more diverse gatherings focused on broader issues than the sponsor's own products. In OGE 06 x 7, for example, we indicated that an agency may authorize attendance at a conference, co-sponsored by a contractor and a university, that would not focus on a particular company's own products and services but rather on IT security threats generally. The latter example also included speakers from academia, industry and government. Note, however, that if an employee has official duties related to a particular contractor, there must be a written determination that the agency's interest in the employee's attendance will outweigh any concern that the employee may be improperly influenced.

7. Board Meetings

Agencies sometimes ask whether the WAG exception applies to free attendance at the meeting of a board of directors of a for-profit or nonprofit corporation. Some corporate boards are relatively large and their members often come from different walks of life. Nevertheless, OGE does not view corporate board meetings as being sufficiently diverse, within the meaning of the WAG rule. The focus of a corporate board meeting is on the business of the corporation, and all board members are attending

⁹Apart from the WAG rule, OGE understands that agencies sometimes may assign employees to attend such events on official duty in order to learn more about the products and services the contractor can offer the agency. In some cases, agencies may pay any attendance fees, or accept a waiver of fees if permitted under an applicable agency gift acceptance statute. Where no attendance fees are charged and the only personal items given to employees are refreshments or meals, employees may be able to rely on provisions in the OGE gift rules other than the WAG exception. See 5 C.F.R. §§ 2635.204(a)(\$20 *de minimis* exception); 2635.203(b)(1)(exclusion for modest refreshments).

in their capacity as fiduciaries of the same organization. Although OGE does not doubt that agencies occasionally may have an interest in their employees' attending a particular board meeting, the WAG exception is simply not appropriate for such events.

This does not necessarily mean that attendance at such meetings is precluded. In some cases, attendance at a board meeting will not involve a "gift" at all, for example, if no entertainment or food is provided, other than modest refreshments. See 5 C.F.R. § 2635.203(b)(1); OGE Informal Advisory Letter 98 x 15. In other cases, the employee may be attending in an official capacity to present the views of the agency, which may be permissible under section 2635.204(g)(1); note that the latter provision is not by its own terms limited to "widely attended" events.¹⁰ Moreover, various gift exceptions, such as the de minimis exception, 5 C.F.R. § 2635.204(a), or the exception for meals and other benefits resulting from an employee's outside business activities, 5 C.F.R. § 2635.204(e)(2), could be applicable in other circumstances.

OGE also would distinguish board meetings from the kinds of periodic conventions that are held by many associations for their members. Although these conventions may have some activities related to the internal business of the organization as such, often there are many other activities focused on issues of broader concern to an entire industry or profession. Indeed, these events can become the very occasion for bringing together "members from throughout the interested industry or profession" envisioned by the WAG rule. 5 C.F.R. § 2635.204(g)(2).

8. *University Events*

Symposia and similar proceedings sponsored by universities often are attended by members of the public or the larger academic world, and one generally would expect such events to qualify as WAGs. Occasionally, however, employees may be invited to attend narrower events that are limited almost

¹⁰See 57 *Federal Register* at 35020 ("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").

exclusively to the internal university community, i.e., administrators, faculty and students. For example, if a senior official at the Department of Education were invited by a university to attend a reception where attendance is otherwise limited to the internal university community, the event would not constitute a WAG because the interests or points of view represented are more or less associated with the university itself.

9. *Events Focused on Federal Officials*

A difficult set of issues is posed by events that are limited or primarily directed to an audience of Federal employees. In such cases, one reasonably might question whether the gathering is sufficiently diverse, because most of the attendees are employed by the same Government and there is little opportunity to exchange ideas with outside parties.

Certainly, an event that is largely devoted to promoting the sponsor's products to a Federal audience is not a WAG (see discussion of "Contractor-Sponsored Seminars and Similar Events" above). Moreover, events limited mainly to attendees from one agency, or a small number of agencies involved in related operations, would be very difficult to characterize as a WAG.

Other events, however, may come closer to the kind of diversity required by the rule. For example, OGE is aware that think tanks and other organizations occasionally conduct events to sensitize Federal officials to certain issues or to bring together representatives from various agencies to share their experiences and views on matters of common concern. Sometimes, this type of event can be characterized as a WAG, particularly if the attendees represent a significant range of agencies with different perspectives on the subject and the sponsoring organization brings in at least a few scholars or experts who are neither Federal employees nor officers or staff of the sponsor.

Another example involves organizations comprised mostly of Federal employees, such as associations of Federal attorneys or physicians, which may sponsor educational and other events. Federal policy generally recognizes that such organizations can benefit an agency's programs. See 5 C.F.R. § 251.202 (agency support to organizations in which employees participate); cf. 18 U.S.C. § 205(d)(1)(B) (representation of organizations comprised of Federal employees). Particularly where the event is likely to attract professionals from across the Government,

agencies may authorize employees to accept offers of free attendance under the WAG rule. Of course, employees who are actually members of the particular organization sometimes may accept certain benefits, including free attendance at certain events, pursuant to other gift provisions. See, e.g., 5 C.F.R. § 2635.204(c)(discounts and similar benefits).¹¹

D. FINANCIAL DISCLOSURE

A final word is in order concerning the disclosure of gifts of free attendance on public and confidential financial disclosure statements. With certain limitations, filers of annual and termination reports generally are required to disclose all gifts from any one source with an aggregate value in excess of \$305 for the reporting period. See 5 C.F.R. §§ 2634.304; 2634.907(g).¹² **Gifts of free attendance accepted under the WAG exception are subject to this reporting requirement because these gifts are accepted by an employee in a personal capacity. They are not gifts accepted by the employee's agency.**

OGE's experience suggests that some may have misunderstood this disclosure requirement in the past, perhaps on the assumption that such items need not be reported as personal gifts because an agency designee already has made a determination that attendance is in the agency's interest. Nevertheless, nothing in section 2635.204(g)(2) or in the Standards of Conduct generally excuses filers from disclosing otherwise reportable gifts. Moreover, this conclusion serves the policies underlying financial disclosure: the transparency afforded by public reporting, in particular, serves as an additional disincentive to accepting gifts of free attendance under questionable circumstances. See S. Rep. 170, 95th Cong., 1st Sess. 21-22 (1977)(public disclosure will deter conflicts and enable public to evaluate officials' performance in light of outside interests). In the future, therefore, agency ethics officials should be mindful of the financial disclosure

¹¹An employee whose membership fee payment automatically entitles him or her to attendance at certain meetings has already paid market value, and the attendance would not even constitute a gift. See 5 C.F.R. § 2635.203(b)(9).

¹²Periodic adjustments are made to the dollar thresholds for gift reporting. See 5 U.S.C. app. § 102(a)(2)(A).

obligations of employees who are authorized to accept free attendance at events under the WAG rule.

Of course, many gifts of free attendance may not meet the dollar threshold for financial disclosure. Moreover, employees who are granted free attendance at an event for the purpose of giving an official speech or otherwise conveying information on behalf of their agency have not received a gift at all. See 5 C.F.R. § 2635.204(g)(1) ("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.").

CONCLUSION

As should be apparent from the discussion above, the application of the WAG exception requires good judgment on the part of ethics officials and agency designees. This is true not only in determining whether the event is widely attended but also in determining that a particular employee's attendance is in the interest of the agency. No doubt, some events will pose close questions. Officials should take care, therefore, to evaluate all the relevant circumstances of any proposed WAG before an employee is authorized to accept free attendance.