

Office of Government Ethics

99 X 2

**Letter to an Industry Group
dated March 15, 1999**

Your letter of January 12, 1999, requested advice from the Office of Government Ethics (OGE) regarding acceptance of free attendance by Government employees at widely attended gatherings, and related issues. You suggested some possible inconsistencies on these matters among existing OGE advisory opinions, as well as between those opinions and the gift rules in the Standards of Ethical Conduct for Employees of the Executive Branch regulation at subpart B of 5 C.F.R. part 2635.

BACKGROUND

Your letter indicates that [an] Industry [Group] of [a Corporation] plans to cosponsor a fund-raising event with [a Foundation]. As legal counsel for the [Industry Group], you are seeking OGE's advice on potential gift issues arising from that cosponsorship. We understand from your letter that the [Corporation] is a nonprofit corporation comprising organizations interested in governmental use of resources, and that the [Industry Group] is an advisory group within the [Corporation], made up of companies that [provide resources] to the Government and organized to enhance communications between professional Government resources managers and the industrial community.

The [Industry Group]/[Foundation] fund-raising event, according to your description, will include a dinner, live entertainment, special recognition of a senior Government official and a senior industry official for their support of [resources] management in the Government, an opportunity for exchange of ideas in an informal setting, an auction, and a raffle featuring a Mercedes Benz as first prize. You anticipate that the price of attendance will be \$250 per person, with more than 100 persons expected to attend, including Congressional leaders and representatives of companies that are members of the [Industry Group].

Your inquiry concerns the [Industry Group's] proposal to

invite senior Government [resources] managers, and [other] persons in similar positions, to attend without charge, courtesy of the [Foundation]. These invitations would be extended to specific Government employees, identified by job title or function, as well as their spouses, and you are asking whether free attendance would be acceptable under Government gift rules for widely attended gatherings. Alternatively, you suggest that persons other than the event sponsors may be willing to defray the cost of attendance for specific employees. Your third alternative, if the first two are determined to be impermissible, is for the [Industry Group] and [the Foundation] to offer all Government employees a discount to attend the event.

GIFTS OF FREE ATTENDANCE AT WIDELY ATTENDED GATHERINGS

Regulatory and Interpretive Guidance Extant

As your letter tacitly acknowledges, OGE can provide advice on these matters only for employees in the executive branch of the Federal Government. The Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) regulation, which was promulgated in 1992 and is codified at 5 C.F.R. part 2635, controls. You correctly observe that, under 5 C.F.R. § 2635.202(a)(1), employees cannot accept gifts of free attendance at an event from a prohibited source unless an exception applies. The [Industry Group] falls within the definition of a prohibited source at 5 C.F.R. § 2635.203(d) for employees of certain Federal agencies, because a majority of the [Industry Group's] members seek or conduct business with those Federal agencies. Even if the donor is determined not to be the [Industry Group] but instead the [Foundation], which might not be a prohibited source, the same gift rules still govern, as the free attendance is being offered to specific Government employees because of their official positions. See 5 C.F.R. §§ 2635.202(a)(2) and 2635.203(e).

Your letter recognizes that the gift ban's exception for certain widely attended gatherings, at 5 C.F.R. § 2635.204(g)(2), potentially could permit invited Government employees and their spouses to accept free attendance from the [Industry Group] or [the Foundation] as sponsors of this fund-raising event. As you know, this exception encompasses gatherings of mutual interest to a number of parties, at which it is expected that a large number of persons with a diversity of views or interests will attend. Further, this exception applies only after a determination by the

employee's agency that attendance is in that agency's interest because it will further agency programs and operations. Where the invitation has been extended by a person who has interests that may be substantially affected by the performance or nonperformance of an employee's official duties, a determination of agency interest must include a written finding that the agency's interest outweighs concerns about improper influence on the employee's performance of duties, or even the appearance thereof.

You are concerned about statements in OGE's Informal Advisory Letter 89 x 2, which you believe might be interpreted by some agencies to inhibit or limit their discretion in reaching a finding of agency interest. In evaluating whether such a finding would be appropriate, that opinion noted that "charitable fund-raising events are not customarily structured to facilitate an interchange of ideas." Further, it expressed concerns beyond the gift question, noting that OGE had "grave doubts as to the appropriateness of attendance at charitable fund-raising events by executive branch employees who are invited because of their official positions." The opinion noted that employees are prohibited from taking any action which might result in or create the appearance of giving preferential treatment, and that by attending such events, a Government employee "appears tacitly to be endorsing the beneficiary organization by assisting in its fund-raising effort."

You query whether that opinion may be inconsistent with OGE Informal Advisory Letter 93 x 15, which acknowledged that a finding of agency interest could be made even for attendance at certain social gatherings, since the focus for such a determination is not on the nature of activity at a widely attended gathering but on whether the gathering is of mutual interest to those in attendance and will further agency programs and operations.¹ Additionally, you suggest that Example 2 following 5 C.F.R. § 2635.203(c) of the Standards of Conduct regulation appears to recognize a charitable fund-raising event as suitable for a finding of agency interest under the gift exception for certain widely attended gatherings.

Legal Analysis

¹ See also OGE Informal Advisory Letters 94 x 2 and 97 x 15.

We do not find the two OGE opinions which you referenced to be palpably inconsistent. Fund-raising events are only one type of social gathering; others, such as receptions, may more clearly be conducive to an exchange of ideas or otherwise more readily support a finding of agency interest. Concerning the regulatory example that you cited, it simply elucidates the manner of calculating fair market value when determining whether free attendance at an event falls within the separate gift exception for gifts of \$20 or less, by illustrating that the face value of a ticket to a charitable fund-raising event will typically exceed that amount. The example neither supports nor vitiates the possibility that a charitable event could meet the regulatory requirements for a widely attended gathering.

We do not mean to imply that charitable fund-raising events can never justify a finding of agency interest, nor do we consider OGE Informal Advisory Letter 89 x 2 to interpose such a bar. As your letter acknowledges, each agency must make that determination for itself, after considering the particular circumstances. Furthermore, OGE Informal Advisory Letter 89 x 2 has been circumscribed to some extent by the subsequent 1992 regulation on Standards of Conduct. That regulation states in the introductory text on gift exceptions at 5 C.F.R. § 2635.204 that "an employee's acceptance of a gift in accordance with one of those paragraphs [the gift exceptions] will be deemed not to violate the principles set forth in § 2635.101(b), including appearances."²

Nonetheless, we do not believe it would be appropriate or necessary to rescind OGE Informal Advisory Letter 89 x 2. The concerns about appearances and preferential treatment that were highlighted therein may still provide relevant considerations for an agency's use in evaluating whether to approve an employee's acceptance of free participation at widely attending gatherings as being in the agency's interest. Those types of concerns are now built directly into the requirements for each gift exception, as illustrated by the widely attended gatherings exception at 5 C.F.R. § 2635.204(g)(3)(i):

If the person who has extended the invitation has interests that may be substantially affected by the

² This text is quoted from the most current version, as amended at 63 *Fed. Reg.* 69993 (December 18, 1998).

performance or nonperformance of an employee's official duties or is 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 the 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.

See also the regulatory preamble to this section when it was being revised in 1996, at 61 *Fed. Reg.* 42965, 42966 (August 20, 1996), which underscores the need for agencies to balance an event's value to their programs and operations against appearance concerns, before deciding that the widely attended gatherings exception can be utilized.

In addition to the gift acceptance question of free attendance at a charitable fund-raising event, employees and their agencies must separately consider the implications of any involvement in such an event beyond mere attendance, whether in a personal or official capacity. Those concerns, detailed at 5 C.F.R. § 2635.808, include restrictions, for example, on the employee's solicitation of funds, participation in the conduct of a fund-raising event, and use of official position, title or authority.

Donors Other than Event Sponsors

As an alternative to having the [Industry Group] or [the Foundation] bear the cost of attendance for specific Government employees, your letter suggests that certain nonsponsors might be willing to do so. An agency may approve nonsponsor gifts under the exception for widely attended gatherings where more than 100 attendees are expected, if the value of such a gift will not exceed \$250, conditions which you indicate this event will satisfy. A gift from someone other than the sponsor of an event necessitates this additional scrutiny and special limitation, as provided at 5 C.F.R. § 2635.204(g)(2) and (g)(5). Assuming that free attendance at this event has been properly evaluated by the [Industry Group] and [the Foundation] at \$250 per person, you are correct that a gift of free attendance to an employee from a non-sponsor would preclude an additional such gift to that employee's spouse, as both are gifts to the employee and must be aggregated.

RELATED ISSUES

You had proposed a third alternative of offering a discount to all Government employees who wish to attend this event, if the first two alternatives were not permitted by the rules. Since those two alternatives are available, subject to each agency's examination and approval as outlined above, you may decide not to explore the discount option. If you do choose to consider that mechanism, you should consult the gift exclusion that you cited at 5 C.F.R. § 2635.203(b)(4), and you may wish to discuss the specifics of such a plan with us directly.

Your letter also offered assurances that all event participants would be admonished about their own responsibility to determine whether they may accept any door prizes, raffle prizes,³ or other awards at this fund-raising event. We appreciate that concern and concur that it is a matter for employees and their agencies to consider, utilizing the rules on gifts, especially the gift exclusion at 5 C.F.R. § 2635.203(b)(5) and OGE interpretations thereof. If the senior Government official that you plan to honor at the event will be receiving an award or attending officially, that official and his agency may also want to consult 5 C.F.R. § 2635.204(d) on achievement awards and section 2635.808(a)(2) on special waiver of attendance fees.

Sincerely,

Stephen D. Potts
Director

³ Any legal issues regarding the conduct of a raffle will be left to your examination; OGE expresses no opinion regarding that matter.