

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



Preventing Conflicts of Interest
in the Executive Branch

Part II of II: Significant Changes to Subpart B's Gift Exceptions

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Questions from Part I: A Recap



- Market Value at § 2635.203(c):
 - Question: If a gift has a retail cost but is also available from an online marketplace, should an employee use the retail cost or the cost from the online marketplace to determine market value?

Definition of Market Value



- Changes to Market Value by Final Rule:

(c) *Market value* means the cost that a member of the general public would reasonably expect to incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit is deemed to be the face value of the ticket.

Questions from Part I: A Recap



- Market Value at § 2635.203(c):
 - Question: If a gift has a retail cost but is also available from an online marketplace, should an employee use the retail cost or the cost from the online marketplace to determine market value?
 - Answer: If a gift has a retail cost, the employee must use the retail cost, not the cost from an online marketplace.

Questions from Part I: A Recap



- Free Attendance for Official Capacity
Speaking at § 2635.203(b)(8) & Definition of
Free Attendance at § 2635.203(g):
 - Question: If a speakers' meal occurs on the day before or the day after the employee is to speak in their official capacity, may the employee attend the meal under § 2635.203(b)(8)?
 - Answer: Not under § 2635.203(b)(8), but another authority may allow attendance.

Questions from Part I: A Recap



- Disposition by Destruction at § 2635.206(a)(1):
 - Question: Under § 2635.206(a)(1), does destruction mean that no one is able to enjoy the prohibited gift?
 - Answer: Yes.

Significant Changes to Subpart B's Exceptions



§ 2635.204	Exceptions to the prohibition for acceptance of certain gifts
§ 2635.204(a) & (b)	Gifts of \$20 or less & Gifts based on a personal relationship
§ 2635.204(d)	Awards and honorary degrees
§ 2635.204(e) & (f)	Gifts based on outside business or employment relationships & Gifts in connection with political activities permitted by the Hatch Act Reform Amendments
§ 2635.204(g)	Gifts of free attendance at widely attended gatherings
§ 2635.204(h)	Social invitations
§ 2635.204(m)	Gifts of informational materials

General prohibition on solicitation or acceptance of gifts (§ 2635.202)



- Last Week:

§ 2635.202 General prohibition on solicitation or acceptance of gifts.

(a) Prohibition on soliciting gifts.

Except as provided in this subpart, an employee may not, directly or indirectly:

(1) Solicit a gift from a prohibited source; or

(2) Solicit a gift to be given because of the employee's official position.

(b) Prohibition on accepting gifts.

Except as provided in this subpart, an employee may not, directly or indirectly:

(1) Accept a gift from a prohibited source; or

(2) Accept a gift given because of the employee's official position.

§ 2635.204: Exceptions to the prohibition for acceptance of certain gifts



- First, why do some Exceptions permit employees to solicit gifts in certain circumstances from prohibited sources and accept those gifts, while others only permit employees to accept certain gifts?
 - OGE crafted the general prohibition on soliciting a gift to be expansive. But in doing so, it can be interpreted to cover situations that it is not meant to cover.
- Second, is this a substantive change? No.
- Where is this change reflected? The exceptions.

§ 2635.204: Exceptions to the prohibition for acceptance of certain gifts



¹ (a) *Gifts of \$20 or less.* An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph (a) does not exceed \$50 in a calendar year.

	Solicit PS (a)(1)	Solicit B/C (a)(2)	Accept PS (b)(1)	Accept B/C (b)(2)
De Minimis	x	x	✓	✓
Personal Relationship	✓	x	✓	✓
Discounts	✓	x	✓	✓
Awards and Degrees	✓	x	✓	✓
Outside Employment	✓	x	✓	✓
Hatch Act	✓	x	✓	✓
WAG	x	x	✓	✓
Social Invites	x	x	x	✓
Foreign Areas	x	x	✓	✓
To Pres & VP	✓	x	✓	✓
Supp Reg	N/A	x	✓	✓
Statute	N/A	x	✓	✓
Info Mats	x	x	✓	✓

	Solicit PS (a)(1)	Solicit B/C (a)(2)	Accept PS (b)(1)	Accept B/C (b)(2)
De Minimis	x	x	✓	✓
Personal	✓	x	✓	✓
Employment		x	✓	✓
		x	✓	✓
		x	✓	✓
		x	✓	✓
Hatch Act	✓	x	✓	✓
WAG	x	x	✓	✓
Social Invites	x	x	x	✓
Foreign Areas	x	x	✓	✓
To Pres & VP	✓	x	✓	✓
Supp Reg	N/A	x	✓	✓
Statute	N/A	x	✓	✓
Info Mats	x	x	✓	✓

2635.205(b): “Use, or permit the use of, the employee’s Government position, or any authority associated with public office, to solicit or coerce the offering of a gift;”

§ 2635.204: Exceptions to the prohibition for
acceptance of certain gifts & § 2635.205:
Limitations on use of exceptions



Example: Eric works for the FDA, and his childhood friend, Ron, works for a pharmaceutical manufacturer. If Eric and Ron were to go to an NFL football game and Eric asked Ron to buy him a pretzel and a soda, Eric would not violate Subpart B if Ron did so and Eric accepted the pretzel and soda.

	Solicit PS (a)(1)	Solicit B/C (a)(2)	Accept PS (b)(1)	Accept B/C (b)(2)
De Minimis	x	x	✓	✓
Personal Relationship	✓	x	✓	✓
Discounts	✓	x	✓	✓
Awards and Degrees	✓	x	✓	✓
Outside Employment	✓	x	✓	✓
Hatch Act	✓	x	✓	✓
WAG	x	x	✓	✓
Social Invites	x	x	x	✓
Foreign Areas	x	x	✓	✓
To Pres & VP	✓	x	✓	✓
Supp Reg	N/A	x	✓	✓
Statute	N/A	x	✓	✓
Info Mats	x	x	✓	✓

§ 2635.204(a): Gifts of \$20 or less &
§ 2635.204(b): Gifts based on a personal
relationship



- Gifts of \$20 or less, § 2635.204(a):
 - Example 7 incorporates LA-15-04's guidance on gift cards: General-use prepaid cards may not be accepted because they are cash.
- Gifts based on a personal relationship, § 2635.204(b):
 - May only be used to accept gifts from individuals, not organizations.
 - OGE's longstanding interpretation.

§ 2635.204(d): Awards and honorary degrees



- Awards: OGE re-ordered the awards subsection for clarity (non-substantive changes).
- Honorary Degrees: OGE updated the citations for and expanded the scope of the honorary degrees exception.
 - Expansion: Employees may now accept honorary degrees from “similar foreign institution[s] of higher education.”

§ 2635.204(e): Gifts based on outside business or employment relationships &

§ 2635.204(f): Gifts in connection with political activities



- Gifts based on outside relationships:
 - OGE clarified that employees may attend receptions or similar events put on by a former employer when:
 - Other former employees have been invited;
 - The invitation and benefits are based on the former employment relationship; and
 - It is clear that such benefits have not been offered or enhanced because of the employee's official position
- Gifts in connection with political activities:
 - Includes offers of free attendance to an accompanying spouse or other guests.

§ 2635.204(g): Gifts of free attendance at widely attended gatherings



- All WAG authorizations must be in writing
- Previously, WAGs were required to be written only if the donor had interests that may be “substantially affected by the performance or nonperformance of an employee’s official duties”
- Level of detail required to be written is up to the discretion of the agency

§ 2635.204(g): Gifts of free attendance at widely attended gatherings



- For all WAGs, agency designees must find that the agency's interest in the employee's attendance outweighs the concern of improper influence. § 2635.204(g)(3)(iii).
 - Two new factors for agency designees to consider for this finding:
 - Would acceptance reasonably create the appearance that the donor is receiving preferential treatment?
 - Is the Government providing persons with views or interests that differ from those of the donor with access to the Government?

§ 2635.204(h): Social invitations



- OGE has added one requirement to this exception:
 - If the invitation is from an organization or if the event is sponsored by an organization, the agency designee must do a written .201(b) determination.

§ 2635.204(m): Gifts of informational materials



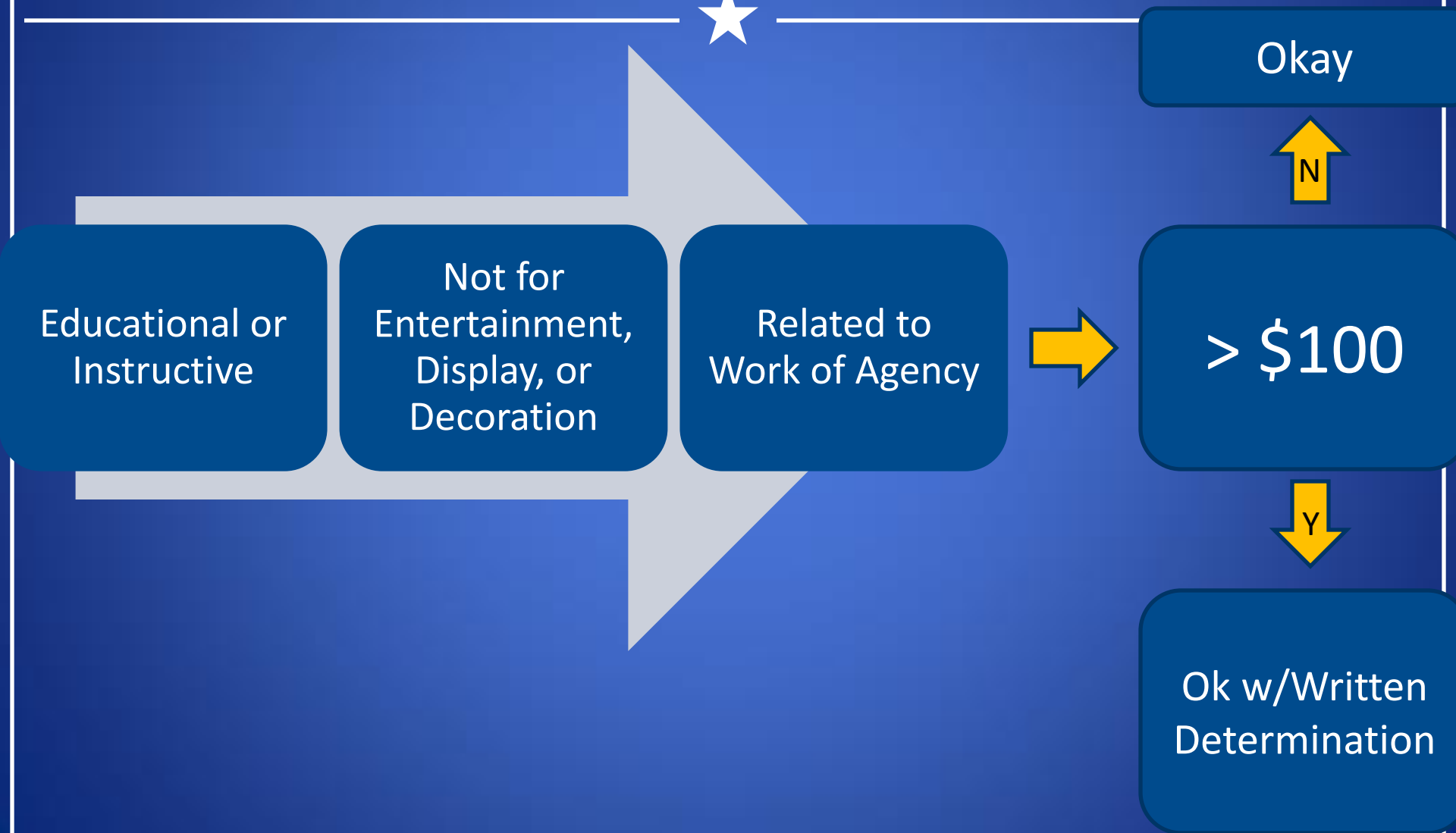
- The House has a similar exception.
- OGE determined that creating the exception was appropriate because:
 - The items are typically given with the goal of communicating ideas and positions of the donor (not personally benefitting the employee).
 - It benefits the agency and the Government.
 - It accommodates the right of citizens to petition their Government.

§ 2635.204(m): Threshold Question— What are informational materials?



- The first thing to ask: Does the item provide information?
 - Not a substantive element, simply a definitional question.
- Is the gift a writing, recording, document, record, or other [similar] item?

§ 2635.204(m): Gifts of informational materials



§ 2635.204(m): Relatedness Requirement



(iii) Contain information that relates in whole or in part to the following categories:

(A) The employee's official duties or position, profession, or field of study;

(B) A general subject matter area, industry, or economic sector affected by or involved in the programs or operations of the agency; or

(C) Another topic of interest to the agency or its mission.

Applying § 2635.204(m)



Example 1: Laura works at the EPA as a scientist in water research. As part of her duties, she has been working with a professor from a university on a study that will be published soon. If the professor offers her a copy of the Handbook of Environmental Health, Vol. 2: Pollutant Interaction in Air, Water, and Soil, which costs \$180, may she accept it?

Applying § 2635.204(m)



Definitionally does the gift provide information? Yes, it is a writing.

Elements:

1. Is it educational or instructive in nature? Yes, it is a textbook.
2. Was it created primarily for entertainment, display, or decoration? No, again, it is a textbook.
3. Does it relate to Laura's duties or the work of the EPA? Yes, it is about water pollution, which is both part of her duties and the work of the EPA.
4. Is the market value of the book or of all informational materials Laura received from the professor in a calendar year greater than \$100 in value? Yes. A .201(b) determination is required.

Applying § 2635.204(m)



Example 2: Laura works at the EPA as a scientist in water research. As part of her duties, she has been working with a professor from a university on a study that will be published soon. If the professor offers her a copy of Tron: Legacy, the four disc box set, may she accept it?

Applying § 2635.204(m)



Definitionally does the gift provide information?
Yes, it is a film.

Elements:

1. Is it educational or instructive in nature? No, it is a sci-fi film.
2. Was it created primarily for entertainment, display, or decoration? Yes, it was created primarily for entertainment.

Applying § 2635.204(m)



Example 3: Laura works at the SEC as an attorney in the enforcement division. As part of her duties, she has been working with an attorney who knows of her love of nature. If the attorney offers her a copy of the first edition of Rachel Carson's Silent Spring, may she accept it?

Applying § 2635.204(m)



Definitionally does the gift provide information?
Yes, it is a writing.

Elements:

1. Is it educational or instructive in nature? Yes, it is a book on environmental science.
2. Was it created primarily for entertainment, display, or decoration? No, it was created to shed light on the use of pesticides.
3. Does it relate to Laura's duties or the work of the SEC? No, Laura works at the SEC in the enforcement division.

Questions?



Please (please) send questions to:

TrainingRegistration@oge.gov

We will try to address these questions.