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January 26, 2016

**Via Regulations.gov**

U.S. Office of Government Ethics  
Attn: Proposed Amendments to Subpart B  
1201 New York Avenue NW, Suite 500  
Washington, DC 20005-3917  
Fax: (202) 482-9237  
*usoge@oge.gov*

**Re: RIN 3209-AA04; Office of Government Ethics; Standards of Ethical Conduct for Employees of the Executive Branch; Amendment to the Standards Governing Solicitation and Acceptance of Gifts From Outside Sources; Proposed Rule; 80 Fed. Reg. 74004 (November 27, 2015)**

Dear Sir or Madam:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule cited above.<sup>1</sup> The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.<sup>2</sup>

<sup>1</sup> Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates and Heather K. Weiner and Anthony N. Palladino, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

<sup>2</sup> This letter is available in pdf format at [http://www.americanbar.org/groups/public\\_contract\\_law/resources/prior\\_section\\_comments.html](http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html) under the topic “Ethics and Compliance.”

## **I. BACKGROUND**

On November 27, 2015, the U.S. Office of Government Ethics (“OGE”) issued the above-captioned proposed rule (the “Proposed Rule”), which would substantially revise the regulations governing the solicitation and acceptance of gifts by Executive Branch employees. According to the public notice, OGE intends for the proposed changes to reinforce, clarify, and in some cases modify the existing OGE regulations in 5 C.F.R. Part 2635, Subpart B to “more effectively advance public confidence in the integrity of Federal officials.”<sup>3</sup>

The Proposed Rule, which would mark the first comprehensive rewrite of Subpart B since 1992, would affect numerous aspects of the existing regulations. It would provide a new, overarching framework to guide employees in assessing whether an otherwise permissible gift might raise ethical concerns. It would revise many of the key definitions, including what constitutes a “gift” and how to calculate “market value.” It would provide greater flexibility to Executive Branch employees in some areas, such as the ability of government presenters to accept limited gifts of free attendance and meals in connection with their presentations, and broaden requirements in other areas, such as expanding the requirement for non-presenters to obtain pre-approval before accepting free attendance to an event that qualifies as a widely attended gathering (“WAG”). OGE’s public notice provides extensive commentary explaining the basis for each of the proposed changes.

## **II. COMMENTS**

The Section strongly supports the policy of promoting an ethical culture among Executive Branch employees that underpins OGE’s current gift regulations in Subpart B and OGE’s efforts to clarify, reinforce, and modify those rules to further that policy. We commend OGE for undertaking this rulemaking to improve these critical regulations. In general, we applaud OGE’s efforts throughout the Proposed Rule to provide additional clarity concerning rules that permit broader interaction between the Executive Branch and the private sector. That interaction is essential for familiarity with the business and regulatory issues and concerns each group faces, and for more efficient and effective governance, regulatory actions, and enforcement actions. In the current era of declining training and travel budgets for federal agencies and departments, when opportunities for this interaction are infrequent, such interaction should be encouraged.

On a more granular level, the Section supports the majority of OGE’s proposed changes to Subpart B, including the following examples:

- The proposed revisions to the definition of “market value” to mean the amount the general public “would reasonably expect to incur to purchase the gift” and the addition of examples addressing the calculation of market value for items not available for retail

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<sup>3</sup> 80 Fed. Reg. 74004.

purchase, such as admission to a private skybox or an invitation-only event that does not charge an entry fee.<sup>4</sup>

- The clarification that employees who solicit or accept funds or other support for a charitable organization in conformity with Subpart H of Part 2635 (pertaining to outside activities) do not violate the gift prohibitions in Subpart B.<sup>5</sup>
- The change to permit employees who are presenters at an event to attend the entire event and to accept meals outside of the large group setting so long as the meal is open to all presenters and is hosted by the sponsor of the event. As the OGE noted in its commentary, event sponsors customarily provide a separate luncheon or dinner for presenters, and the participation of Executive Branch employees in such smaller luncheons or dinners can be beneficial to the Government by allowing the employee an opportunity to “interact with other presenters, receive instructions, and hear about program goals or changes.”<sup>6</sup> This should have the effect of encouraging additional attendance and providing for additional exchange of information between the Executive Branch employee and others present at the event.
- The introduction of guidance on how to assess whether social media contacts qualify as personal relationships.<sup>7</sup>
- The change to permit an employee to accept an invitation from his or her former employer to attend a reception or similar event and accept benefits provided at the event if other former employees have been invited and the benefits are not offered or enhanced due to the Executive Branch employee’s official position.<sup>8</sup>
- The addition of guidance concerning the disposition of prohibited gifts.<sup>9</sup>

Nonetheless, although the Section supports most of OGE’s proposed changes, we believe that some of the specific changes could be refined and improved, and we are concerned that a limited number of the changes may be counterproductive and could hinder communication between the Government and the private sector. Our specific suggestions are discussed below. As an overarching point, we ask OGE to be mindful that regulations that are unduly restrictive or onerous can discourage the interaction between Executive Branch personnel and individuals and organizations in the private sector, and to consider adopting guidance indicating that public-government interaction is important to good governance and should be encouraged when possible.

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<sup>4</sup> *Id.* at 74006.

<sup>5</sup> *Id.* at 74012.

<sup>6</sup> *Id.* at 74005-06.

<sup>7</sup> *Id.* at 74007. The Proposed Rule would clarify that a relationship that is limited to contacts through social media (e.g., a Facebook friend) generally would be insufficient to constitute a personal relationship that could form the basis for a permissible gift.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 74017-18.

**A. OGE Should Revise Proposed Section 2635.201 to Add Examples and Further Refine the Overview and Considerations for Declining Otherwise Permissible Gifts.**

The Section supports OGE's proposal to create a new Section 2635.201 to encourage federal employees to consider whether it may be prudent to decline an otherwise permissible gift. Such guidance would be helpful and serve an important purpose. We are concerned, however, that as proposed, Section 2635.201 may create confusion among the Executive Branch employees responsible for complying with and applying the guidance, and thus, we believe this section could be enhanced with additional guidance and illustrative examples.

OGE has explained that it proposed adding Section 2635.201 "because it is OGE's experience that 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 or legitimacy of the agency's programs."<sup>10</sup> In Section 2635.201(b)(2), OGE has provided a list of factors that an employee *may* consider in determining "whether acceptance of a gift would lead a reasonable person to question the employee's integrity."<sup>11</sup> For example, Section 2635.201(b)(2)(vii) encourages the employee to consider "whether acceptance of the gift would cause a reasonable person to question the employee's ability to act impartially."<sup>12</sup>

We suggest that OGE consider whether the purpose of Section 2635.201 would be better served if that section were clear about whether a gift is simply permissible or impermissible, without further parsing the permissible gifts into additional categories, i.e., technically permissible and actually permissible. If OGE proceeds with Section 2635.201, it should, at a minimum, include illustrative examples to help Executive Branch employees and ethics officials apply the rule in actual scenarios. Indeed, Section 2635.201 is the only subpart of the Proposed Rule that contains no illustrative examples. Adding examples would help to clarify how an employee should analyze whether to accept an otherwise permissible gift pursuant to a "reasonable person" analysis. An alternative solution would be to supplement the proposed Section 2635.201 with a separate OGE publication, such as an ancillary guidance document.

Further, we are concerned that the Proposed Rule does not provide clear guidance on how OGE intends Executive Branch employees to respond when they are offered permissible gifts. On the one hand, Section 2635.201(b) states that "[e]ven when acceptance of a gift would be permitted by one of the exceptions contained in [Section] 2635.204, it is frequently prudent for an employee to decline a gift offered by a prohibited source or because of the employee's official position."<sup>13</sup> Additionally, the Proposed Rule provides reassurance that "an employee who accepts a gift that qualifies for an exception under [Section] 2635.204 does not violate this subpart or the Principles of Ethical Conduct set forth in [Section] 2635.101(b)."<sup>14</sup> On the other

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<sup>10</sup> *Id.* at 74004.

<sup>11</sup> *Id.* at 74010.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 74010.

<sup>14</sup> *Id.*

hand, the Proposed Rule also uses stronger language suggesting that whether to accept a permissible gift is not simply a matter of individual discretion. For instance, Section 2635.201(b)(4) provides that “[e]mployees who have questions regarding this subpart, including whether the employee *should* decline a gift that would otherwise be permitted under an exception found in [Section] 2635.204, should seek advice from an agency ethics official.”<sup>15</sup>

Use of the word “should” suggests that there are right and wrong answers as to whether particular gifts, though permissible, can be accepted. Although we appreciate the purpose of the proposed language, we are concerned that the move away from bright-line rules could undermine the confidence of Executive Branch employees in following the rules. Additionally, it also could put Executive Branch employees in an uncomfortable situation vis-à-vis individuals and organizations offering gifts, particularly those who are familiar with the OGE’s pre-existing rules governing acceptance of gifts. When an individual or organization offers a gift that is not improper (or at least not *per se* improper) under the rules and the employee tells the offeror that the gift “should” nonetheless be declined under the rules, this could create confusion and chill interactions between Executive Branch employees and the private sector. Because Section 2635.201 suggests but does not require that an employee decline an otherwise acceptable gift, an offeror could find that the same gift is accepted by some federal employees and declined by others, again leading to additional confusion between Executive Branch employees and the private sector about what exactly the rules require.

Further, the Proposed Rule’s statement that “[e]ven when acceptance of a gift would be permitted by one of the exceptions contained in [Section] 2635.204, it is frequently prudent for an employee to decline a gift offered by a prohibited source or because of the employee’s official position” suggests that a federal employee should rarely, if ever, accept a permissible gift—a suggestion that OGE may not have intended.<sup>16</sup> This change could have a chilling effect on interactions between the Executive Branch and the private sector, and could lead cautious employees and agency ethics officials to refuse to accept any and all gifts no matter the circumstances. An alternative approach would be to explain the basis for OGE’s concern regarding the acceptance of permissible gifts under the exceptions at Section 2635.204, and OGE’s preference that these exceptions should not be invoked frequently to justify the acceptance of otherwise impermissible gifts.

**B. OGE Should Revise Proposed Section 2635.203 to Clarify that the Presence of Alcoholic Beverages at an Event Does Not Necessarily Preclude the Employees from Accepting Free Attendance at the Event.**

The Proposed Rule would introduce a new example concerning the definition of “gift” to clarify that free alcoholic beverages always qualify as a gift, even if they are of modest value.

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<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> *Id.*

Proposed Section 2635.203(b)(1) would state as follows:

Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodging and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. The term excludes the following: (1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal . . . .

Example 1 to 2635.203(b)(1) would provide:

A Department of Defense employee invited to a defense contractor's holiday party. Alcoholic beverages are served at the party. Attendance at the party would be a gift to the employee because alcoholic beverages are not modest items of food or refreshment.

The proposed example suggests that not only the alcoholic beverages, but also the free attendance at any event at which alcoholic beverages are served would qualify as a gift regardless of whether or not the Executive Branch employee were to partake in the alcoholic beverages. We believe that OGE meant for the example to state that alcoholic beverages always qualify as a gift and are not encompassed within the exception for "modest items of food and refreshments." OGE's commentary supports this view, stating, "Proposed Example 1 to paragraph (b)(1) clarifies that the exclusion for 'modest items of food and refreshment' would not cover alcoholic beverages served at a Government contractor's holiday party."<sup>17</sup> We believe that a rule precluding Executive Branch employees from accepting free attendance at any event at which alcoholic beverages are served would be unduly broad. Accordingly, the Section asks that OGE revise the example to avoid the implication that attendance at events at which alcohol is served is necessarily improper and to clarify, as intended, that free alcoholic beverages always qualify as a gift, even if they are of modest value.

**C. OGE Should Consider Revising Proposed Section 2635.204(a) to Increase the Thresholds for Acceptance of Gifts of Minimal Value.**

Since 1992, OGE's rules have included an exception for gifts of modest value.<sup>18</sup> The preamble to the original regulations explained that OGE intended this exception to establish a uniform federal rule for acceptance of gifts of *de minimis* value.<sup>19</sup> The 1992 proposed rule would have allowed acceptance of gifts valued at \$25 per occasion, with a \$100 annual aggregate limitation from any one source.<sup>20</sup> After considering numerous comments, OGE adopted the current exception that allows an employee to accept gifts with a market value of \$20 or less per

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<sup>17</sup> *Id.* at 74005.

<sup>18</sup> *See* 57 Fed. Reg. at 35015-16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

source/occasion, with an aggregate annual limit of \$50 per source each calendar year.<sup>21</sup> According to OGE's commentary, these amounts were intended to permit acceptance of mementos and small gifts that would not generally be seen as problematic, while establishing a bright-line rule that would be easy to apply without the need to memorize numerous *de minimis* exceptions that existed prior to the uniform rules.<sup>22</sup>

Over the more than two decades since it was adopted, the "20/50 rule" has become a well-known and generally understood aspect of OGE's Subpart B framework governing acceptable and unacceptable gifts. The \$20 and \$50 thresholds, however, have not been updated since they were first adopted, and thus the current value of those thresholds no longer align with the original values. For instance, the inflation-adjusted value of \$20 in 1992 is now roughly \$33. The fair market value of customary mementos (biographical books, for example) has risen from about \$10 to \$20 each to about \$20 to \$30 each. Non-lavish working lunches in many markets are now routinely valued at from \$20 to \$30 (inclusive of tax and gratuity).

We believe that a general indexing of these amounts (as is required for several federal procurement thresholds) is not necessary, but that OGE should consider increasing the thresholds to account for inflation. A modest increase in the \$20 and \$50 thresholds would provide additional flexibility that could be beneficial in allowing employees to accept appropriate *de minimis* gifts, and it would align with the initial intent of the exception.

**D. OGE Should Revise Proposed Section 2635.204(g) to Remove the Requirement to Obtain Pre-approval Before Accepting Free Attendance for Any Event that Qualifies as a WAG.**

The proposed rule would require an Executive Branch employee to receive written authorization from an agency designee before accepting a gift of free attendance at a WAG. OGE's commentary indicates that OGE believes that the increased workload associated with the expansion of the approval requirement will be mitigated by "increased access to certain technologies since the Standards were promulgated, such as the Internet and mobile devices."<sup>23</sup> Further, OGE states that "requiring a written authorization on all occasions will promote the public's confidence in Government operations."<sup>24</sup>

The Section understands OGE's goals, but is concerned that expanding the approval requirement would impose a burden on Executive Branch employees and their ethics officials that would be disproportionate to the potential benefit associated with the expansion. We question the need for a formal written opinion before an employee can attend any event that qualifies as a WAG. The current rule requires a written authorization "only when the person extending the invitation has interests that may be substantially affected by the performance or non-performance off the employee's official duties, or is an organization the majority of whose

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 80 Fed. Reg. 74008.

<sup>24</sup> *Id.*

members have such interests.”<sup>25</sup> The proposed requirement that *all* federal employees obtain a written authorization prior to accepting the gift of free attendance at *any* WAG likely would impose a significantly heightened workload on the authorizing agency official.

The Section believes that the additional administrative burden is not commensurate with the risk of impropriety or potential appearance of impropriety associated with an Executive Branch employee’s accepting the gift of free attendance at a WAG. Although we recognize that this requirement could serve OGE’s efforts to eliminate from the WAG definition events that are not structured with sufficient “opportunity to exchange ideas and views” between Executive Branch employees and other attendees, requiring a written approval in each instance would hinder the ability of Executive Branch employees to attend WAGs. Agency ethics officials already face challenges in authorizing attendance at events as required under the current standards, with substantial advance notice needed. Many of these WAGs are beneficial and increase interactions between Government and industry, and additional approval steps may decrease attendance simply because the events cannot be approved in time.

Moreover, it is not clear that widely accessible technologies such as the Internet and mobile devices will mitigate the workload of agency officials charged with responsibility for authorizing employees to accept the gift of free attendance at WAGs. The majority of the effort required of the agency official under the Proposed Rule would consist of weighing the factors listed at proposed section 2635.204(g)(4)(i)-(vii). It is not apparent how the identified technologies (or other technologies) are expected to ease that burden. As noted above, the burden on agency officials derives from the fact that the Proposed Rule will require written authorizations in more circumstances than currently required under the existing regulations. Technology will not alleviate the need for agency officials to review and assess each situation under the proposed requirement.

Accordingly, the Section recommends that OGE consider eliminating the proposal to expand the pre-approval requirement for free attendance at WAGs beyond the existing requirements.

**E. OGE Should Revise Proposed Section 2635.204(m) to Refine the Rules Concerning Acceptance of Gifts of Informational Materials.**

The Proposed Rule would revise the regulations concerning gifts of informational materials. The Proposed Rule would define “information materials” as “writings, recordings, documents, records, or other items intended primarily to communicate information, not including images intended primarily for display or decoration, provided that the information relates in whole or in part to the following categories: (i) The employee’s official duties or position, profession, or field of study; (ii) A general subject matter area, industry, or economic sector affected by or involved in the programs and operations of the agency; or (iii) Another topic of interest to the agency or its mission.”<sup>26</sup> Under the Proposed Rule, an employee could accept an

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<sup>25</sup> *Id.* at 74007.

<sup>26</sup> *Id.* at 74017.

unsolicited gift of informational materials valued less than \$100 so long as the materials are “primarily provided for educational or instructive purposes, rather than entertainment.”<sup>27</sup> For informational materials valued over \$100, the employee would need to obtain approval from the agency designee.<sup>28</sup> The Proposed Rule also removes “vendor promotional materials” from the definition of “gift.”<sup>29</sup> OGE’s commentary explains the purpose of these proposed changes as follows:

OGE proposes to add a new gift exception for unsolicited gifts of informational materials at proposed [Section] 2635.204(m). Executive Branch employees occasionally receive unsolicited gifts of books and periodicals. These items are often given with the goal of communicating the ideas and positions of the donor rather than personally benefitting the individual employee. The proposed gift exception would allow the acceptance of these materials when either they are less than \$100 or, if they are in excess of \$100, there has been a determination that their acceptance accords with the general standard found at proposed [Section] 2635.201(b). An employee could not use the proposed exception to accept entertainment materials, such as novels, audio or video recordings of entertainment programs, or pictures, photographs, or artwork intended for display or decoration.<sup>30]</sup>

The Section supports the proposal to provide Executive Branch employees greater flexibility to accept gifts of free information materials. We believe that the inclusion of “vendor promotional materials” in the definition of gift under the current rules creates confusion among Executive Branch employees about what informational and marketing materials they can accept under Subpart B and what materials they cannot.

OGE could further improve the rule by providing more detailed guidance related to the acceptance of informational materials. OGE should consider revising the rule to state (or adding an example to clarify) that marketing and promotional materials can qualify under the exception for informational materials so long as they are not primarily for entertainment purposes. OGE also should consider revising the rule to note that, for gifts of informational materials that exceed \$100 in value, the agency could either authorize the employee to accept the materials (as contemplated in proposed Section 2635.204(m)(1)(ii)(B)) or it could authorize the employee to accept the materials on the agency’s behalf so long as the agency has statutory authority to accept gifts (to avoid an issue with improperly supplementing appropriations).

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* at 74006 (“OGE proposes removing current [Section] 2635.203(g), defining the term ‘vendor promotional training.’ The term is no longer used in the substantive provisions of the subpart, and the definition is therefore unnecessary.”).

<sup>30</sup> *Id.* at 74008-09.

### III. CONCLUSION

As noted above, the Section supports the majority of OGE's proposed changes. We believe that the focused suggestions discussed above could further refine and improve particular aspects of Subpart B. Our recommendations are intended to preserve the integrity of interactions between Executive Branch employees and individuals and organizations in the private sector, while also promoting—or at least not unduly discouraging—reasonable, productive interactions between the Executive Branch and the private sector.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



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