

UNITED STATES OFFICE OF  
**GOVERNMENT ETHICS**



Preventing Conflicts of Interest  
in the Executive Branch

# Part I of II: Significant Changes to Subpart B

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# Subpart B: The Process



- Agency participation prior to, and during, the regulations process

# Subpart B: Rationale for .201(b)

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- Need for gift regulations
- Blending of values-based and rules-based approaches
- Advising employees

# Significant Changes to Subpart B



§ 2635.201(b)	Considerations for declining otherwise permissible gifts
§ 2635.202	General prohibition on solicitation or acceptance of gifts
§ 2635.203(b)(8) & § 2635.203(g)	Free attendance to employees speaking in their official capacities <u>and</u> the definition of Free Attendance
§ 2635.203(c)	Definition of Market Value
§ 2635.206(a)(1)	Disposition of gifts of tangible items
§ 2635.203(f) & § 2635.205	The definition of Indirectly solicited or accepted <u>and</u> Limitations on use of exceptions

# § 2635.201(b)



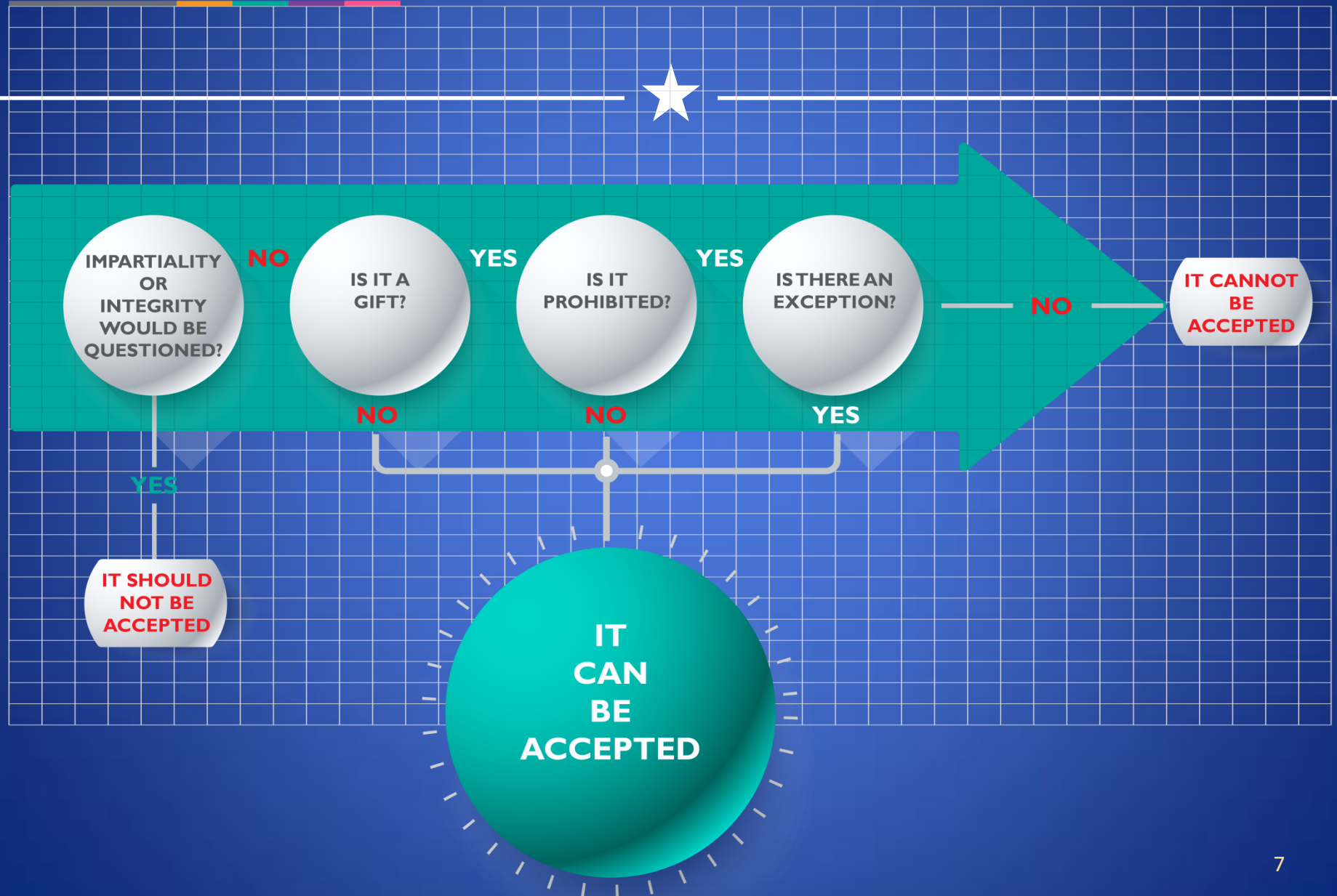
.201(b)(1): “employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality as a result of accepting the gift.”

# § 2635.201(b)



.201(b)(2): Employees should consider these four factors (among others) prior to acceptance:

- Value
- Timing
- Identity (of donor)
- Access (the gift provides)



# OGE's Rationale for .201(b)



- Proposed Rule:

*Proposed § 2635.201 Overview and Considerations For Declining Otherwise Permissible Gifts*

Proposed § 2635.201(a) reiterates the language that is contained in current § 2635.201, and includes a new subheading "Overview." Proposed § 2635.201(b) is new to the Standards. This section is entitled "Considerations for declining otherwise permissible gifts." OGE is proposing the addition of this section 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 and legitimacy of the agency's programs. To counter this tendency, OGE is proposing to add § 2635.201(b)(1), which sets out a flexible, non-binding standard that employees are encouraged to use when deciding whether to accept a gift that would otherwise be permitted by this subpart. Specifically, this section



# Why is the paradigm shift important?

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- It is important because of what it does:
  - It changes the default.
  - It shifts the employee's focus from “how can I accept this,” to “should I accept this.”
  - It requires the employee to engage in ethical decisionmaking. Ethics questions occur everyday, whether a specific rule applies or not.
    - Ownership by the employee of his/her actions

# Intended Results from the Change to Subpart B's Framework

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- Relieves pressure on ethics officials (First: Has the employee done a .201(b) analysis? Not--can I accept this gift?).
- Expected result is less gifts being accepted, and more importantly less problematic gifts being accepted.
- More “ethical decisionmaking” (apply same framework to other ethics situations).

# Applying the Standard and Factors



- Mechanics:
  - Employees should apply the Standard
    - Unless an ethics official is required, by an exception, to do so (i.e., .204(h), .204(m)).
  - Employees may not be punished for not applying the standard, nor may they be punished if the employee and their ethics official/supervisor disagree over whether the gift should be accepted.

# Example 1: Applying § 2635.201(b)



Example 1: An employee of the Peace Corps is in charge of making routine purchases of office supplies. After a promotional presentation to highlight several new products, a vendor offers to buy the employee lunch, which costs less than \$20. The employee is concerned that a reasonable person may question her impartiality in accepting the free lunch, as the timing of the offer indicates that the donor may be seeking to influence an official action and the company has interests that may be substantially affected by the performance or nonperformance of the employee's duties.

# § 2635.201(b)



.201(b)(1): “employees should consider declining otherwise permissible gifts if they believe that a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality as a result of accepting the gift.”

# The Factors



Value: Is the gift expensive or relatively cheap?

Timing: Is the gift given at a time when the donor is seeking or has business before the agency?

Identity: Is the donor someone who has interests affected by the employee's official duties?

Access: Is the gift going to provide the donor with significantly disproportionate access to the employee and the agency?

# Example 1: Applying the Standard and Factors

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Standard: Would a reasonable person question the employee's integrity or impartiality as a result of accepting the gift?

Value: Is the gift expensive or relatively cheap?

- Value is \$20, which is relatively cheap.

Timing: Is the gift given at a time when the donor is seeking or has business before the agency?

- Certainly, based on the promotional presentation, the vendor is seeking business with the agency.

Identity: Is the donor someone who has interests affected by the employee's official duties?

- Certainly, the employee is in charge of routine purchases.

Access: Is the gift going to provide the donor with significantly disproportionate access to the employee and the agency?

- Likely. Only the employee and the vendor are going to lunch.

## Example 2: Applying § 2635.201(b)



Example 2: An employee in the enforcement division of the SEC is currently investigating a broker for fraud. The law firm representing the broker also employs the employee's brother-in-law, but the brother-in-law is not assigned to the case. If the brother-in-law wants to take the employee's son (his nephew) to the law firm's skybox for a baseball game, should the employee permit his son to attend?



# Example 2: Applying the Standard and Factors

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Standard: Would a reasonable person question the employee's integrity or impartiality as a result of accepting the gift?

Value: Is the gift expensive or relatively cheap?

- For a skybox, the value is rather expensive.

Timing: Is the gift given at a time when the donor is seeking or has business before the agency?

- If the law firm is the donor, it would appear that the answer is yes. If the brother-in-law is the donor, possibly not.

Identity: Is the donor someone who has interests affected by the employee's official duties?

- If the law firm is the donor, it would appear that the answer is yes. If the brother-in-law is the donor, possibly not.

Access: Is the gift going to provide the donor with significantly disproportionate access to the employee and the agency?

- No. The employee's son is attending the game, not the employee.

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

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- Current Language:

## §2635.202 General standards.

(a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

- (1) From a prohibited source; or
- (2) Given because of the employee's official position.

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

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- What we did not change, what we did change, and why:

**§ 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.

# Free Attendance to employees speaking in their official capacities and the definition of Free Attendance

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- 5 C.F.R. § 2635.204(g)(1): Speaking and similar engagements in exceptions
  - Moved to § 2635.203(b)(8), where exclusions from definition of gift are located



# Free Attendance to employees speaking in their official capacities and the definition of Free Attendance

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- Because of the re-organization, OGE has a new subpart-wide definition for Free Attendance at 5 C.F.R. § 2635.203(g).
  - OGE has also made a substantive change to the definition, permitting employees who are speaking under .203(b)(8) to attend speakers' meals if they are on the day of the presentation.

# Definition of Market Value



- Where we are currently:

(c) *Market value* means the retail cost the employee would 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 shall be the face value of the ticket.

# Definition of Market Value



- Current Framework:
  - Look to retail cost, unless it is a ticket.
    - If there is no retail cost, then look to the retail cost of items of like quality.
  - For tickets, face value is the market value.
    - If there is no face value, skybox rule applies. DO-07-003.

# 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.



# Definition of Market Value



- New Framework:
  - Look to what a member of the general public would pay, unless it is a ticket.
    - If there is no publicly available price, then look to the retail cost of items of like quality.
  - For tickets, face value is the market value.
    - If there is no face value, skybox rule applies. DO-07-003.
      - BUT no need to add to the cost of the most expensive publicly available ticket the value of benefits if the benefits are included in the cost of the publicly available ticket.

# Disposition of Gifts of Tangible Items

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- Starting Point for Gift Disposition:
  - The acceptance of prohibited gifts is disfavored.
  - But sometimes employees do receive prohibited gifts, and OGE has now provided greater flexibility to employees in those situations.
- Tangible gifts valued at less than \$100 may be disposed of by:
  - Returning the gift;
  - Reimbursing the donor the market value; or
  - Destroying the gift

# Indirect Solicitation/Acceptance & Limitations on Use of Exceptions

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- OGE added a “member of the employee’s household” to the definition of “Indirectly solicited or accepted.” § 2635.203(f)(1).
- OGE moved the limitations from § 2635.202 to § 2635.205.
  - No need to read the limitations on exceptions, before reading the exceptions.

# Questions?



*Please (please) send questions to:*

*TrainingRegistration@oge.gov*

*We will try to address these questions in Part II—  
stay tuned.*