

OGE Amends the Executive Branch Gift Regulations

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Government Contracts Issue Update

Effective January 1, 2017, there are noteworthy changes to the portions of the Standards of Ethical Conduct for Executive Branch Employees that govern the solicitation and acceptance of gifts from outside sources. Of most interest are the changes to the executive branch gift regulations that:

- Prohibit executive branch employees from accepting alcoholic beverages under the exclusion for modest items of food and refreshment;
- Clarify the method of calculating the market value of a ticket to an event when that ticket lacks a face value;
- Require executive branch employees to obtain written authorization before accepting gifts of free attendance to widely-attended gatherings;
- Provide guidance on whether a social media contact may qualify as a personal friend for purposes of the exception for gifts based on a personal relationship; and
- Create a new exception permitting employees to accept gifts of informational materials.

Alcohol. Under a long-standing exclusion to the definition of what constitutes a “gift” under the executive branch Standards of Conduct, executive branch employees have been permitted to accept “modest items of food and refreshment, such as soft drinks, coffee and donuts, offered other than as part of a meal.” The executive branch Office of Government Ethics (OGE) has stated that it “has long treated alcoholic beverages as not being part of the class of modest

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refreshments covered by this exclusion.” Reflecting this interpretation, the relevant provision has been amended to exclude from the definition of “gift” “modest items of food and *non-alcoholic* refreshments, such as soft drinks, coffee, and donuts, offered other than as part of a meal.”

Tickets with no face value. As part of an amended definition of “market value” as used in the gift regulations, OGE has now included a new example illustrating and clarifying how to determine the market value of a ticket to an event when the ticket lacks a face value. This approach requires including in the calculation the “face value of the most expensive publicly available ticket” to the event. New Example 4 to this provision reads:

A company offers an employee of the Federal Communication Commission (FCC) free attendance for two to a private skybox at a ballpark to watch a major league baseball game. The skybox is leased annually by the company, which has business pending before the FCC. The skybox tickets provided to the employee do not have a face value. To determine the market value of the [two] tickets, the employee must add the face value of two of the most expensive publicly available tickets to the game and the market value of any food, parking or other tangible benefits provided in connection with the gift of attendance that are not already included in the cost of the most expensive publicly available tickets.

Written approval for widely attended events. Under the amended executive branch regulations, employees who wish to accept an offer of free attendance to an event under the “widely-attended gathering” exception must now—in all instances—obtain written authorization from their designated agency ethics official (DAEO) *before* attending the event. The amended provision on “widely-attended gatherings”—or “WAGs”—now also makes clear that a qualifying gathering must “include an opportunity to exchange ideas and views among invited persons.”

Social media “friends.” In a leap into the 21st century, the amended gift regulations now provide an example to illustrate when, and whether, a social media “friend” may be considered for purposes of the exception for “gifts based on a personal relationship.” The kernel of this very long example appears to be that, by itself, a virtual relationship is unlikely to be a “personal relationship” under the rule. As provided in the example, an agency employee—who uses a social media site to keep in touch with friends, coworkers, and professional contacts—is offered via the site a pair of \$30 concert tickets by a government contractor whom the employee met at a business meeting. Although they have granted access to each other’s social media networks, they do not otherwise “communicate further in their personal capacities, carry on extensive personal interactions, or meet socially outside work.” The example concludes: “Although the employee and the individual are connected through social media, the circumstances do not demonstrate that the gift was clearly motivated by a personal relationship, rather than the position of the employee, and therefore the employee may not accept the gift pursuant to” the exception.

Informational Materials. The new exception for “informational materials” permits an executive branch employee to accept “writings, recordings, documents, records, or other items” if the materials are “educational or instructive in nature” (they may not be primarily for entertainment, display, or decoration) and if the materials relate to the employees official duties, to a general subject matter within the purview of the

employee's agency, or to another topic of interest to the agency. The aggregate value of such informational materials received by an employee from any one person may not exceed \$100 in a calendar year, unless the DAEO makes a written determination permitting acceptance of materials exceeding this \$100 limit.

None of these amendments radically alters the circumstances of when an executive branch employee may accept a gift from a "prohibited source"—that is, from someone seeking official action by, doing (or seeking to do) business with, or regulated by the employee's agency, or who has interests that may be affected by the performance of the employee's official duties. But, as in all government ethics matters, the devil is in the detail of application of the gift regulations to particular cases and scenarios. When a question arises, attorneys in Wiley Rein's Election Law & Government Ethics Practice Groups are ready to assist you and your organization in understanding and complying with these rules.