

# Proposed Rules

Federal Register

Vol. 76, No. 177

Tuesday, September 13, 2011

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2635

RIN 3209-AA04

#### Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts From Registered Lobbyists and Lobbying Organizations

**AGENCY:** Office of Government Ethics (OGE).

**ACTION:** Proposed rule; amendments.

**SUMMARY:** The Office of Government Ethics is proposing amendments to the regulation governing standards of ethical conduct for executive branch employees of the Federal Government, to impose limits on the use of gift exceptions by all employees to accept gifts from registered lobbyists and lobbying organizations, and to implement the lobbyist gift ban for appointees required to sign the Ethics Pledge prescribed by Executive Order 13490.

**DATES:** Written comments are invited and must be received before November 14, 2011.

**ADDRESSES:** You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209-AA04, by any of the following methods:

- E-Mail: [usoge@oge.gov](mailto:usoge@oge.gov). Include the reference "Proposed Amendments to Part 2635" in the subject line of the message.

- Fax: (202) 482-9237.

- Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Richard M. Thomas, Associate General Counsel.

Instructions: All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209-AA04, for this proposed rulemaking.

**FOR FURTHER INFORMATION CONTACT:**

Richard M. Thomas, Associate General Counsel, Office of Government Ethics;

telephone: 202-482-9300; TTY: 800-877-8339; FAX: 202-482-9237.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

##### A. Existing OGE Gift Prohibitions

The Standards of Conduct for Employees of the Executive Branch were initially promulgated by the Office of Government Ethics in 1992 and are codified at 5 CFR part 2635. See 57 FR 35005-35067 (August 7, 1992). Subpart B of part 2635 sets out the restrictions on the solicitation and acceptance of gifts from outside sources by employees of the Executive Branch.

Under subpart B, all executive branch employees are subject to two general prohibitions: employees shall not, directly or indirectly, solicit or accept a gift either (1) from a prohibited source, or (2) given because of the employee's official position. 5 CFR 2635.202(a). A prohibited source is broadly defined to include any person seeking official action from the employee's agency, doing or seeking to do business with the employee's agency, conducting activities regulated by the employee's agency, or having interests that may be substantially affected by the employee's official duties; additionally, prohibited source includes any organization a majority of whose members are prohibited sources. 5 CFR 2635.203(d). Beyond gifts from prohibited sources, the rule also proscribes gifts given because of the employee's official position, which means any gift that would not have been solicited, offered, or given had the employee not held the status, authority or duties of his or her Federal position. 5 CFR 2635.203(e). While the prohibition on gifts from prohibited sources largely derives from statute, 5 U.S.C. 7353(a), OGE, itself, imposed the regulatory prohibition on gifts given because of official position as a further check against appearances that an employee might use his or her official position for private gain. See 56 FR 33777, 33780 (July 23, 1991)(preamble to proposed part 2635).

Subpart B also contains several exceptions, which are found in 5 CFR 2635.204. These exceptions cover a range of situations—such as gifts from family members and friends, de minimis gifts, and gifts of free attendance at widely attended gatherings—and each exception has its own criteria and limitations. Additionally, there are

several general limitations on the use of the gift exceptions, which are found at 5 CFR 2635.202(c). These limitations, for example, preclude employees from relying on the gift exceptions to solicit or coerce the offering of a gift or to accept a gift in violation of any statute.

##### B. Executive Order 13490

Against this backdrop of existing regulations, President Obama imposed an additional gift prohibition on full-time, non-career (i.e., political) appointees appointed on or after January 20, 2009. Executive Order 13490 requires these full-time political appointees to sign an "Ethics Pledge." Exec. Order 13490, section 1, 74 FR 4673, 3 CFR, 2009 Comp., p. 193, January 21, 2009. The first paragraph of the Pledge is the "Lobbyist Gift Ban," which states: "I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee." *Id.*, 13490, section 1, par. 1. The Pledge ban applies to gifts from lobbyists and organizations that are currently registered under the Lobbying Disclosure Act (LDA), 2 U.S.C. 1603, as well as any person currently identified as a lobbyist for an organization in a registration statement or quarterly disclosure report filed under the LDA. Exec. Order 13490, section 2(e). The Secretary of the Senate and the Clerk of the House of Representatives maintain searchable, online databases of registrants and lobbyists under the LDA, from which appointees and ethics counselors may determine whether a particular person is a permissible source for a gift under the Pledge ban.<sup>1</sup>

The Office of Government Ethics issued initial interpretive guidance to implement the lobbyist gift ban in a Memorandum to Designated Agency Ethics Officials on February 11, 2009. OGE, DO-09-007, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2009/do09007.html](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09007.html). OGE's guidance makes clear that the lobbyist gift ban for political appointees "is in addition to the OGE prohibitions on gifts from 'prohibited sources' and gifts 'given because of the employee's official position.'" *Id.* (emphasis added). Thus, for example, the ban applies to gifts

<sup>1</sup> See <http://soprweb.senate.gov/index.cfm?event=selectfields>; <http://disclosures.house.gov/ld/ldsearch.aspx>.

from registered lobbyists and lobbying organizations even if they do not lobby the appointee's own agency or they confine their lobbying solely to the Legislative Branch. *Id.* Moreover, the lobbyist gift ban in the Pledge is subject to a more limited set of exceptions than those otherwise applicable under the OGE gift regulations. *Id.* The Pledge intentionally broadened existing gift restrictions, in connection with registered lobbyists and organizations, because of concerns that gifts sometimes may appear to be given in connection with efforts by professional lobbyists to obtain access to the political leadership in the Executive Branch. The stricter requirements were in large part a response to various scandals involving the use of gifts by lobbyists such as Jack Abramoff, and in this regard the Pledge followed similar efforts by Congress to respond to some of the same concerns. *E.g.*, 153 Cong. Rec. H 6 (January 4, 2007)(adoption of lobbyist gift ban for House of Representatives); Honest Leadership and Open Government Act of 2007 (HLOGA), Public Law 110–81, sections 203, 305, 541, 542, 544 (various provisions pertaining to lobbyist gifts and contributions).

The OGE guidance also emphasized that the Pledge ban is not limited to gifts from lobbyists and lobbying firms that provide lobbying services to others. DO–07–007, at p. 2. Under the plain meaning of the Executive Order, the phrase “registered lobbyist or lobbying organization” includes any “organization filing a registration” under the LDA, not just lobbying firms. Exec. Order 13490, section 2(e). The ban also includes, therefore, organizations that register because they employ “at least one in-house lobbyist” to lobby on their own behalf, such as a corporation that employs its own governmental affairs officer who meets the LDA definition of lobbyist (2 U.S.C. 1602(10)). *Id.* Nevertheless, the OGE guidance carved out two categories of organizations from this definition, even though they may employ their own lobbyists: nonprofit organizations exempt from taxation under 26 U.S.C. 501(c)(3), and media organizations. *Id.* at 5–6. In consultation with the White House Counsel's Office, OGE determined that these categories of organizations did not implicate the purposes of the Pledge ban, although the guidance did provide that an appointee “still may not accept a gift if the organization employee who extends the offer is a registered lobbyist him- or herself.” *Id.* at 5.

In addition to the Pledge requirements for full-time political appointees, the Executive Order directed OGE “to adopt

such rules or procedures as are necessary or appropriate \* \* \* to apply the lobbyist gift ban set forth in paragraph 1 of the pledge to all executive branch employees.” Exec. Order 13490, sec. 4(c)(3)(ii). OGE is to undertake this task “in consultation with the Attorney General and the Counsel to the President or their designees.” *Id.* It was intended that OGE would take the opportunity to learn from its initial experience in implementing the lobbyist gift ban for political appointees and then evaluate how best to extend the limitations to the ranks of career employees, for whom different considerations may be relevant. This proposed rule is the result of that evaluation, and OGE's conclusions about the most appropriate way to extend the lobbyist gift limitation beyond just the political leadership are summarized below, under “General Approach.”

Finally, the Executive Order charged OGE with adopting rules and procedures “to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban.” *Id.* at section 4(c)(3)(iii). As discussed below, this proposed rule specifies a limited set of exceptions applicable to full-time political appointees, as well as an expanded but still limited set of exceptions applicable to all other employees. Like the initial OGE guidance Memorandum, the proposed rule also excludes certain types of organizations from the category of lobbying organizations from which gifts are banned, with some modifications and additions to the exclusions as originally described in the Memorandum. OGE intends that these exclusions from the proposed definition of “registered lobbyist or lobbying organization” would be applicable to all employees, including full-time political appointees subject to the Pledge.

## II. Proposed Amendments to the Standards

### A. General Approach

After considering the myriad issues that have arisen under the lobbyist gift ban for full-time political appointees, as well as the varied circumstances of the millions of employees to whom Subpart B applies, the Office of Government Ethics has decided that the best approach for extending the lobbyist gift ban beyond the core political personnel is to add a lobbyist limitation to the existing limitations in section 2635.202(c) on the use of the gift exceptions in the OGE regulations. In this way, the lobbyist limitation would

build on concepts, prohibitions and exceptions with which employees and agency ethics officials already are familiar, rather than adding a new stand-alone prohibition. This approach would extend the real benefits that OGE already has perceived as a result of the gift ban for political appointees, without introducing unnecessary complexity or restrictions that have little relation to the real ethics concerns affecting the great mass of career and other employees outside the full-time political leadership of the executive branch.

With the implementation of the current Pledge restriction for political appointees, OGE believes that the most important salutary effect has been the elimination of sometimes questionable “widely-attended gatherings,” “social invitations,” and other gifts that might have been permissible under applicable gift exceptions in section 2635.204 had the gifts not been extended by registered lobbyists or lobbying organizations. While all of the exceptions in section 2635.204 have their appropriate uses, OGE has indeed become concerned that some of the exceptions may have been used on occasion to permit gifts, such as attendance at certain events, where the nexus to the purpose of the exception is attenuated at best. *See, e.g.*, OGE DAEOgram DO–07–047, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2007/do07047.html](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2007/do07047.html). (widely attended gatherings under section 2635.204(g)(2)). When such gifts are offered by persons who are paid to influence government action, the concerns obviously are magnified. However, in the period since the Pledge ban was imposed on political appointees, OGE has noted a decrease in pressure to extend some of these exceptions, because the Pledge simply makes the exceptions unavailable for gifts from lobbyists and lobbying organizations.

The proposed rule, therefore, targets this issue directly. Proposed section 2635.202(c)(6) would operate as a straightforward limitation on the use of certain gift exceptions. Unlike the Pledge ban, the proposed rule does not add a third general prohibition applicable to all employees (i.e., in addition to the general prohibitions on gifts from prohibited sources and gifts because of official position). Rather, the proposed rule would limit the ability of employees to rely on certain gift exceptions when a prohibited source—or a person giving a gift because of the employee's official position—also happens to be a registered lobbyist or lobbying organization. With respect to the large and diverse class of career and

other employees who are not required to sign the Pledge, OGE has determined that there is no demonstrated need for a new general prohibition against accepting gifts from lobbyists, as long as those lobbyists are not prohibited sources for an employee and do not even extend gifts because of the employee's official position. As described above, the terms "prohibited source" and "because of the employee's official position" are already defined quite broadly. Those restrictions cover so much of the real potential for ethical harm that it would be difficult to explain to career employees why they also should be subject to discipline for failing to determine whether a gift that does not fall within those broad prohibitions is extended by a registered lobbyist. By contrast, where a gift is extended by a prohibited source or because of the employee's official position, OGE believes that it is reasonable to ask employees (and their ethics counselors) to determine whether a particular donor is a registered lobbyist or lobbying organization before the employee may rely on certain exceptions to the OGE gift prohibitions.

At the same time, under proposed section 2635.202(d), full-time political appointees who must sign the Pledge would remain subject to the lobbyist gift ban as a separate prohibition. This result is compelled by Executive Order 13490, and it means that these appointees will remain barred from accepting gifts from registered lobbyists and lobbying organizations even when the lobbyist or organization is not a prohibited source and has not offered the gift because of an appointee's official position. Apart from the plain meaning of the Executive Order, the stricter treatment of the political leadership in the executive branch is justified by experience. Most, if not all, of the executive branch officials who were implicated in the scandals involving Jack Abramoff and his associates were political appointees. Indeed, in the case of career employees, it seems unlikely that lobbyists would expend significant time and resources to cultivate access through the use of gifts if the lobbyists (and the clients they represent) were not prohibited sources. However, one could envision strategic efforts to cultivate access to the political leadership generally, even if the lobbyists do not currently qualify as a prohibited source for a particular political appointee. OGE does not discount the symbolic value of the Pledge prohibition for the political class within the Executive Branch, and this broader prophylactic restriction remains

an appropriate response to public concerns about the use of gifts as a means of access by professional lobbyists.

#### *B. Proposed Section 2635.202(c)(6)*

##### 1. Exceptions Unavailable for Lobbyist Gifts

Proposed section 2635.202(c)(6) would preclude employees from using several of the gift exceptions in section 2635.204 to accept a gift from a registered lobbyist or lobbying organization. Like the Pledge ban for full-time political appointees, the proposed rule would not permit any employee to use the following exceptions in connection with gifts from registered lobbyists or lobbying organizations: Section 2635.204(a), the \$20 de minimis exception; section 2635.204(g)(2), the widely attended gathering exception (WAG); section 2635.204(h), the social invitation exception; and section 2635.204(i), the exception for meals, refreshments and entertainment from private entities in a foreign area. The de minimis and WAG provisions, in particular, are among the most widely used exceptions in the OGE gift regulations, so the change effected by the proposed new limitation is not inconsiderable. Nevertheless, as explained below, OGE believes that the proposed lobbyist limitation is appropriate for those popular exceptions, as well as the social invitation and foreign areas exceptions.

##### De Minimis Exception in Section 2635.204(a)

Section 2635.204(a) permits employees to accept gifts, other than cash or investments, having a market value of \$20 per source on a single occasion. This de minimis exception also allows employees to accept gifts in the aggregate valued up to \$50 per source in any calendar year.

OGE has determined that it is appropriate to follow the House and the Senate, as well as the President's Ethics Pledge, in sending a consistent message that there is no de minimis for lobbyist gifts. Both the House and Senate amended their de minimis gift rules, in response to the Abramoff scandals and related concerns, to preclude gifts from registered lobbyists. *See House Ethics Manual* at 29–30 (2008); Rule XXXV of the Standing Rules of the Senate, par. 1(a)(2)(B); HLOGA, sec. 541. While the OGE de minimis exception is set at only \$20, as compared to \$50 for the House and Senate, it is nonetheless clear that both Houses of Congress intended to preclude lunches and other items from lobbyists even if the gifts were valued

well below the de minimis threshold. *See, e.g.,* Senate Select Committee on Ethics, "New Ethics Rules: Gifts and Events" (September 25, 2007) ("Senators and staff can no longer accept gifts of any value from registered lobbyists"). Moreover, although OGE believes that the rules and circumstances of the Executive Branch ethics program often are unavoidably different from those of Congress, OGE also is respectful of the "Sense of the Congress," expressed in section 701 of HLOGA, that similar restrictions should apply. OGE's experience in implementing the Pledge ban for political appointees in the Executive Branch has not indicated any significant problems with eliminating the de minimis exception for lobbyist gifts, and OGE believes it is time to follow suit for the rest of the Executive Branch.

Of course, OGE cannot deny the convenience of the \$20 de minimis rule as currently applied. It provides a bright line test, and employees generally can accept a gift within this limit without even having to determine whether the donor is a prohibited source or is extending the offer because of the employee's official position—let alone without having to determine whether the source is registered under the Lobbying Disclosure Act. Nevertheless, where the donor is a prohibited source or is offering a gift because of the employee's position, OGE believes it is not too much to ask of employees and their ethics counselors to determine whether the source also is a registered lobbyist or lobbying organization. In fact, one could say that heightened sensitivity in the use of any of the gift exceptions, including the de minimis provision, would be a positive result. As OGE states in the introduction to the gift exceptions: "Even though acceptance of a gift may be permitted by one of the exceptions contained in paragraphs (a) through (l) of this section, it is never inappropriate and frequently prudent for an employee to decline a gift offered by a prohibited source or because of his official position." 5 CFR 2635.204. Requiring employees to stop and consider whether a potential donor is engaged in professional lobbying activities will further encourage this kind of prudential attitude.

##### Exception for Widely Attended Gatherings in Section 2635.204(g)(2)

The exception at section 2635.204(g)(2) permits employees to accept offers of free attendance at certain widely attended gatherings (WAG), where an agency designee has determined that attendance is in the interest of the agency. This exception

has been used to permit attendance of a very wide range of events, from substantive activities (such as conferences and seminars) that provide a significant training opportunity, to purely social functions (such as fundraisers and gala celebrations) that provide an opportunity for government employees and others to interact in a more relaxed social setting.

As already noted above, OGE has perceived some instances over the years in which the WAG exception was used to permit attendance at events, particularly social events, where the nexus to the government's interest was attenuated. In fact, OGE issued a memorandum to agency ethics officials in December 2007 that was partly a call for agencies to focus on the real purposes of the exception. DO-07-047. The WAG exception raises particular concerns when free attendance is provided by a lobbyist. That is for the simple reason that the "gift" involved is something that the employee will enjoy in the very company of the lobbyist. If one views the problem of lobbyist gifts as the mere potential for some quid pro quo, then probably an invitation to a gala ball will not directly influence an official to take action benefiting the giver. But it is increasingly recognized that the more realistic problem is not the brazen quid pro quo, but rather the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients. As one scholar has observed, "the public's concern is not just that \* \* \* officials will engage in blatant [selling of their services] to lobbyists but, more subtly, that they will become partial to the causes of lobbyists' clients because they spend a lot of time in lobbyists' company." Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 Ala. L. Rev. 513, 524-25 (2007). The WAG exception, at least when used in connection with social events, can provide the opportunity for a lobbyist not only to discuss any pending issues with the employee but also to foster a social bond that may be of greater use in the long run. Therefore, proposed section 2635.202(c)(6) would preclude the use of the WAG exception where the gift is offered by a registered lobbyist or lobbying organization.

Having said this, OGE also knows that widely attended gatherings still can serve important government purposes. For example, OGE does not believe that employees, including political appointees subject to the Pledge, should be precluded categorically from accepting offers of free attendance at

substantive events that would provide a legitimate educational or professional development benefit that furthers the interests of an agency. Therefore, under the definition of registered lobbyist or lobbying organization at proposed section 2635.203(h)(4), discussed below, OGE is proposing to exclude nonprofit professional associations, scientific organizations and learned societies, at least with respect to the educational and professional development activities of those entities. This will preserve a "substantive core" of the WAG exception, regardless of whether the donor is registered under the LDA.

A final word is in order concerning the first paragraph of section 2635.204(g), which permits free attendance at events where an employee is speaking or presenting information on behalf of the government. As explained in OGE's initial Memorandum concerning the Pledge ban, the restriction on the use of section 2635.204(g)(2) does not extend to section 2635.204(g)(1):

"Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of 'gift' in section 2635.203(b): 'The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency.' 5 CFR 2635.204(g)(1)."

DO-09-007, at 4 n.3. Likewise, proposed section 2635.202(c)(6) would not affect the ability of employees to accept offers of free attendance in connection with official speaking engagements, as provided in section 2635.204(g)(1). The same would be true with respect to agency support personnel "whose presence at the event is deemed essential under agency procedures to the speaker's participation at the event." OGE DAEOgram DO-10-003, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2010/do10003.html](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2010/do10003.html).

Exception for Social Invitations in Section 2635.204(h)

Section 2635.204(h) permits employees to accept offers of free attendance at social events attended by several persons, provided that the invitation is not from a prohibited source and no attendance fee is charged to anyone. This exception has been used, for instance, to permit employees to attend such events as movie screenings and Washington cocktail

parties, as illustrated by the official examples following the regulatory text. See 5 CFR 2635.204(h)(Examples 1 & 2).

For reasons similar to those discussed above in connection with the WAG exception, OGE has determined that the social invitation exception should be unavailable to employees for lobbyist gifts. It is no secret that social events of this type sometimes are used as "lobbying tools." Jim Puzanghera, "Courtship starts with free film screenings," *Los Angeles Times*, December 31, 2007, <http://articles.latimes.com/2007/dec/31/business/fi-mpaa31> (lobbyist describes cultivation of relationships through social events as "soft lobbying"). It is true that section 2635.204(h) already has an important limitation in that it may not be used to accept gifts from a prohibited source. Nevertheless, even though a lobbyist might not have any matters currently pending before a particular employee's agency, the lobbyist could use social events as a way to build general good will with a class of employees in case access is needed for a future issue or client. It is important to remember that the lobbyist limitation in proposed section 2635.202(c)(6) will not even come into play unless the gift is otherwise prohibited under the OGE Standards. So the only time the limitation would preclude an employee from using the social invitation exception would be when a lobbyist has at least extended the invitation *because* of the employee's official position, even if the lobbyist is not technically a prohibited source at that time. The potential for harm, while perhaps latent, is nonetheless real.

Exception for Meals, Refreshments and Entertainment From Private Entities in a Foreign Area in Section 2635.204(i)

Section 2635.204(i) permits employees to accept food, refreshments or entertainment in the course of official attendance at certain meetings or events in foreign areas. The meeting or event must involve non-U.S. citizens, or representatives of foreign governments or other foreign entities, but the source of the gift itself may not be a foreign government as defined in 5 U.S.C. 7342(a)(2). The market value of the gift also may not exceed the per diem rate specified for the foreign area by the Department of State. This exception was included in the OGE Standards at the request of several agencies with overseas operations who were concerned that, without such an exception, "employees will be required to decline the customary invitations of hospitality that frequently accompany the transaction of business in many

foreign countries and that the foreign nationals and entities involved may be offended.” 57 FR 35021.

Proposed section 2635.202(c)(6) would bar employees from relying on this foreign areas exception if the gift is offered by a registered lobbyist or lobbying organization. OGE does not doubt the utility or reasonableness of this exception. However, OGE believes that the exception should not be a vehicle for registered lobbyists and lobbying organizations to entertain government employees with hospitality, which could raise some of the same concerns as those discussed above in connection with WAGs and social invitations. It is not clear how many registered lobbyists or lobbying organizations even would be geographically positioned to extend such offers in foreign areas. However, OGE notes that some foreign private entities do register under the LDA and may do so in order to avoid the more onerous registration requirements of the Foreign Agents Registration Act. *See* 22 U.S.C. 613(h); S. Rep. 105–147, at 4 (1997). Where the private entity engages in lobbying activity for which it is registered under the LDA, OGE has determined that there is sufficient reason to preclude an employee from accepting food and entertainment in the company of that entity.

## 2. Exceptions Available for Lobbyist Gifts

Exceptions Already Permitted Under Pledge: Section 2635.204(b), (c), (e)(1), (e)(2), (j), (k) and (l)

Even for full-time political appointees, the Pledge gift ban recognizes that certain gift exceptions are reasonable even though the donor is a registered lobbyist or lobbying organization. *See* Executive Order 13490, sec. 2(c)(3) (exceptions to Pledge gift ban). The Pledge permits full-time political appointees to accept the following: Gifts based on a personal relationship, under section 2635.204(b); discounts and similar benefits, under section 2635.204(c); gifts resulting from a spouse’s business or employment, under section 2635.204(e)(1); customary gifts provided by prospective employers, under section 2635.204(e)(3); gifts to President or Vice President, under section 2635.204(j); gifts authorized by an OGE-approved supplemental regulation, under section 2635.204(k); and gifts accepted under specific statutory authority, under section 2635.204(l). As explained in OGE’s February 11, 2009 memorandum: “Because the lobbyist gift ban is very broad, these common sense exceptions

are necessary to avoid potentially absurd results. Thus, an appointee may accept a birthday present from his or her spouse who is a registered lobbyist or sign up for a training course sponsored by a registered lobbying organization that provides a discount for Federal Government employees.” DO–09–007, at 3. The proposed rule extends these exceptions likewise to career employees and others not subject to the Pledge.

### Additional Exceptions Permitted by Proposed Section 2635.202(c)(6)

Additionally, OGE has determined that there is good reason to permit employees—other than the full-time political appointees subject to the Pledge—to use three other exceptions that are not applicable to the Pledge restriction. The additional exceptions are: Section 2635.204(d), for awards and honorary degrees; section 2635.204(e)(2), for gifts resulting from an employee’s outside business or employment; and section 2635.204(f), for certain benefits in connection with permissible political activities.

### Exception for Awards and Honorary Degrees in Section 2635.204(d)

Section 2635.204(d) sets forth specific criteria under which employees may accept “bona fide awards” for meritorious public service or achievement. The award must not be extended by a person with interests that may be substantially affected by the employee’s duties or by an association of such persons. Furthermore, awards of cash or awards valued in excess of \$200 require a written determination by an agency ethics official that the award is “made as part of an established program of recognition” under which (1) awards have been made on a regular basis in the past or are funded to ensure their continuation in the future and (2) the selection of recipients is made pursuant to written standards. 5 CFR 2635.204(d)(1). Although probably used less frequently, section 2635.204(d) also sets forth criteria under which an employee may accept an honorary degree from an institution of higher education, based on a written determination by an agency ethics official that the timing of the degree will raise not raise questions concerning the employee’s impartiality in any matter affecting the institution. 5 CFR 2635.204(d)(2).

OGE has determined that the limitation of proposed section 2635.202(c)(6) should not preclude employees from relying on section 2635.204(d). For one thing, section 2635.204(d) follows a longstanding interpretation that bona fide awards for

meritorious public service and achievement fall outside the prohibition of salary supplementation in 18 U.S.C. 209, “primarily because the grantors are typically detached from and disinterested in the performance of the public official’s duties.” 8 Op. O.L.C. 143, 144 (1984); *see* 57 FR 35018. Consequently, the exception itself already includes both substantive and procedural safeguards that OGE believes are adequate to prevent real or perceived abuses when employees outside the political leadership are granted awards, even where the granting organization is registered under the LDA. Permitting employees to rely on this exception also would further one of the specific goals recently articulated by the Office of Science and Technology Policy concerning the promotion of professional development of government scientists and engineers. *See* John P. Holdren, Director of the Office of Science and Technology Policy, Memorandum for the Heads of Executive Departments and Agencies, December 17, 2010 (OSTP Memorandum). Among other things, the OSTP Memorandum states that agencies should establish policies that “[a]llow Government scientists and engineers to receive honors and awards for their research and discoveries with the goal of minimizing, to the extent practicable, disparities in the potential for private-sector and public-sector scientists and engineers to accrue the professional benefits of such honors and awards.” *Id.* at 4.

With respect to honorary degrees, under section 2635.204(d)(2), even the Pledge currently permits acceptance in most cases. That is because OGE, in consultation with the White House Counsel’s Office, has excluded 501(c)(3) organizations from the category of registered lobbying organizations from which appointees may not accept gifts under the Pledge. DO–09–007, at 5. A large percentage of institutions of higher education, as defined in 20 U.S.C. 1001, are such 501(c)(3) organizations. Moreover, those institutions of higher education that OGE has encountered that are *not* 501(c)(3) organizations have been state and local universities and colleges. As to the latter, OGE already has advised informally that such public institutions are so similar to the educational institutions that have 501(c)(3) status that the Pledge ban likewise should be inapplicable to them. For the same reasons, OGE also is proposing to define “registered lobbyist or lobbying organization” to exclude all institutions of higher education (see discussion of proposed section

2635.203(h)(2) below). In view of this proposed definition, arguably it is redundant to exclude honorary degrees from the limitation in proposed section 2635.202(c)(6). Nevertheless, for purposes of simplicity, OGE proposes to include a general reference to section 2635.204(d) in its entirety in section 2635.202(c)(6), thus clarifying that employees may accept both awards and honorary degrees notwithstanding the lobbyist gift limitation.

#### Exception for Gifts Resulting From an Employee's Outside Business or Employment Activities in Section 2635.204(e)(2)

Section 2635.204(e)(2) is one of three separate, but related exceptions in paragraph (e) of 2635.204, all of which pertain to gifts offered because of some non-federal business or employment. Paragraphs (e)(1) and (e)(3), which respectively cover gifts resulting from a spouse's business or employment and customary gifts given in connection with an employee's discussions with a prospective employer, are already applicable to the Pledge gift ban. Paragraph (e)(2), however, is not applicable to the Pledge ban, in large part because this exception covers benefits resulting from an employee's own current outside employment or business, and there was a general assumption that the political leadership in the Executive Branch would have little need of such an exception while they focused their time and effort on the business of the Administration. Indeed, for many Pledge signers, there are significant ethical limitations and restrictions on their ability to engage in outside employment and business activities. *See* 5 U.S.C. app. 501–505; 5 CFR part 2636; Exec. Order 12674, section 102, 54 FR 15159, 3 CFR, 1989 Comp., p. 215.

However, OGE has determined that section 2635.204(e)(2) does serve a significant purpose for career employees and others who are not subject to the Pledge. Many employees have non-Federal employment and business activities that are consistent with the ethics rules and in fact may have been approved by agency ethics officials. The vast majority of Executive Branch employees are not subject to the limitations on outside business and employment activity cited above, and their outside activities fulfill many personal and professional goals that are perfectly legitimate. For example, most part-time members of Federal commissions and boards have their regular employment with non-Federal entities; even though it is generally expected that such employees will not

be registered lobbyists themselves, no doubt many of them work for entities that are registered under the LDA. *See* 75 FR 67397–67399 (November 2, 2010) (proposed Office of Management and Budget guidance does not “restrict the appointment of individuals who are themselves not Federal registered lobbyists but are employed by organizations that engage in lobbying activities”). Another example would be full-time career employees who have approved outside activities with entities that are registered under the LDA, such as physicians who have been authorized to engage in the outside practice of medicine with hospital organizations that also happen to employ lobbyists. *See* 5 CFR 5501.106(c)(3)(A) (employees of Food and Drug Administration may engage in outside medical practice with regulated entities under certain circumstances). The exception for benefits resulting from outside business or employment is useful and appropriate for these employees, particularly given the important proviso in section 2635.204(e)(2) that such benefits may not be offered or even “enhanced” because of employees' official status. *See* 5 CFR 2635.204(e)(2) (Example 1).

#### Exception for Gifts in Connection With Permissible Political Activities in Section 2635.204(f)

Section 2635.204(f) applies to employees who are permitted by the Hatch Act Reform Amendments of 1993, 5 U.S.C. 7323, to take an active part in political management or political campaigns. The exception allows such employees to accept meals, travel and other benefits when provided in connection with their outside political activities, if the gift is from a political organization as described in 26 U.S.C. 527(e). Section 2635.204(f) was promulgated by OGE so that the gift restrictions would not “hamper the political activities” of employees, where those activities are themselves authorized by Congress (originally by the Hatch Act and later more extensively by the Hatch Act Reform Amendments). 56 FR at 33782; *see also* 61 FR 50689, 50690 (September 27, 1996).

OGE believes that this exception should remain available to employees—other than those appointees subject to the Pledge—out of consideration for the rights of employees to participate in political activities. It is not clear to OGE how likely it is that a political organization, under 26 U.S.C. 527(e), would also be a registered lobbying organization, but OGE thinks it best to send a clear message to employees that

nothing in the lobbyist gift limitation is intended to interfere with their existing rights to participate in political activities.

#### C. Proposed Section 2635.202(d)

As discussed above, the proposed rule leaves the lobbyist gift ban of Executive Order 13490 in place as a separate restriction for appointees required to sign the Pledge, in addition to the general restrictions in the OGE regulations on gifts from prohibited sources and gifts given because of official position. Proposed section 2635.202(d) would accomplish this by reiterating the Pledge ban and emphasizing that it is in addition to the prohibitions set forth in section 2635.202(a). The proposed provision allows only those exceptions permitted expressly by section 2(c)(3) of the Executive Order: Gifts based on a personal relationship, under section 2635.204(b); discounts and similar benefits, under section 2635.204(c); gifts resulting from a spouse's business or employment, under section 2635.204(e)(1); customary gifts provided by prospective employers, under section 2635.204(e)(3); gifts to the President or Vice President, under section 2635.204(j); gifts authorized by an OGE-approved supplemental regulation, under section 2635.204(k); and gifts accepted under specific statutory authority, under section 2635.204(l). Note, however, that the definition of “registered lobbyist or lobbying organization,” in proposed section 2635.203(h), would apply to the Pledge restriction at proposed section 2635.202(d); that proposed definition, as discussed below, would exclude certain organizations from the Pledge ban.

#### D. Proposed Section 2635.203(h)

Proposed section 2635.203(h) defines the phrase “registered lobbyist or lobbying organization.” This definition would apply both to the limitation on the use of the gift exceptions, in proposed section 2635.202(c)(6), and the additional prohibition for full-time political appointees (the Pledge ban), in proposed section 2635.202(d).

The proposed definition mainly follows the definition in section 2(e) of Executive Order 13490. The definition includes any lobbyist or organization that is currently registered under the Lobbying Disclosure Act (LDA) or identified as a lobbyist in a registration. As discussed above, the definition in the Executive Order covers not only lobbying firms that provide services to others but also organizations that employ in-house lobbyists to lobby on behalf of the organization itself. The

proposed rule would retain this scope of coverage. Also following the Executive Order, the proposed definition does not extend to persons or organizations that simply retain “outside” lobbyists or lobbying firms: Organizations that are merely “clients” but not actually employers of lobbyists do not have to file registrations under the LDA, even though they may be listed as clients in registrations filed by the lobbyists or firms they retain. See DO-09-007, at 2-3.

Like the current OGE guidance applicable to the Pledge ban, the proposed definition emphasizes, in the Note following section 2635.203(h), that employees may determine whether the source of a gift is a lobbyist or a lobbying organization by relying on the searchable, online databases of lobbyists and registrants maintained by the Secretary of the Senate and the Clerk of the House, pursuant to the Lobbying Disclosure Act (LDA), 2 U.S.C. 1605(a).<sup>2</sup> The proposed Note also includes guidance about how to determine whether a given registrant or lobbyist currently is registered or listed; the guidance with respect to the de-listing or cessation of the lobbying activity of a particular lobbyist is derived from the proposed guidance issued by the Office of Management and Budget concerning “Appointment of Lobbyists to Federal Boards and Commissions.” OMB, Proposed Guidance, A1, 75 FR 67397-67399 (November 2, 2010). Additionally, the Note provides that, “[w]ith respect to organizations that have subsidiaries, parents or affiliates that are separate legal entities, employees need only determine the registration status of the entity that offered the gift.” Since the Pledge ban went into effect, OGE has fielded numerous questions about how to treat gifts from an organization that is not registered but that has a parent, subsidiary or affiliate that is registered. In answering these questions, OGE generally has relied on the guidance provided by the Secretary of the Senate and the Clerk of the House with respect to the registration requirements for such entities:

“Assuming a parent entity or national association and its subsidiary or subordinate are separate legal entities, the parent makes a determination whether it meets the registration threshold based upon its own activities, and does not include subordinate units’ lobbying activities in its assessment. Each subordinate must make its own assessment as to whether any of its own employees meet the definition of a lobbyist,

and then determine if it meets the registration threshold with respect to lobbying expenses.”

Secretary of the Senate & Clerk of the House of Representatives, *Lobbying Disclosure Act Guidance* (June 15, 2010), section 5 [http://lobbyingdisclosure.house.gov/amended\\_lda\\_guide.html](http://lobbyingdisclosure.house.gov/amended_lda_guide.html). With the understanding that parents, subsidiaries and affiliates file their own registrations without regard to each other’s activities (albeit with certain accommodations for a single filing in limited circumstances, *id.*), OGE believes that the clearest and most practical approach is to search the LDA database only for the legal entity that offered the gift.

The proposed definition of registered lobbyist or lobbying organization provides four exclusions. These exclusions pertain to organizations that may be registered under the LDA, but which do not pose the concerns at which the Executive Order was directed. Two of these exclusions—for 501(c)(3) organizations and media organizations—are already found in the current OGE guidance concerning the Pledge ban. See DO-09-007, at 5-6. A third exclusion—for institutions of higher education—largely follows from OGE’s existing guidance on 501(c)(3) organizations and in fact has been the subject of informal advice from OGE to agency ethics officials. The fourth exclusion—for nonprofit professional associations, scientific organizations and learned societies engaging in educational or professional development activities—would be new, although the purposes of this exclusion are related to those for 501(c)(3) organizations and institutions of higher education. These four exclusions are discussed in more detail below.

It is important to remember that the mere fact that an entity is excluded from the definition of registered lobbyist or lobbying organization does not necessarily mean that a gift from such an organization may be accepted. Rather, it means only that a gift from such an organization would not trigger the lobbyist limitation at proposed section 2635.202(c)(6) or the separate gift prohibition for Pledge signers at proposed section 2635.202(d). Where the gift happens to be given by a prohibited source, or given because of the employee’s official position, the employee still must rely on an applicable exception in section 2635.204 to accept the gift. However, in some cases, this will mean that an employee could rely on an exception that otherwise would be unavailable, either under section 2635.202(c)(6) or section 2635.202(d), if the source were

not excluded from the definition of registered lobbyist or lobbying organization. For example, any employee (including Pledge signers) could use the \$20 de minimis exception to accept a \$10 lunch from a prohibited source that is a 501(c)(3) organization, even though that organization may be registered under the LDA. However, if that same organization offered to pay for a \$45 dinner, and no other gift exception in section 2635.204 applied, the gift would violate the bar on gifts from a prohibited source.

#### Exclusion of 501(c)(3) Organizations in Proposed Section 2635.203(h)(1)

OGE’s original guidance concerning the Pledge gift ban excluded “charitable and other not-for-profit organizations that are exempt from taxation under 26 U.S.C. 501(c)(3)” for several reasons: They are limited by law as to the lobbying in which they may engage; their exempt purposes often involve activities of particular interest and value to agencies (e.g., educational, charitable, scientific); and similar considerations are reflected in the Government Employees Training Act (5 U.S.C. 4111). DO-09-007, at 5. In OGE’s experience, the exclusion for 501(c)(3) organizations generally has worked well for the full-time political appointees subject to the Pledge, and it makes sense to extend it now to the provisions covering all employees, at proposed section 2635.203(h)(1).

The proposed rule would make one adjustment to the current OGE guidance concerning gifts from registered 501(c)(3) organizations. OGE’s guidance Memorandum states that, notwithstanding the exclusion of 501(c)(3) organizations, “appointees still may not accept a gift if the organization employee who extends the offer is a registered lobbyist him- or herself.” *Id.* Based on experience in implementing the Pledge ban for political appointees, OGE has decided not to carry this limitation forward into proposed section 2635.203(h)(1). For one thing, this limitation has proven difficult to apply in practice. For example, in determining whether an invitation to an event has actually been “extended” by an individual who is the organization’s lobbyist, should one focus on who officially signed the invitation letter, who e-mailed a PDF copy of the signed letter, or who called the employee to say that a written invitation is coming? Moreover, the proviso has not proved to be a meaningful limitation anyway, because the same invitation can be resent through a different messenger who is not listed as a lobbyist for the organization. OGE believes that the

<sup>2</sup> See <http://soprweb.senate.gov/index.cfm?event=selectfields;http://disclosures.house.gov/ld/ldsearch.aspx>.

clearest and most straightforward approach is to exclude 501(c)(3) organizations entirely from the definition, without regard to which organization official conveys the offer.

#### Exclusion of Institutions of Higher Education in Proposed Section 2635.203(h)(2)

One of the primary reasons that OGE, in consultation with the White House Counsel's Office, originally excluded 501(c)(3) organizations from the Pledge gift ban was a desire to avoid creating barriers to interaction between employees and educational institutions. However, after issuing the initial guidance Memorandum on the Pledge gift ban, it came to OGE's attention that some state and local universities and colleges have not obtained separate 501(c)(3) status, usually for reasons pertaining to state law. Because it made little sense to discriminate between those state institutions that have obtained 501(c)(3) status and those that have not, OGE has advised agencies informally that the latter are not covered by the Pledge ban. Proposed section 2635.203(h)(2) would codify this guidance. For this purpose, the proposed rule incorporates the definition of "institution of higher education" in 20 U.S.C. 1001, which includes both "public and nonprofit" institutions. Therefore, under proposed section 2635.203(h)(2), private for-profit institutions of higher education are not included as part of the exclusion from the definition of "registered lobbyist or lobbying organization" and are covered by the Pledge ban.

#### Exclusion of Media Organizations in Proposed Section 2635.203(h)(3)

OGE's initial guidance Memorandum concerning the Pledge gift ban indicated that it was not the intent of the Executive Order to bar gifts from media organizations. Relying on some of the concerns underlying the LDA, as well as past Executive Branch concerns about facilitating interactions between government officials and members of the press, OGE explained the exclusion as follows: "The LDA itself reflects solicitude for the unique constitutional role of the press in gathering and disseminating information. See 2 U.S.C. 1602(8)(B)(ii). Likewise, the lobbyist gift ban is not intended to erect unnecessary barriers to interaction between appointees and journalists. This is consistent with concerns about the application of the OGE gift prohibitions to certain press dinners shortly after the Standards of Conduct became effective. See Memorandum from the Counsel to the President to All Agency Heads,

December 21, 1993 (suspending enforcement of gift rule with respect to press dinners, pending revision of rule). "Therefore, an appointee may accept a gift from an employee of a media organization, as long as the gift is permissible under the OGE gift rules, including any applicable exceptions." DO-09-007, at 5-6.

For the same reasons, OGE now proposes to carry forward the media organization exclusion in the definition at proposed section 2635.203(h)(3). The proposed rule defines media organization by reference to the definition in the LDA, 2 U.S.C. 1602(11). OGE sees this as a broad definition, covering print, broadcast, electronic and other kinds of mass communications organizations.

OGE has added one limitation, however, that was not included in the original guidance Memorandum. The proposed rule excludes a media organization only with respect to gifts that are made in connection with the organization's information gathering or dissemination activities. This limitation brings the exclusion closer to the purposes of the Pledge and the LDA, as the latter expressly excludes media contacts from the definition of "lobbying contact" only when those contacts are made for the purpose of "gathering and disseminating news and information to the public," 2 U.S.C. 1602(8)(B)(ii). This limitation will address one question that has arisen under the current OGE guidance, which is whether gifts from media organizations are always permitted even if wholly unrelated to the news activities of the organization. OGE believes there is no reason to exclude media organization gifts that are extended under other circumstances, such as a lunch invitation from an executive of a media conglomerate to an official of the Department of Justice for the purpose of discussing a proposed corporate acquisition. By contrast, for example, OGE does intend that the exclusion would permit employees to accept invitations from media organizations to attend the typical "press dinners" at which journalists and government officials interact with each other, as such interactions foster relationships that further the news gathering functions of the organizations.

Proposed section 2635.203(h)(3) would make one additional modification to the current OGE guidance on the Pledge ban. As with the exclusion for 501(c)(3) organizations, the initial OGE guidance Memorandum imposed a limit on gifts from media organizations: "appointees may not accept a gift if the organization

employee who extends the offer is actually a registered lobbyist." DO-09-007, at 6. For the same reasons discussed above with respect to the exclusion for 501(c)(3) organizations, OGE has not carried this limitation forward in the proposed rule.

#### Exclusion for Nonprofit Professional Associations, Scientific Organizations and Learned Societies Engaging in Educational or Professional Development Activities in Proposed Section 2635.203(h)(4)

As explained above, under "Exceptions Unavailable for Lobbyist Gifts," proposed section 2635.202(c)(6) would preclude employees from relying on the widely attended gathering (WAG) exception, 5 CFR 2635.204(g)(2), to accept a gift from a registered lobbyist or lobbying organization. However, as also described above, OGE has determined that certain widely attended events provide legitimate educational and professional development opportunities that may further agency interests, even if the offer of free attendance is extended by an organization that is registered under the LDA. Therefore, proposed section 2635.203(h)(4) would exclude nonprofit professional associations, scientific organizations and learned societies from the definition of registered lobbyist or lobbying organization, with respect to gifts made in connection with the entity's educational or professional development activities. Effectively, this would mean that an employee still could rely on the WAG exception (or other applicable exceptions) to accept free attendance at a training or professional development event hosted by one of these entities, without regard to the LDA registration status of the organization. Nevertheless, because of the concerns expressed above about gifts of free attendance from lobbyists, the exclusion will not apply to these organizations in connection with invitations to purely social events (gala balls, fundraisers, parties, etc.).<sup>3</sup>

<sup>3</sup> Where an employee is authorized to accept an offer of free attendance from a nonprofit professional association, scientific organization or learned society, pursuant to 5 CFR 2635.204(g)(2) and proposed section 2635.203(h)(4), the employee would be permitted to accept "food, entertainment, instruction and materials furnished to all attendees as an integral part of the event." 5 CFR 2635.204(g)(4) (emphasis added). This means, for example, that employees could attend a reception that is integral to an educational or professional development event, but could not accept "entertainment collateral to the event" or "meals taken other than in a group setting with all other attendees." *Id.*; see generally DO-07-047 (discussing the WAG exception, including what it

The proposed exclusion is intended to further the goal, recently articulated by the Office of Science and Technology Policy, of setting “policies that promote and facilitate \* \* \* the professional development of Government scientists and engineers,” OSTP Memorandum at 3. However, OGE would not limit this exclusion to scientific organizations but would extend it to any professional or learned societies that promote the development or education of members of a profession or discipline. Many of the entities that sponsor educational and professional development activities of interest to Federal employees and their agencies would be 501(c)(3) organizations and, therefore, excluded already under proposed section 2635.203(h)(1). Nevertheless, many professional organizations are exempt from taxation under provisions other than 26 U.S.C. 501(c)(3), so OGE believes the limited exclusion in proposed section 2635.203(h)(4) is necessary and appropriate. Although the exclusion is intended to cover a wide range of organizations devoted to various professions and disciplines, OGE does not intend that proposed section 2635.203(h)(4) would cover trade associations, such as associations of manufacturers of particular products. Trade associations may sponsor educational activities for their members and even the public, but the primary concern of such associations generally is not the education and development of members of a profession or discipline, which is the focus of the proposed exclusion.<sup>4</sup>

#### E. Proposed Section 2635.203(i)

Proposed section 2635.203(i) would define the phrase “full-time, non-career appointee,” which is a term describing the types of political appointees subject to the Pledge under Executive Order 13490. The proposed definition largely follows the definition of “appointee” in section 2(b) of the Executive Order and is consistent with guidance already issued by OGE concerning which officials are required to sign the Pledge.

means for entertainment to be integral as opposed to collateral).

<sup>4</sup> Compare *Encyclopedia Britannica* (2008) (“trade association” is “voluntary association of business firms organized on a geographic or industrial basis to promote and develop commercial and industrial opportunities within its sphere of operation, to voice publicly the views of members on matters of common interest, or in some cases to exercise some measure of control over prices, output, and channels of distribution”); *Collins English Dictionary* (2009) (“professional association” is “body of persons engaged in the same profession, formed usually to control entry into the profession, maintain standards, and represent the profession in discussions with other bodies”).

See DO–09–010, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2009/do09010.html](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09010.html); DO–09–020, [http://www.usoge.gov/ethics\\_guidance/daeograms/dgr\\_files/2009/do09020.html](http://www.usoge.gov/ethics_guidance/daeograms/dgr_files/2009/do09020.html). The definition is included in the proposed rule because proposed section 2635.202(d) reiterates the Pledge restriction.

### III. Matters of Regulatory Procedure

#### *Administrative Procedure Act*

Interested persons are invited to submit written comments on this proposed amendatory rulemaking, to be received by November 14, 2011. The comments will be carefully considered and any appropriate changes will be made before a final rule is adopted and published in the **Federal Register** by OGE.

#### *Regulatory Flexibility Act*

As Acting Director of OGE, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal employees.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed rule because it does not contain an information collection requirement that requires the approval of the Office of Management and Budget.

#### *Unfunded Mandates Reform Act*

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed amendatory rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

#### *Congressional Review Act*

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

#### *Executive Order 12866 and Executive Order 13563*

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

#### *Executive Order 12988*

As Acting Director of the Office of Government Ethics, I have reviewed this proposed amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

#### **List of Subjects in 5 CFR Part 2635**

Conflict of interests, Executive branch standards of ethical conduct, Government employees.

Approved: September 7, 2011.

**Don W. Fox,**

*Acting Director, Office of Government Ethics.*

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is proposing to amend part 2635 of subchapter B of chapter XVI of title 5 of the Code of Federal Regulations, as follows:

#### **PART 2635—STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH**

1. The authority citation for part 2635 is revised to read as follows:

**Authority:** 5 U.S.C. 7301, 7351, 7353; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; E.O. 13490, 74 FR 4673, 3 CFR, 2009 Comp., p. 193.

#### **Subpart B—Gifts From Outside Sources**

2. Section 2635.202 is amended by adding, new paragraph (c)(6) and a new paragraph (d), as follows:

#### **§ 2635.202 General standards.**

\* \* \* \* \*

(c) *Limitations on use of exceptions.*

\* \* \*

\* \* \* \* \*

(6) Accept a gift from a registered lobbyist or lobbying organization, unless

pursuant to paragraphs (b), (c), (d), (e), (f), (j), (k) and (l) of § 2635.204.

(d) *Other prohibition applicable to full-time, non-career appointees.* In addition to the general prohibitions set forth in paragraph (a) of this section pertaining to gifts from a prohibited source and gifts given because of an employee's official position, a full-time, non-career appointee who is required to sign the Ethics Pledge prescribed by section 1 of Executive Order 13490 shall not accept a gift from a registered lobbyist or lobbying organization, except pursuant to paragraphs (b), (c), (e)(1), (e)(3), (j), (k), or (l) of § 2635.204.

3. Section 2635.203 is amended by adding new paragraphs (h) and (i), as follows:

**§ 2635.203 Definitions.**

\* \* \* \* \*

(h) *Registered lobbyist or lobbying organization* means a person (including an organization) currently registered pursuant to 2 U.S.C. 1603 (Lobbying Disclosure Act) or listed as a lobbyist in such registration, as found in the databases maintained by the Secretary of the Senate and the Clerk of the House of Representatives, but it does not include:

(1) An organization exempt from taxation pursuant to 26 U.S.C. 501(c)(3);

(2) An institution of higher education as defined in 20 U.S.C. 1001;

(3) A media organization as defined in 2 U.S.C. 1602(11), with respect to any gift made in connection with the information gathering or dissemination activities of the organization; or

(4) A nonprofit professional association, scientific organization or learned society, with respect to any gift made in connection with the entity's educational or professional development activities.

**Note to paragraph (h):** The Secretary of the Senate and the Clerk of the House of Representatives maintain searchable, online databases of registrants and lobbyists, pursuant to 2 U.S.C. 1605(a). Employees may rely on the information contained in those databases to determine whether any gift source currently is registered or listed as a lobbyist. For these purposes, a registrant will not be considered to be currently registered if the person has filed a termination of registration. Similarly, a lobbyist will not be considered to be currently listed if the individual has been de-listed by his or her employer as an active lobbyist reflecting the actual cessation of the individual's lobbying activities, or if the individual has not appeared on a quarterly lobbying report for three consecutive quarters as a result of the individual's actual cessation of lobbying activities. With respect to organizations that have subsidiaries, parents or affiliates that are separate legal entities, employees need

only determine the registration status of the entity that offered the gift.

(i) *Full-time, non-career appointee* includes every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria). It does not include a career appointee in the Senior Foreign Service or similar system, nor does it include any person appointed solely as a uniformed service commissioned officer.

[FR Doc. 2011-23311 Filed 9-12-11; 8:45 am]

**BILLING CODE 6345-03-P**

**DEPARTMENT OF ENERGY**

**10 CFR Part 430**

**[Docket No. EERE-2011-BT-TP-0007]**

**RIN 1904-AC44**

**Energy Conservation Program for Consumer Products: Test Procedures for Residential Furnaces and Boilers (Standby Mode and Off Mode)**

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of proposed rulemaking and announcement of public meeting.

**SUMMARY:** In an earlier final rule, the U.S. Department of Energy (DOE) prescribed amendments to its test procedures for residential furnaces and boilers to include provisions for measuring the standby mode and off mode energy consumption of those products, as required by the Energy Independence and Security Act of 2007. These test procedure amendments are primarily based on provisions incorporated by reference from the International Electrotechnical Commission (IEC) Standard 62301 (First Edition), "Household electrical appliances—Measurement of standby power." This document proposes to further update the DOE test procedure through incorporation by reference of the latest edition of the industry standard, specifically IEC Standard 62301 (Second Edition). The new version of this IEC standard includes a number of methodological changes designed to increase accuracy while reducing testing burden. DOE's review suggests that this document represents an improvement over the prior version,

so DOE has decided to exercise its discretion to consider the revised IEC standard. DOE is also announcing a public meeting to discuss and receive comments on the issues presented in this rulemaking.

**DATES:** *Meeting:* DOE will hold a public meeting on October 3, 2011, from 9 a.m. to 4 p.m., in Washington, DC. The meeting will also be broadcast as a webinar. See section V, "Public Participation," for webinar information, participant instructions, and information about the capabilities available to webinar participants.

*Comments:* DOE will accept comments, data, and information regarding the notice of proposed rulemaking (NOPR) before and after the public meeting, but no later than November 28, 2011. For details, see section V, "Public Participation," of this NOPR.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E-089, 1000 Independence Avenue, SW., Washington, DC 20585. To attend, please notify Ms. Brenda Edwards at (202) 586-2945. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE as soon as possible by contacting Ms. Brenda Edwards at the phone number above to initiate the necessary procedures.

Any comments submitted must identify the NOPR on Test Procedures for Furnaces and Boilers, and provide the docket number EERE-2011-BT-TP-0007 and/or regulatory information number (RIN) 1904-AC44. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

2. *E-mail: FurnaceBoiler-IEC-2011-TP@ee.doe.govmailto:* Include docket number EERE-2011-BT-TP-0007 and RIN 1904-AC44 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE-2J, 1000 Independence Avenue, SW., Washington, DC 20585-0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586-2945. If possible, please