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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2635

RIN 3209-AA04

Standards of Ethical Conduct for Employees of the Executive Branch; Amendment to the Standards Governing Solicitation and Acceptance of Gifts from Outside Sources

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule.

SUMMARY: The U.S. Office of Government Ethics is issuing a final rule revising the portions of the Standards of Ethical Conduct for Executive Branch Employees that govern the solicitation and acceptance of gifts from outside sources. The final rule modifies the existing regulations to more effectively advance public confidence in the integrity of Federal officials. The final rule also incorporates past interpretive guidance, adds and updates regulatory examples, improves clarity, updates citations, and makes technical corrections.

DATES: This final rule is effective January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Leigh J. Francis, Assistant Counsel, or Christopher J. Swartz, Assistant Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005-3917; Telephone: 202-482-9300; TTY: 800-877-8339; FAX: 202-482-9237.

SUPPLEMENTARY INFORMATION:

I. Rulemaking History

On November 27, 2015, the U.S. Office of Government Ethics (OGE) published for public comment a proposed rule setting forth comprehensive revisions to subpart B of the Standards of Ethical Conduct for Employees of the Executive Branch

(Standards of Ethical Conduct), 5 CFR part 2635. 80 FR 74004 (Nov. 27, 2015). Subpart B of part 2635 contains the regulations governing the solicitation and acceptance of gifts from outside sources by officers and employees of the Executive Branch. These regulations implement the gift restrictions set forth in 5 U.S.C. 7353 and section 101(d) of Executive Order 12674, as modified by Executive Order 12731. The proposed rule was issued following OGE's retrospective review of the regulations found in subpart B, pursuant to section 402(b)(12) of the Ethics in Government Act of 1978, Public Law 95-521, codified at 5 U.S.C. Appendix IV, sec. 402(b)(12). Prior to publishing the proposed rule, OGE consulted with the Office of Personnel Management and the Department of Justice in accordance with section 402(b) of the Ethics in Government Act and section 201(a) of Executive Order 12674, as modified by Executive Order 12731, and with other officials throughout the Federal Government.

The proposed rule provided a 60-day comment period, which ended on January 26, 2016. OGE received ten timely and responsive comments, which were submitted by four individuals, three professional associations, two Federal agencies, and a law firm. After carefully considering all comments and making appropriate modifications, and for the reasons set forth below and in the preamble to the proposed rule at <https://www.gpo.gov/fdsys/pkg/FR-2015-11-27/pdf/2015-29208.pdf>, OGE is publishing this final rule.

II. Summary of Comments and Changes to Proposed Rule

General Comments

OGE received one comment from an individual observing that various references to spousal and dating relationships in the examples used dual-gendered relationships and gender-specific pronouns. The commenter expressed concern that such examples could be read as excluding same-sex marriages or relationships. OGE treats same-sex spouses the same as opposite-sex spouses for the purposes of all of its regulations. OGE Legal Advisory LA-13-10 (Aug. 19, 2013). OGE has therefore reviewed the examples highlighted by the commenter and has replaced the terms “husband” and

“wife” with the gender-neutral term “spouse.”

Various commenters suggested that one or more of the proposed amendments to the rule might negatively impact the ability of the public to interact with Federal employees. These commenters pointed out the beneficial impact of this interaction and encouraged OGE to consider this equity in drafting gift regulations. As a general matter, OGE agrees with the commenters' proposition that communication between the Government and the public is vital to ensuring that Government decisions are responsive to citizen needs. Public interaction done in a non-preferential manner may: (1) Provide executive branch decisionmakers with information and data they may not otherwise possess; (2) identify policy options and alternatives that may not have been raised internally; and (3) produce better and more thoughtful decisions. These interactions must, however, occur in an environment that promotes the public's confidence in the integrity of Government decisionmaking. When Federal employees accept or solicit gifts from members of the public who have interests that are affected by the employee's agency, the public's confidence can be eroded as “[s]uch gifts may well provide a source of illicit influence over the government official; in any case they create a suspicious and unhealthy appearance.” *The Association of the Bar of the City of New York, Conflict of Interest and Federal Service* 219 (1960). When drafting this final rule, OGE has carefully considered the commenters' concerns in light of the important objective of promoting the public's confidence in the impartial administration of the Government.

§ 2635.201 Overview and Considerations for Declining Otherwise Permissible Gifts

OGE received comments from three sources on proposed § 2635.201(b)(1). Section 2635.201(b)(1) establishes a non-binding standard that can assist employees in considering whether to decline an otherwise permissible gift. The standard encourages employees to consider whether their acceptance of a gift that would otherwise be permissible to accept would nonetheless create the appearance that their integrity or ability

to act impartially may be compromised. The duty to avoid such appearances is a responsibility of all executive branch employees. See 5 CFR 2635.101(b)(1); (14).

Based on past experience with executive branch agencies applying subpart B of part 2635, OGE is concerned that employees and ethics officials may not be sufficiently analyzing appearance concerns and, instead, may be focusing exclusively on whether a gift can be accepted under a regulatory gift exception. This kind of analysis may unintentionally overlook other important considerations, such as “whether acceptance of the gift could affect the perceived integrity of the employee or the credibility and legitimacy of [an] agency’s programs.” 80 FR 74004, 74004 (Nov. 27, 2015). The non-binding standard in § 2635.201(b)(1) was explicitly included in subpart B to correct for this tendency and to enhance the overall quality of employees’ ethical decisionmaking.

Commenters on this section raised concerns with the new standard and the factors for applying the standard. OGE appreciates the concerns raised by commenters, which are examined in detail below. OGE has addressed these concerns by making appropriate adjustments to the standard, rather than adopting some of the commenters’ requests for the outright removal of this section. The changes make the standard easier for employees to understand and apply.

A few commenters suggested that ethics training would be more effective than a regulatory change in ensuring that employees consider appearance issues before accepting gifts. OGE fully agrees with the commenters’ suggestions that ethics education is important. Without this amendment of the regulation, however, there would not be a uniform standard upon which to base ethics training regarding appearance issues in connection with gifts. Prior to this amendment, the regulation cautioned only that “it is never inappropriate and frequently prudent for an employee to decline a gift,” but the regulation did not articulate an applicable standard or any factors for employees to use in identifying the frequently arising circumstances when it would be prudent to decline a gift. OGE believes it is imperative that the regulatory framework itself enable and encourage employees to meaningfully consider the appearances of accepting gifts. By articulating the standard and relevant factors, the amended § 2635.201(b)(1) will increase the value and uniformity of agency ethics training

because that standard and those factors will become a focus of ethics training.

One commenter believed that the proposed standard creates confusion because it moves away from the previous system of bright-line rules regarding gift acceptance. Specifically, the commenter requested that OGE amend the regulation in a way that sets out definitive rules as to whether “a gift is simply permissible or impermissible, without further parsing the permissible gifts into additional categories, *i.e.*, technically permissible and actually permissible.” OGE does not believe that the non-binding standard will create confusion because OGE has maintained the clear, uniform, and objective rules that are found in the current regulation. Section 2635.201(b)(1) augments those rules by encouraging employees to consider the appearances of their actions. The posited distinction between “technically permissible” and “actually permissible” is inaccurate because an employee will not face disciplinary action in the event that someone later subjectively disagrees with the employee’s analysis. The bright-line rules provide a floor for ethical behavior, and the appearance analysis under § 2635.201(b) provides a mechanism with which to reach for a stronger, values-based ethical culture. This framework provides the certainty and uniformity of the existing rules, while furthering the underlying objective of increasing public trust by improving the ethical decisionmaking of employees.

The commenters also suggested that employees will feel compelled by this non-binding standard to always decline legally permissible gifts. OGE does not agree that the standard creates a presumption that all legally permissible gifts should be declined. Although some employees will decline legally permissible gifts after carefully analyzing them under the standard that § 2635.201(b)(1) establishes, the standard does not change the fact that the determination as to whether a legally permissible gift should be accepted is the employee’s to make. Section 2635.201(b)(1) is designed to increase uniformity and promote public trust by articulating factors, which are informed by the ethical values consistent with the executive branch’s Principles of Ethical Conduct, in order to guide the employee’s decisionmaking process. This section provides employees an effective means of adequately assessing whether, notwithstanding a gift exception, the specific factual circumstances may raise appearance concerns weighing against acceptance of a gift.

In light of the comments referenced above, however, OGE has streamlined the language of § 2635.201(b). OGE has also clarified the overarching objective of that provision by placing the emphasis in § 2635.201(b)(1) on an assessment as to whether “a reasonable person with knowledge of the relevant facts would question the employee’s integrity or impartiality.” In the proposed rule, substantially similar language appeared in the list of factors in § 2635.201(b)(2). Because this language articulates the standard to be applied, however, it is more appropriately included in paragraph (b)(1), which establishes the standard, than in paragraph (b)(2), which provides factors for determining whether the standard has been met. Using this “reasonable person” language in the articulated standard has the added benefit of addressing a commenter’s concern regarding the potential for confusion, as executive branch employees have extensive experience applying this particular standard, which has long been used to address appearance concerns under § 2635.502. At the end of § 2635.201(b)(1), OGE has also added “as a result of accepting the gift” in order to tie the appearance concerns to the specific action giving rise to them.

As a final note, one commenter was concerned that the application of the reasonable person standard could vary, resulting in the “unequal application” of the standard. Reliance on a reasonable person standard, however, is not a novel approach in Government ethics. The Standards of Ethical Conduct at part 2635 have successfully employed the reasonable person standard for over two decades. See 5 CFR 2635.101(b)(14); 2635.502(a); *cf.* 2635.702(b) (“that could reasonably be construed”). In fact, when OGE first proposed the Standards of Ethical Conduct in 1991, OGE noted that the use of the reasonable person standard reflected both “case law and longstanding practice,” which “temper the appearance standard by reference to the perspective of a reasonable person with knowledge of the relevant facts.” 56 FR 33778, 33779 (July 23, 1991). OGE explained that the use of the reasonable person standard “is intended to ensure that the conduct of employees is judged by a standard of reasonableness.” *Id.* That reasoning continues to hold today.

Factors for Applying the § 2635.201(b)(1) Standard

Two commenters requested that OGE remove § 2635.201(b)(2), which sets out factors that employees may consider when determining whether to decline

an otherwise permissible gift. These commenters requested the factors be removed because of their concern that the factors listed in § 2635.201(b)(2) are too complex and confusing, and will inevitably lead employees to decline permissible gifts. OGE is sensitive to these concerns and has revised the language to address them.

OGE reviewed each of the proposed factors closely to determine whether any could be removed, streamlined, or changed to eliminate unnecessary complexity or confusion. OGE removed several factors that appeared in the proposed rule on the basis that clarification of the reasonable person standard in § 2635.201(b)(1) in the final rule has rendered them unnecessary:

- Whether acceptance of the gift would lead the employee to feel a sense of obligation to the donor;
- Whether acceptance of the gift would cause a reasonable person to question the employee's ability to act impartially; and
- Whether acceptance of the gift would interfere with the employee's conscientious performance of official duties.

See 80 FR 74004, 74010 (Nov. 27, 2015). At the same time, OGE has added a straightforward factor focusing on whether “[t]he timing of the gift creates the appearance that the donor is seeking to influence an official action,” in order to provide a concrete example intended to remind employees that the timing of a gift can create the appearance that a person is seeking to influence the decisionmaking process.

OGE has also revised the factor articulated at § 2635.201(b)(2)(iv). The proposed language read: “Whether acceptance of the gift would reasonably create an appearance that the employee is providing the donor with preferential treatment or access to the Government.” OGE's intent was that the word “preferential” would be read to modify both “treatment” and “access.” In light of concerns the commenters expressed regarding the clarity of § 2635.201(b)(2) generally, OGE has determined that the proposed language could have been clearer in this respect. In reviewing this language, OGE also noted that the phrase “preferential treatment” is redundant of the phrase “preferential . . . access to the Government,” in that the specific preferential treatment at issue is the preferential access that the donor may be perceived as having received. The concern is that a donor may offer a gift that, by its nature, would provide the donor with significantly disproportionate access to the employee. This concern can arise in connection with gifts such as frequent

lunches, trips, social invitations, free attendance at widely attended gatherings, and other items. If such gifts were to result in an employee spending considerable time with a donor, the donor may appear to have inordinate opportunities to discuss matters of interest to the donor and, thereby, unduly influence the employee. Accordingly, OGE has simplified this language and made it more specific. The language at § 2635.201(b)(2)(iv) now reads: “Acceptance of the gift would provide the donor with significantly disproportionate access.” This language should not be read as discouraging employees from attending events merely because they present opportunities to discuss official business. There is no requirement to provide exact parity in all cases with regard to the level of access afforded to those with competing viewpoints, but there is a value in guarding against any person, or multiple persons with a common interest or viewpoint, from enjoying significantly disproportionate access as a result of having given gifts to employees. An employee who is concerned about the level of access provided to those with a particular viewpoint may choose to decline the offered gifts or may take steps to ensure that those with different viewpoints are able to communicate with the employee, such as by taking their telephone calls, agreeing to meet with them in the employee's office, or convening a public forum.

OGE has also removed the following two factors:

- With regard to a gift of free attendance at an event, whether the Government is also providing persons with views or interests that differ from those of the donor with access to the Government;
- With regard to a gift of free attendance at an event, whether the event is open to interested members of the public or representatives of the news media.

80 FR 74004, 74010 (Nov. 27, 2015). Although OGE continues to believe these factors are important when an employee considers any gift of free attendance, their inclusion in § 2635.201(b)(2) is unnecessary given their more limited application. Furthermore, these factors often are most relevant to free attendance at widely attended gatherings under § 2635.204(g), where similar factors already exist.

OGE believes that these changes to § 2635.201(b)(2) diminish the potential for confusion created by the longer list of factors included in the proposed rule while continuing to provide guidance as

to how employees should apply the standard in § 2635.201(b)(1) in the areas that OGE believes raise the greatest potential for appearance problems.

Receipt of Independent Advice From an Ethics Official Under § 2635.201(b)(4)

One commenter raised a concern about the language OGE used in § 2635.201(b)(4), which reminds employees to contact an appropriate agency ethics official if they have questions regarding whether acceptance of a gift is permissible and advisable. The commenter was concerned that the statement “[e]mployees who have questions regarding . . . whether the employee *should* decline a gift that would otherwise be permitted under an exception [emphasis in original],” seemed to indicate that there are “right and wrong” conclusions. OGE has not deleted the reference to advice from an ethics official because the regulation is sufficiently clear that the decision to decline or accept an otherwise permissible gift is the employee's to make. Although consulting an ethics official may assist the employee in making that decision, the regulation does not require such consultation. Section 2635.201(b)(3) explicitly states that an employee who does not decline a permissible gift under § 2635.201(b) has not violated the Standards of Ethical Conduct. At the same time, OGE believes that the reminder as to the availability of ethics advice will prove helpful to employees. Ethics officials can provide employees with valuable insights and guidance in assessing the reasonable person standard in individual cases because they possess experience in Government ethics, awareness as to how the Standards of Ethical Conduct are applied across the agency and across the executive branch, and knowledge of circumstances relevant to evaluating the effect on the public's trust of accepting certain gifts.

Nevertheless, to partly address the commenter's concern, OGE has deleted the reference to § 2635.107(b) at the end of § 2635.201(b)(4). After considering the commenter's concern, OGE recognized that the reference to § 2635.107(b) was potentially confusing because that section provides a safe harbor against disciplinary action in certain circumstances when an employee has consulted an agency ethics official. As § 2635.201(b)(3) makes clear, however, employees may not be disciplined under this provision and have no need for the safe harbor provision in connection with the appearance analysis under § 2635.201(b).

Examples to § 2635.201(b)

One commenter suggested that OGE should add examples to the regulation to indicate how to apply new § 2635.201(b). OGE has added Example 1 to paragraph (b) in order to illustrate how an employee may use the standard and factors found in § 2635.201(b). The same commenter also suggested that OGE provide additional guidance documents to further assist agency officials and employees in understanding how to apply the standard found in § 2635.201(b). OGE intends to provide additional guidance and training as needed on an ongoing basis.

5 CFR 2635.202 General Prohibition on Solicitation or Acceptance of Gifts

OGE received no comments on § 2635.202. OGE is adopting the amendments to this section as proposed for the reasons described in the preamble to the proposed rule. A small change to Example 1 to paragraph (c) was made after the Supreme Court's recent decision in *McDonnell v. United States*, 579 U.S. ___, 135 S. Ct. 1136 (2016), which limited the scope of the term "official act" as used in 18 U.S.C. 201(a)(3).

5 CFR 2635.203 Definitions

OGE received a number of comments on the definitions of the terms "gift," "market value," "indirectly solicited or accepted," and "free attendance." In regard to the definition of "gift," all comments focused on the exclusions to the definition. The comments for these terms are separately addressed in greater detail below.

Definition of "Gift": Exclusion for Modest Items of Food and Refreshment

OGE received three comments on proposed Example 1 to § 2635.203(b)(1). Section 2635.203(b)(1) explains that the definition of "gift" for purposes of subpart B excludes "[m]odest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal." Proposed Example 1 to paragraph (b)(1) was included for the purpose of making explicit OGE's longstanding interpretation that alcohol is not a modest item of refreshment under § 2635.203(b)(1). Because none of the beverages currently listed in the regulation are alcoholic and the exclusion specifically refers to "soft," meaning non-alcoholic drinks, OGE has long treated alcoholic beverages as not being part of the class of modest refreshments covered by the exclusion.

All three of the commenters were concerned that the example seemed to

indicate that attendance at an event where alcohol is served is *per se* "improper." To address this concern, OGE has removed the example altogether and amended the regulatory text of § 2635.203(b)(1) to exclude from the definition of "gift" "[m]odest items of food and non-alcoholic refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal." This amendment codifies the interpretation that was previously set out in the proposed example. Although the carve-out from the definition of "gift" at § 2635.203(b)(1) for modest refreshments is limited to non-alcoholic beverages, this limitation does not impact the gift exceptions at 5 CFR 2635.204.

Definition of "Gift": Exclusion for Greeting Cards and Presentation Items With Little Intrinsic Value

OGE received two comments on the proposed revisions to § 2635.203(b)(2). The first comment, from a professional association, was in favor of the proposal to modify the exclusion for presentation items. The second comment, from an individual, requested that OGE further amend the regulation to state that "items with little intrinsic value . . . intended primarily for presentation" are excluded from the definition of "gift" only if they "do not have significant independent use." The individual noted that OGE used this phrase in proposed Example 2 to paragraph (b)(2) when explaining why a \$25 portable music player would not be excluded from the definition of "gift" under this provision. OGE has decided not to adopt this change. As evidenced by the example, the fact that an item lacks other uses is a legitimate consideration in support of a finding that the item is intended "primarily for presentation." The regulation does not, however, require that an item lack any potential other use in order to qualify as an item intended "primarily for presentation."

Definition of "Gift": Exclusion for Items Purchased by the Government or Secured Under Government Contract

OGE received one comment on the proposed example to § 2635.203(b)(7), which states that Federal employees may retain certain "travel promotional items, such as frequent flyer miles, received as a result of [] official travel, if done in accordance with 5 U.S.C. 5702, note, and 41 CFR part 301-53." The commenter explained: (1) That employees who receive such frequent flyer miles should be encouraged to use such frequent flyer miles for subsequent official travel; and (2) that no personal use should be allowed for employees of

the Federal Aviation Administration. OGE has not changed the substance of this example. As explained in the example, Congress passed a statute specifically permitting employees to accept these types of travel-related benefits. The General Services Administration (GSA) has primary authority for implementing that statute, and has done so through regulations found at 41 CFR part 301-53. To partly address the commenter's concern, however, OGE revised the language "if done in accordance with 5 U.S.C. 5702, note, and 41 CFR part 301-53," to read "to the extent permitted by 5 U.S.C. 5702, note, and 41 CFR part 301-53," in order to clarify that OGE's regulation does not create any new authority for accepting these travel related benefits beyond what Congress and GSA provided for in the statute and the regulation.

Definition of "Gift": Exclusion for Free Attendance Provided to Employees Speaking in Their Official Capacity and Extension to Personal Capacity Speaking Events

One commenter requested that OGE expand § 2635.203(b)(8) to exclude from the definition of "gift" free attendance at events where employees are speaking in their personal capacity on matters that are unrelated to their duties. The commenter noted that § 2635.203(b)(8) excludes free attendance in connection with official speaking engagements and requested a parallel exclusion for personal speaking engagements. OGE has not adopted this change. Normally, the Standards of Ethical Conduct would not prohibit an employee from accepting free attendance at an event at which the employee has a *bona fide* arrangement to speak in a personal capacity. This subject is addressed in § 2635.807(a)(2)(iii)(B), which permits employees to accept a waiver of attendance fees for speeches related to their official duties, and OGE has traditionally applied § 2635.202 consistently with that provision of § 2635.807 for speeches unrelated to official duties.

Definition of "Market Value"

OGE received two comments on the proposed amendments to the definition of "market value," as used throughout the regulation, as well as the examples following the definition. OGE proposed to amend "market value" to mean "the cost that a member of the general public would reasonably expect to incur to purchase the gift." One commenter was generally in favor of the amendment, as well as the examples illustrating how the definition would be applied in

various circumstances. The other commenter noted that Example 4 to paragraph (c) did not explicitly state that the tickets offered to the employee lacked a face value. OGE has amended Example 4 to indicate that the tickets provided to the employee in the example do not have a face value, and therefore the general rule used for calculating the market value of a ticket would not apply. OGE also amended Example 4 to further clarify the method of calculating the market value of such tickets.

Definition of “Indirectly Solicited or Accepted”

OGE received one comment on § 2635.203(f), which establishes when a gift will be deemed to have been accepted or solicited indirectly. The commenter was in favor of OGE’s amendment at § 2635.203(f)(2). OGE has adopted the language as proposed for the reasons set forth in the preamble to the proposed rule.

Definition of “Free Attendance”

OGE received two comments in favor of the proposed subpart-wide definition of “free attendance” at § 2635.203(g). Both commenters supported OGE’s amendment allowing employees who are presenting at an event to accept attendance at “speakers’ meals” provided by the sponsor of the event. OGE has adopted the language as proposed for the reasons set forth in the preamble to the proposed rule.

§ 2635.204 Exceptions to the Prohibition for the Acceptance of Certain Gifts

Although OGE did not receive a specific comment on the title of the regulation, OGE has made a technical change to the title of this section for clarity and to more closely track the substance of the regulation.

OGE has also revised the introductory text to remind employees to consider the standard found in § 2635.201(b) when determining whether to rely on an exception. The revised language is modeled on the introductory text found in the current version of § 2635.204, but cross-references § 2635.201(b).

Gifts of \$20 or Less

OGE received two comments requesting that OGE raise the regulatory dollar thresholds found in the gift exception at § 2635.204(a). Pursuant to § 2635.204(a), an employee may accept otherwise prohibited gifts not exceeding \$20 per occasion so long as he or she does not accept more than \$50 worth of gifts from the same person per year. In support of this request, one commenter

pointed out the effect that inflation has had on the value of this *de minimis* threshold.

OGE carefully considered these commenters’ suggestions. As OGE explained when it issued the final gift regulations, the *de minimis* exception was included to remove the need for a “laundry list of exceptions for small, unobjectionable gifts.” 57 FR 35006, 35016 (Aug. 7, 1992). The *de minimis* exception was intended to provide a uniform means for employees to accept only inexpensive and innocuous gifts on an infrequent basis. *Id.* OGE believes that the current dollar threshold continues to meet that narrow objective. OGE is concerned that raising the *de minimis* would encourage employees to accept, and private citizens to give, more expensive and more frequent gifts than employees are currently able to accept. Although some gifts that once fell at the higher end of the spectrum may now be precluded, OGE believes that the \$20 threshold continues to be workable, permitting employees to accept on an infrequent basis most of the types of items that can be characterized as inexpensive and innocuous. In addition, the existing exclusions and exceptions from the gift rules permit employees to accept targeted items that are over \$20 in carefully restricted circumstances (*e.g.*, a gift from an employee’s spouse). See 5 CFR 2635.204(b). Although \$20 may not buy the sort of lunch that it bought in 1992 when the regulation was issued, no compelling argument has been made to support a conclusion that raising the cap on the blanket *de minimis* exception, in order to allow employees to accept more expensive and more frequent gifts, would strengthen the integrity of the executive branch’s operations. Accordingly, OGE has decided not to adopt the commenters’ suggestions to increase the cap.

Gifts Based on a Personal Relationship

OGE received one comment in support of the new Example 3 to § 2635.204(b), which provides guidance on assessing whether a gift provided by a social media contact falls within the bounds of the gift exception. OGE has adopted the text of § 2635.204(b) substantially as proposed for the reasons set forth in the preamble to the proposed rule.

Awards and Honorary Degrees

OGE did not make changes based on comments received from two individuals on proposed § 2635.204(d). Section 2635.204(d) permits employees to accept gifts of certain awards and honorary degrees, including items

incident to such awards and degrees. The first commenter suggested that OGE relocate the two examples following paragraph (d)(1) so that they would appear after paragraph (d)(2). OGE has not adopted the suggestion. These examples address paragraph (d)(1), which establishes the several requirements for accepting awards, and do not specifically address paragraph (d)(2), which defines the term “established program of recognition.”

The second commenter addressed the acceptance of qualifying honorary degrees from certain “foreign institution[s] of higher education.” See 80 FR 74004, 74007 (Nov. 27, 2015). The commenter suggested that OGE clarify the basis of the Government’s concerns regarding the acceptance of emoluments from foreign governments. OGE has not adopted this change because the prohibition stems from the Emoluments Clause of the United States Constitution. See U.S. Const., art. 1, sec. 9, cl. 8. OGE is not the appropriate authority to delineate the basis for specific provisions of the Constitution.

Gifts Based on Outside Business or Employment Relationships

OGE received one comment on the proposed amendments to § 2635.204(e), which sets forth various exceptions to the general prohibitions on accepting and soliciting gifts when such gifts are offered as a result of an outside business or employment relationship. The commenter was generally in favor of the amendments. OGE has retained the exception as proposed for the reasons set out in the preamble to the proposed rule.

Gifts of Free Attendance to Widely Attended Gatherings

OGE received a number of comments related to the exception at § 2635.204(g), permitting employees to accept offers of free attendance to widely attended gatherings (WAGs) if certain criteria are met. In the proposed rule, OGE presented a number of amendments to the WAG, including changes to: (1) Make it clear that an event does not qualify as a WAG if it does not present “an opportunity to exchange ideas and views among invited persons”; (2) require employees to obtain written authorizations before accepting gifts of free attendance at WAGs; and (3) require agency designees to weigh the agency’s interest in employees’ attendance at WAGs against the possibility that acceptance of gifts of free attendance will influence their decisionmaking or create the appearance that they will be influenced in their decisionmaking.

One commenter expressed concern about the proposed amendment to the definition of “widely attended gatherings.” The proposed language clarifies that events do not qualify as WAGs unless there is “an opportunity to exchange ideas and views among invited persons.” The commenter suggested that this language would narrow the rule to apply to only “panel or roundtable events.” OGE believes that this is a mischaracterization of the regulatory amendment. Nothing in the amendment would narrow the definition exclusively to roundtable or panel events. The amendment reflects only OGE’s longstanding interpretation that the event must present an opportunity for an “exchange” or “interchange” of ideas among attendees. See OGE Informal Advisory Opinion 07 x 14 (Dec. 5, 2007).

Several commenters objected to the change requiring written authorizations because it might increase the workload of ethics officials. Three commenters raised workload concerns in connection with the requirement that an employee obtain a written authorization from an agency designee prior to accepting free attendance to a WAG, though one commenter acknowledged that a requirement to obtain written authorization “protects both the employee and the private sector sponsors.” OGE has not eliminated the requirement to obtain written authorization before an employee attends a WAG. Any additional burden on ethics officials will not be so substantial as to outweigh the potential benefits of recording WAG authorizations. In this regard, it is worth noting that agency ethics officials have long been required to make several of the findings required by § 2635.204(g)(3), as proposed. In addition, some agencies have already adopted the practice of recording all WAG authorizations in writing. In any case, most of the work required of ethics officials under the amended regulation will stem from the requirement to make a number of determinations that have always been required under the regulation. After making these determinations, ethics officials have discretion to determine the level of detail to include in the written authorization. The amended regulation does not, however, require a “formal written opinion” as one commenter suggested.

One commenter noted that the amended rule requires agencies to determine in all cases whether “[t]he agency’s interest in the employee’s attendance outweighs the concern that the employee may be, or may appear to

be, improperly influenced in the performance of [his or her] official duties.” The regulation did not previously require this determination in every case, but agency officials have always been charged with evaluating “all the relevant circumstances of any proposed WAG before an employee is authorized to accept free attendance.” OGE Informal Advisory Opinion 07 x 14 (Dec. 5, 2007). The determination now required in all cases is consistent with this preexisting requirement, inasmuch as improper influence, or the appearance of improper influence, would necessarily have been a relevant circumstance to be analyzed under the regulation even prior to the current amendment.

Two commenters expressed concern that ethics officials will approve attendance at fewer events for substantive reasons. However, the new regulation does not significantly change the substantive analysis, which remains focused, as it always has been, on the potential for improper influence and the appearance of improper influence. Disapproval of a gift of free attendance, when an agency has determined that an employee’s acceptance of the gift would result in improper influence or the appearance of improper influence, is a proper outcome under any responsible ethics regime.

OGE received two additional comments related to § 2635.204(g). One commenter posited a hypothetical case under § 2635.204(g)(1). OGE is not in a position to assess the interests of a hypothetical agency or other relevant factual circumstances not specified in the commenter’s hypothetical. At the request of the other commenter, however, OGE has inserted a reference to the written determination requirement in proposed Example 4 to paragraph (g).

Social Invitations

OGE received one comment from an agency on proposed § 2635.204(h), which permits an employee and accompanying guests to accept certain benefits that are provided at a “social event” so long as the person extending the invitation is not a prohibited source. The proposed rule added a requirement that employees receive a written determination that such attendance would not cause a reasonable person to question the employee’s integrity if the event is sponsored by, or the invitation is from, an organization. The commenting agency questioned the purpose of this amendment and suggested that it could increase the workload of agency ethics officials.

Although OGE understands the programmatic consideration raised by the commenter, OGE does not believe that those concerns weigh significantly against the written determination requirement. In many cases, OGE believes that the analysis as to whether a reasonable person would question the employee’s integrity or impartiality in attending will be relatively easy to assess, particularly given that the offeror cannot be a prohibited source. Likewise, the standard should be easier to meet if the circumstances indicate that the event is for purely social reasons or is open to a wide variety of attendees. Moreover, ethics officials have discretion to determine the level of detail to include in the written authorization and to choose an appropriate means, such as email, for transmitting the authorization. OGE does not, therefore, believe that the amended regulation will substantially increase the burden on ethics officials. At the same time, there is a heightened risk for, at a minimum, an appearance that the motivation for the gift is to advance a business objective when the sponsor of the event, or offeror of the invitation, is an organization. For this reason, OGE believes that the additional requirement with regard to organizations is warranted.

OGE has made three technical changes to the language of this exception for consistency with other sections and for clarity. First, OGE added the phrase “with knowledge of the relevant facts” to the language in § 2635.204(h)(3), which establishes a reasonable person standard for consistency with the wording of the reasonable person standard in § 2635.201(b) and elsewhere in the Standards of Ethical Conduct. See 5 CFR 2635.101(b)(14); 2635.501; 2635.502(a); 2635.502(c). Second, OGE changed “makes” to “has made” in § 2635.204(h)(3) in order to clarify that the determination to allow an employee to attend the social event must be made before the employee actually attends the event. Third, OGE replaced the legal citation to § 2635.201(b) at the end of the social invitations exception with the following plain language phrase: “consistent with § 2635.201(b).” None of these three technical changes alters what OGE intended to be the substantive meaning of the regulation.

Gifts Accepted Under Specific Statutory Authority

OGE has made a technical correction to § 2635.204(l)(1) so that the language tracks the interpreting regulation for 5 U.S.C. 4111 at part 410 of this title.

Informational Materials

Two professional associations and an individual commented on the new exception at § 2635.204(m). The exception permits employees to accept qualifying gifts of informational materials. The exception also sets out certain procedural safeguards and defines what constitutes “informational materials” for the purposes of this provision.

One professional association welcomed the addition of the new exception on the basis that it will allow a flow of useful information to employees. The second professional association also supported the new exception, but requested that OGE amend the rule in two ways: (1) Clarify that the rule would permit the acceptance of “marketing and promotional materials”; and (2) clarify that when a gift of informational materials exceeds \$100, an agency may authorize the employee to accept the gift on behalf of the agency if the agency has separate statutory authority. OGE has decided not to revise the proposed exception to include “marketing and promotional materials” as a specific category of acceptable informational materials. Whether an item qualifies for the exception will depend on whether the factual circumstances support a determination that the item offered meets the specific criteria set forth in § 2635.204(m). OGE has likewise decided not to amend the regulatory text to clarify that agencies may accept gifts of informational materials when the gift exceeds \$100. Agencies with gift acceptance authorities have established their own procedures and policies regarding the acceptance of such gifts consistent with their interpretations of those authorities, and OGE is not in a position to direct another agency on the use of its gift acceptance authority.

Another commenter raised two general concerns with the regulatory exception. The first concern is that employees who accept informational materials might sell them. Although it might prove somewhat difficult to sell used informational materials, OGE is generally sensitive to the underlying concern expressed by the commenter. To address this concern, OGE has amended the regulation to add an additional limitation on the use of this exception. As revised, the exception will now require employees to obtain written authorization from the agency designee before accepting informational materials from a single person that in the aggregate exceed \$100 in a calendar year. The commenter’s other concern is that gifts relating to an employee’s

official duties, the agency’s mission, or a subject matter of interest to the agency “ought to be a gift to the Agency.” The commenter questions whether such gifts might be construed as augmenting an agency’s appropriations. Such gifts would not implicate augmentation concerns, however, because, as with all of OGE’s regulatory gift exceptions, the items accepted are for personal use, not the agency’s use.

Following careful review of the regulation, OGE has also reorganized § 2635.204(m) to move the limitations on what constitutes permissible “informational materials” to § 2635.204(m)(2), which contains the definition of “informational materials.” OGE refined the language indicating that, to qualify as “informational material,” an item must be “primarily provided for educational or instructive purposes,” changing it to state more clearly that the item must be “educational or instructive in nature.” As previously written, the regulation could have been misconstrued as requiring employees to ascertain the donor’s intent in offering an item. As modified, the regulation now makes clear that the focus is on the objective nature of the gift, and not the subjective intent of the donor. A corresponding change replaces “not including,” with “Are not primarily,” at the beginning of the phrase “Are not primarily created for entertainment, display, or decoration.” This change is intended to avoid excluding items that are clearly educational or instructive in nature but may have some tangential or incidental qualities that could arguably be characterized as entertaining or visually attractive. OGE believes this modification will make the rule easier to understand and apply.

OGE further reorganized the exception to reduce its structural complexity. As proposed, § 2635.204(m) had several tiers, including: a first tier denoted by numbers, such as the number “(2)”; a second tier denoted by lowercase roman numerals, such as the numeral “(ii)”; a third tier denoted by capital letters, such as the letter “(B)”; and a fourth tier denoted again by numbers, such as the number “(2).” By reorganizing the language of this section, OGE was able to eliminate the fourth tier.

OGE has made four other technical changes for consistency and clarity. First, OGE used the word “person” in paragraphs (m)(1)(i) and (ii) to be consistent with the language in § 2635.204(a), when aggregating gifts. Second, OGE changed the language “an agency designee makes a written determination that,” at

§ 2635.204(m)(1)(ii)(B) of the proposed rule, to “an agency designee has made a written determination after finding that,” now at § 2635.204(m)(1)(ii). The change makes the language of this paragraph consistent with the language used in § 2635.204(g)(3) and § 2635.204(h)(3). Third, OGE has added “provided that” to the opening language of § 2635.204(m)(1) in order to clarify that the \$100 limit in § 2635.204(m)(1)(i) applies in every case unless an employee first obtains a written determination under § 2635.204(m)(1)(ii). Fourth, OGE has revised the reference to “programs and operations” of the agency so that it reads “programs or operations” of the agency. It was not OGE’s intention to require that the subject matter relate to both a program and an operation, or to require that employees somehow distinguish “programs” from “operations.”

5 CFR 2635.205 Limitations on Use of Exceptions

OGE received no comments on § 2635.205. OGE is adopting the amendments to this section as proposed for the reasons set forth in the preamble to the proposed rule. OGE, however, has replaced the period with a semi-colon in the phrase: “Accept a gift in violation of any statute; relevant statutes applicable to all employees include, but are not limited to,” found at § 2635.205(d). OGE has made this change for clarity because paragraph (d) in that section is part of a longer list that is connected by a semi-colon and the word “or” after paragraph (e) in that same section. By eliminating the period, OGE seeks to ensure that the period is not misconstrued as invalidating paragraphs (e) and (f) in the remainder of that list.

5 CFR 2635.206 Proper Disposition of Prohibited Gifts

OGE received four comments on § 2635.206, which explains what steps an employee must take to properly dispose of a prohibited gift. OGE amended this section to provide additional guidance on what steps are required to comply with the disposition authorities. One commenter was generally supportive of the additional guidance provided by OGE. Three commenters expressed concern that OGE’s amendment of § 2635.206(a)(1) to allow employees to destroy prohibited tangible gifts worth \$100 or less was wasteful. These three commenters also recommended that OGE amend § 2635.206(a)(1) to permit employees to donate prohibited tangible gifts worth \$100 or less to charity.

For the following reasons, OGE has not accepted the commenters' suggestions. Allowing the destruction of relatively low-value, tangible gifts provides useful flexibility, while continuing to prohibit employees from retaining impermissible gifts. Setting the value threshold at \$100 establishes a reasonable range that imposes minimal administrative burden in determining whether most low value items qualify for destruction. Setting the threshold far below that level would increase transaction costs because official time would necessarily have to be expended researching the precise market value of inexpensive items in order to determine whether they could be destroyed. It bears noting that, as is explained in § 2635.206(a), an employee is not required to destroy prohibited gifts; destruction is only one of several authorized options for disposition. Other options include returning the gift to the donor, paying the donor the gift's market value, or not accepting the gift in the first instance. Whenever the value of an item approaches the higher end of the \$100 range, employees and agency ethics officials may be disinclined to destroy the item; in fact, the administrative burden of researching the item's precise market value in order to avoid exceeding the permissible value threshold creates a natural incentive to choose another option for disposition of more expensive items.

Authorizing donations to charity in lieu of destruction would present other problems. OGE has considered and rejected this option in the past. *See* 57 FR 35006, 35015 (Aug. 7, 1992). Allowing an employee to direct that a gift be donated to a charity of the employee's choosing would be tantamount to permitting constructive receipt of the gift by the employee. OGE is concerned that employees may be able to claim tax deductions under the Internal Revenue Code for gifts donated to charity, in essence receiving the "gift" of a tax deduction in lieu of the original gift. OGE has also explained in the past that permitting donations "would create an incentive for donors to offer employees items they cannot accept and, in the case of highly visible employees, might result in their favorite charities profiting from their official positions." *Id.* OGE remains concerned that authorizing donations to charity as a means to dispose of impermissible gifts could incentivize some employees to intentionally accept impermissible gifts for the purpose of donating them to their favorite charities.

OGE has, however, revised § 2635.206(a)(1) for clarity. In the proposed regulation, the first sentence

read: "The employee must promptly return any tangible item to the donor, or pay the donor its market value, or, in the case that the tangible item has a market value not in excess of \$100, the employee may destroy the item." In the final regulation, that sentence now reads: "The employee must promptly return any tangible item to the donor or pay the donor its market value; or, in the case of a tangible item with a market value of \$100 or less, the employee may destroy the item." The meaning of the sentence is unchanged, but the revised sentence is easier to understand. In addition, OGE has removed the legal citation at the end of that paragraph, which referred to the definition of "market value" at § 2635.203(c), because the cross reference was unnecessary and potentially confusing to the reader.

III. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this final rule would not have a significant economic impact on a substantial number of small entities because it primarily affects current Federal executive branch employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require 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 5, subchapter II), this final rule would 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.

Executive Order 13563 and Executive Order 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select the regulatory approaches that maximize net benefits (including 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 as a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this final rule 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: November 3, 2016.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics is amending 5 CFR part 2635, as set forth below:

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

■ 1. The authority citation for part 2635 continues 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.

■ 2. Revise subpart B of part 2635 to read as follows:

Subpart B—Gifts From Outside Sources

Sec.

- 2635.201 Overview and considerations for declining otherwise permissible gifts.
- 2635.202 General prohibition on solicitation or acceptance of gifts.
- 2635.203 Definitions.
- 2635.204 Exceptions to the prohibition for acceptance of certain gifts.
- 2635.205 Limitations on use of exceptions.
- 2635.206 Proper disposition of prohibited gifts.

Subpart B—Gifts From Outside Sources

§ 2635.201 Overview and considerations for declining otherwise permissible gifts.

(a) *Overview.* This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or any gift given because of the employee's official position, unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart.

(b) *Considerations for declining otherwise permissible gifts.* (1) Every

employee has a fundamental responsibility to the United States and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. An employee's actions should promote the public's trust that this responsibility is being met. For this reason, 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.

(2) An employee who is considering whether acceptance of a gift would lead a reasonable person with knowledge of the relevant facts to question his or her integrity or impartiality may consider, among other relevant factors, whether:

- (i) The gift has a high market value;
- (ii) The timing of the gift creates the appearance that the donor is seeking to influence an official action;
- (iii) The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and
- (iv) Acceptance of the gift would provide the donor with significantly disproportionate access.

(3) Notwithstanding paragraph (b)(1) of this section, an employee who accepts a gift that qualifies for an exception under § 2635.204 does not violate this subpart or the Principles of Ethical Conduct set forth in § 2635.101(b).

(4) Employees who have questions regarding this subpart, including whether the employee should decline a gift that would otherwise be permitted under an exception found in § 2635.204, should seek advice from an agency ethics official.

Example 1 to paragraph (b): 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. As such, although acceptance of the gift may be permissible under § 2635.204(a), the employee decides to decline the gift.

§ 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.

(c) *Relationship to illegal gratuities statute.* A gift accepted pursuant to an exception found in this subpart will not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B), unless it is accepted in return for being influenced in the performance of an official act. As more fully described in § 2635.205(d)(1), an employee may not solicit or accept a gift if to do so would be prohibited by the Federal bribery statute, 18 U.S.C. 201(b).

Example 1 to paragraph (c): A Government contractor who specializes in information technology software has offered an employee of the Department of Energy's information technology acquisition division a \$15 gift card to a local restaurant if the employee will recommend to the agency's contracting officer that she select the contractor's products during the next acquisition. Even though the gift card is less than \$20, the employee may not accept the gift under § 2635.204(a) because it is conditional upon official action by the employee. Pursuant to §§ 2635.202(c) and 2635.205(a), notwithstanding any exception to the rule, an employee may not accept a gift in return for being influenced in the performance of an official act.

§ 2635.203 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Agency* has the meaning set forth in § 2635.102(a). However, for purposes of this subpart, an executive department, as defined in 5 U.S.C. 101, may, by supplemental agency regulation, designate as a separate agency any component of that department which the department determines exercises distinct and separate functions.

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. The term excludes the following:

(1) Modest items of food and non-alcoholic refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended primarily for presentation;

Example 1 to paragraph (b)(2): After giving a speech at the facility of a pharmaceutical company, a Government employee is presented with a glass paperweight in the shape of a pill capsule with the name of the company's latest drug and the date of the speech imprinted on the side. The employee may accept the paperweight because it is an item with little intrinsic value which is intended primarily for presentation.

Example 2 to paragraph (b)(2): After participating in a panel discussion hosted by an international media company, a Government employee is presented with an inexpensive portable music player emblazoned with the media company's logo. The portable music player has a market value of \$25. The employee may not accept the portable music player as it has a significant independent use as a music player rather than being intended primarily for presentation.

Example 3 to paragraph (b)(2): After giving a speech at a conference held by a national association of miners, a Department of Commerce employee is presented with a block of granite that is engraved with the association's logo, a picture of the Appalachian Mountains, the date of the speech, and the employee's name. The employee may accept this item because it is similar to a plaque, is designed primarily for presentation, and has little intrinsic value.

(3) Loans from banks and other financial institutions on terms generally available to the public;

(4) Opportunities and benefits, including favorable rates and commercial discounts, available to the public or to a class consisting of all Government employees or all uniformed military personnel, whether or not restricted on the basis of geographic considerations;

(5) Rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of the employee's official duties;

Example 1 to paragraph (b)(5): A Government employee is attending a free trade show on official time. The trade show is held in a public shopping area adjacent to the employee's office building. The employee voluntarily enters a drawing at an individual vendor's booth which is open to the public. She fills in an entry form on the vendor's display table and drops it into the contest box. The employee may accept the resulting prize because entry into the contest was not required by or related to her official duties.

Example 2 to paragraph (b)(5): Attendees at a conference, which is not open to the public, are entered in a drawing for a weekend getaway to Bermuda as a result of being registered for the conference. A Government employee who attends the

conference in his official capacity could not accept the prize under paragraph (b)(5) of this section, as the event is not open to the public.

(6) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a current or former employer;

(7) Anything which is paid for by the Government or secured by the Government under Government contract;

Example 1 to paragraph (b)(7): An employee at the Occupational Safety and Health Administration is assigned to travel away from her duty station to conduct an investigation of a collapse at a construction site. The employee's agency is paying for her travel expenses, including her airfare. The employee may accept and retain travel promotional items, such as frequent flyer miles, received as a result of her official travel, to the extent permitted by 5 U.S.C. 5702, note, and 41 CFR part 301-53.

(8) Free attendance to an event provided by the sponsor of the event to:

(i) An employee who is assigned to present information on behalf of the agency at the event on any day when the employee is presenting;

(ii) An employee whose presence on any day of the event is deemed to be essential by the agency to the presenting employee's participation in the event, provided that the employee is accompanying the presenting employee; and

(iii) The spouse or one other guest of the presenting employee on any day when the employee is presenting, provided that others in attendance will generally be accompanied by a spouse or other guest, the offer of free attendance for the spouse or other guest is unsolicited, and the agency designee, orally or in writing, has authorized the presenting employee to accept;

Example 1 to paragraph (b)(8): An employee of the Department of the Treasury who is assigned to participate in a panel discussion of economic issues as part of a one-day conference may accept the sponsor's waiver of the conference fee. Under the separate authority of § 2635.204(a), the employee may accept a token of appreciation that has a market value of \$20 or less.

Example 2 to paragraph (b)(8): An employee of the Securities and Exchange Commission is assigned to present the agency's views at a roundtable discussion of an ongoing working group. The employee may accept free attendance to the meeting under paragraph (b)(8) of this section because the employee has been assigned to present information at the meeting on behalf of the agency. If it is determined by the agency that it is essential that another employee accompany the presenting employee to the roundtable discussion, the accompanying employee may also accept free attendance to

the meeting under paragraph (b)(8)(ii) of this section.

Example 3 to paragraph (b)(8): An employee of the United States Trade and Development Agency is invited to attend a cocktail party hosted by a prohibited source. The employee believes that he will have an opportunity to discuss official matters with other attendees while at the event. Although the employee may voluntarily discuss official matters with other attendees, the employee has not been assigned to present information on behalf of the agency. The employee may not accept free attendance to the event under paragraph (b)(8) of this section.

(9) Any gift accepted by the Government under specific statutory authority, including:

(i) Travel, subsistence, and related expenses accepted by an agency under the authority of 31 U.S.C. 1353 in connection with an employee's attendance at a meeting or similar function relating to the employee's official duties which take place away from the employee's duty station, provided that the agency's acceptance is in accordance with the implementing regulations at 41 CFR chapter 304; and

(ii) Other gifts provided in-kind which have been accepted by an agency under its agency gift acceptance statute; and

(10) Anything for which market value is paid by the employee.

(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.

Example 1 to paragraph (c): An employee who has been given a watch inscribed with the corporate logo of a prohibited source may determine its market value based on her observation that a comparable watch, not inscribed with a logo, generally sells for about \$50.

Example 2 to paragraph (c): During an official visit to a factory operated by a well-known athletic footwear manufacturer, an employee of the Department of Labor is offered a commemorative pair of athletic shoes manufactured at the factory. Although the cost incurred by the donor to manufacture the shoes was \$17, the market value of the shoes would be the \$100 that the employee would have to pay for the shoes on the open market.

Example 3 to paragraph (c): A prohibited source has offered a Government employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only \$20,

the market value of the ticket is its \$250 face value.

Example 4 to paragraph (c): 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 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.

Example 5 to paragraph (c): An employee of the Department of Agriculture is invited to a reception held by a prohibited source. There is no entrance fee to the reception event or to the venue. To determine the market value of the gift, the employee must add the market value of any entertainment, food, beverages, or other tangible benefit provided to attendees in connection with the reception, but need not consider the cost incurred by the sponsor to rent or maintain the venue where the event is held. The employee may rely on a per-person cost estimate provided by the sponsor of the event, unless the employee or an agency designee has determined that a reasonable person would find that the estimate is clearly implausible.

(d) *Prohibited source* means any person who:

(1) Is seeking official action by the employee's agency;

(2) Does business or seeks to do business with the employee's agency;

(3) Conducts activities regulated by the employee's agency;

(4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; or

(5) Is an organization a majority of whose members are described in paragraphs (d)(1) through (4) of this section.

(e) *Given because of the employee's official position.* A gift is given because of the employee's official position if the gift is from a person other than an employee and would not have been given had the employee not held the status, authority, or duties associated with the employee's Federal position.

Note to paragraph (e): Gifts between employees are subject to the limitations set forth in subpart C of this part.

Example 1 to paragraph (e): Where free season tickets are offered by an opera guild to all members of the Cabinet, the gift is offered because of their official positions.

Example 2 to paragraph (e): Employees at a regional office of the Department of Justice (DOJ) work in Government-leased space at a private office building, along with various

private business tenants. A major fire in the building during normal office hours causes a traumatic experience for all occupants of the building in making their escape, and it is the subject of widespread news coverage. A corporate hotel chain, which does not meet the definition of a prohibited source for DOJ, seizes the moment and announces that it will give a free night's lodging to all building occupants and their families, as a public goodwill gesture. Employees of DOJ may accept, as this gift is not being given because of their Government positions. The donor's motivation for offering this gift is unrelated to the DOJ employees' status, authority, or duties associated with their Federal position, but instead is based on their mere presence in the building as occupants at the time of the fire.

(f) *Indirectly solicited or accepted.* A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to the employee's parent, sibling, spouse, child, dependent relative, or a member of the employee's household because of that person's relationship to the employee; or

(2) Given to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee, except the employee has not indirectly solicited or accepted a gift by the raising of funds or other support for a charitable organization if done in accordance with § 2635.808.

Example 1 to paragraph (f)(2): An employee who must decline a gift of a personal computer pursuant to this subpart may not suggest that the gift be given instead to one of five charitable organizations whose names are provided by the employee.

(g) *Free attendance* includes waiver of all or part of the fee for an event or the provision of food, refreshments, entertainment, instruction or materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, or entertainment collateral to the event. It does not include meals taken other than in a group setting with all other attendees, unless the employee is a presenter at the event and is invited to a separate meal for participating presenters that is hosted by the sponsor of the event. Where the offer of free attendance has been extended to an accompanying spouse or other guest, the market value of the gift of free attendance includes the market value of free attendance by both the employee and the spouse or other guest.

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

Subject to the limitations in § 2635.205, this section establishes

exceptions to the prohibitions set forth in § 2635.202(a) and (b). Even though acceptance of a gift may be permitted by one of the exceptions contained in this section, it is never inappropriate and frequently prudent for an employee to decline a gift if acceptance would cause a reasonable person to question the employee's integrity or impartiality. Section 2635.201(b) identifies considerations for declining otherwise permissible gifts.

(a) *Gifts of \$20 or less.* An employee may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph (a) does not exceed \$50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, the employee may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20. Where the aggregate value of tangible items offered on a single occasion exceeds \$20, the employee may decline any distinct and separate item in order to accept those items aggregating \$20 or less.

Example 1 to paragraph (a): An employee of the Securities and Exchange Commission and his spouse have been invited by a representative of a regulated entity to a community theater production, tickets to which have a face value of \$30 each. The aggregate market value of the gifts offered on this single occasion is \$60, \$40 more than the \$20 amount that may be accepted for a single event or presentation. The employee may not accept the gift of the evening of entertainment. He and his spouse may attend the play only if he pays the full \$60 value of the two tickets.

Example 2 to paragraph (a): An employee of the National Geospatial-Intelligence Agency has been invited by an association of cartographers to speak about her agency's role in the evolution of missile technology. At the conclusion of her speech, the association presents the employee a framed map with a market value of \$18 and a ceramic mug that has a market value of \$15. The employee may accept the map or the mug, but not both, because the aggregate value of these two tangible items exceeds \$20.

Example 3 to paragraph (a): On four occasions during the calendar year, an employee of the Defense Logistics Agency (DLA) was given gifts worth \$10 each by four employees of a corporation that is a DLA contractor. For purposes of applying the yearly \$50 limitation on gifts of \$20 or less from any one person, the four gifts must be aggregated because a person is defined at § 2635.102(k) to mean not only the corporate

entity, but its officers and employees as well. However, for purposes of applying the \$50 aggregate limitation, the employee would not have to include the value of a birthday present received from his cousin, who is employed by the same corporation, if he can accept the birthday present under the exception at paragraph (b) of this section for gifts based on a personal relationship.

Example 4 to paragraph (a): Under the authority of 31 U.S.C. 1353 for agencies to accept payments from non-Federal sources in connection with attendance at certain meetings or similar functions, the Environmental Protection Agency (EPA) has accepted an association's gift of travel expenses and conference fees for an employee to attend a conference on the long-term effect of radon exposure. While at the conference, the employee may accept a gift of \$20 or less from the association or from another person attending the conference even though it was not approved in advance by the EPA. Although 31 U.S.C. 1353 is the authority under which the EPA accepted the gift to the agency of travel expenses and conference fees, a gift of \$20 or less accepted under paragraph (a) of this section is a gift to the employee rather than to her employing agency.

Example 5 to paragraph (a): During off-duty time, an employee of the Department of Defense (DoD) attends a trade show involving companies that are DoD contractors. He is offered software worth \$15 at X Company's booth, a calendar worth \$12 at Y Company's booth, and a deli lunch worth \$8 from Z Company. The employee may accept all three of these items because they do not exceed \$20 per source, even though they total more than \$20 at this single occasion.

Example 6 to paragraph (a): An employee of the Department of Defense (DoD) is being promoted to a higher level position in another DoD office. Six individuals, each employed by a different defense contractor, who have worked with the DoD employee over the years, decide to act in concert to pool their resources to buy her a nicer gift than each could buy her separately. Each defense contractor employee contributes \$20 to buy a desk clock for the DoD employee that has a market value of \$120. Although each of the contributions does not exceed the \$20 limit, the employee may not accept the \$120 gift because it is a single gift that has a market value in excess of \$20.

Example 7 to paragraph (a): During a holiday party, an employee of the Department of State is given a \$15 store gift card to a national coffee chain by an agency contractor. The employee may accept the card as the market value is less than \$20. The employee could not, however, accept a gift card that is issued by a credit card company or other financial institution, because such a card is equivalent to a gift of cash.

(b) *Gifts based on a personal relationship.* An employee may accept a gift given by an individual under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making

such a determination include the history and nature of the relationship and whether the family member or friend personally pays for the gift.

Example 1 to paragraph (b): An employee of the Federal Deposit Insurance Corporation (FDIC) has been dating an accountant employed by a member bank. As part of its "Work-Life Balance" program, the bank has given each employee in the accountant's division two tickets to a professional basketball game and has urged each to invite a family member or friend to share the evening of entertainment. Under the circumstances, the FDIC employee may accept the invitation to attend the game. Even though the tickets were initially purchased by the member bank, they were given without reservation to the accountant to use as she wished, and her invitation to the employee was motivated by their personal friendship.

Example 2 to paragraph (b): Three partners in a law firm that handles corporate mergers have invited an employee of the Federal Trade Commission (FTC) to join them in a golf tournament at a private club at the firm's expense. The entry fee is \$500 per foursome. The employee cannot accept the gift of one-quarter of the entry fee even though he and the three partners have developed an amicable relationship as a result of the firm's dealings with the FTC. As evidenced in part by the fact that the fees are to be paid by the firm, it is not a personal friendship but a business relationship that is the motivation behind the partners' gift.

Example 3 to paragraph (b): A Peace Corps employee enjoys using a social media site on the internet in his personal capacity outside of work. He has used the site to keep in touch with friends, neighbors, coworkers, professional contacts, and other individuals he has met over the years through both work and personal activities. One of these individuals works for a contractor that provides language services to the Peace Corps. The employee was acting in his official capacity when he met the individual at a meeting to discuss a matter related to the contract between their respective employers. Thereafter, the two communicated occasionally regarding contract matters. They later also granted one another access to join their social media networks through their respective social media accounts. However, they did not communicate further in their personal capacities, carry on extensive personal interactions, or meet socially outside of work. One day, the individual, whose employer continues to serve as a Peace Corps contractor, contacts the employee to offer him a pair of concert tickets worth \$30 apiece. 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 paragraph (b) of this section.

(c) *Discounts and similar benefits.* In addition to those opportunities and benefits excluded from the definition of

a gift by § 2635.203(b)(4), an employee may accept:

(1) A reduction or waiver of the fees for membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and

(2) Opportunities and benefits, including favorable rates, commercial discounts, and free attendance or participation not precluded by paragraph (c)(3) of this section:

(i) Offered to members of a group or class in which membership is unrelated to Government employment;

(ii) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or

(iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay.

Example 1 to paragraph (c)(2): A computer company offers a discount on the purchase of computer equipment to all public and private sector computer procurement officials who work in organizations with over 300 employees. An employee who works as the computer procurement official for a Government agency could not accept the discount to purchase the personal computer under the exception in paragraph (c)(2)(i) of this section. Her membership in the group to which the discount is offered is related to Government employment because her membership is based on her status as a procurement official with the Government.

Example 2 to paragraph (c)(2): An employee of the Consumer Product Safety Commission (CPSC) may accept a discount of \$50 on a microwave oven offered by the manufacturer to all members of the CPSC employees' association. Even though the CPSC is currently conducting studies on the safety of microwave ovens, the \$50 discount is a standard offer that the manufacturer has made broadly available through a number of employee associations and similar organizations to large segments of the public.

Example 3 to paragraph (c)(2): An Assistant Secretary may not accept a local country club's offer of membership to all members of Department Secretariats which includes a waiver of its \$5,000 membership initiation fee. Even though the country club is not a prohibited source, the offer discriminates in favor of higher ranking officials.

(3) An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds, unless authorized by statute or regulation (e.g., 5 U.S.C. 5702, note, regarding frequent flyer miles).

Example 1 to paragraph (c)(3): The administrative officer for a field office of U.S. Immigration and Customs Enforcement (ICE) has signed an order to purchase 50 boxes of photocopy paper from a supplier whose literature advertises that it will give a free briefcase to anyone who purchases 50 or more boxes. Because the paper was purchased with ICE funds, the administrative officer cannot keep the briefcase which, if claimed and received, is Government property.

(d) *Awards and honorary degrees*—(1) *Awards.* An employee may accept a *bona fide* award for meritorious public service or achievement and any item incident to the award, provided that:

(i) The award and any item incident to the award are not from a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties, or from an association or other organization if a majority of its members have such interests; and

(ii) If the award or any item incident to the award is in the form of cash or an investment interest, or if the aggregate value of the award and any item incident to the award, other than free attendance to the event provided to the employee and to members of the employee's family by the sponsor of the event, exceeds \$200, the agency ethics official has made a written determination that the award is made as part of an established program of recognition.

Example 1 to paragraph (d)(1): Based on a written determination by an agency ethics official that the prize meets the criteria set forth in paragraph (d)(2) of this section, an employee of the National Institutes of Health (NIH) may accept the Nobel Prize for Medicine, including the cash award which accompanies the prize, even though the prize was conferred on the basis of laboratory work performed at NIH.

Example 2 to paragraph (d)(1): A defense contractor, ABC Systems, has an annual award program for the outstanding public employee of the year. The award includes a cash payment of \$1,000. The award program is wholly funded to ensure its continuation on a regular basis for the next twenty years and selection of award recipients is made pursuant to written standards. An employee of the Department of the Air Force, who has duties that include overseeing contract performance by ABC Systems, is selected to receive the award. The employee may not accept the cash award because ABC Systems has interests that may be substantially affected by the performance or

nonperformance of the employee's official duties.

Example 3 to paragraph (d)(1): An ambassador selected by a nonprofit organization as a recipient of its annual award for distinguished service in the interest of world peace may, together with his spouse and children, attend the awards ceremony dinner and accept a crystal bowl worth \$200 presented during the ceremony. However, where the organization has also offered airline tickets for the ambassador and his family to travel to the city where the awards ceremony is to be held, the aggregate value of the tickets and the crystal bowl exceeds \$200, and he may accept only upon a written determination by the agency ethics official that the award is made as part of an established program of recognition.

(2) *Established program of recognition.* An award and an item incident to the award are made pursuant to an established program of recognition if:

(i) Awards have been made on a regular basis or, if the program is new, there is a reasonable basis for concluding that awards will be made on a regular basis based on funding or funding commitments; and

(ii) Selection of award recipients is made pursuant to written standards.

(3) *Honorary degrees.* An employee may accept an honorary degree from an institution of higher education, as defined at 20 U.S.C. 1001, or from a similar foreign institution of higher education, based on a written determination by an agency ethics official that the timing of the award of the degree would not cause a reasonable person to question the employee's impartiality in a matter affecting the institution.

Note to paragraph (d)(3): When the honorary degree is offered by a foreign institution of higher education, the agency may need to make a separate determination as to whether the institution of higher education is a foreign government for purposes of the Emoluments Clause of the U.S. Constitution (U.S. Const., art. I, sec. 9, cl. 8), which forbids employees from accepting emoluments, presents, offices, or titles from foreign governments, without the consent of Congress. The Foreign Gifts and Decorations Act, 5 U.S.C. 7342, however, may permit the acceptance of honorary degrees in some circumstances.

Example 1 to paragraph (d)(3): A well-known university located in the United States wishes to give an honorary degree to the Secretary of Labor. The Secretary may accept the honorary degree only if an agency ethics official determines in writing that the timing of the award of the degree would not cause a reasonable person to question the Secretary's impartiality in a matter affecting the university.

(4) *Presentation events.* An employee who may accept an award or honorary

degree pursuant to paragraph (d)(1) or (3) of this section may also accept free attendance to the event provided to the employee and to members of the employee's family by the sponsor of an event. In addition, the employee may also accept unsolicited offers of travel to and from the event provided to the employee and to members of the employee's family by the sponsor of the event. Travel expenses accepted under this paragraph (d)(4) must be added to the value of the award for purposes of determining whether the aggregate value of the award exceeds \$200.

(e) *Gifts based on outside business or employment relationships.* An employee may accept meals, lodgings, transportation and other benefits:

(1) Resulting from the business or employment activities of an employee's spouse when it is clear that such benefits have not been offered or enhanced because of the employee's official position;

Example 1 to paragraph (e)(1): A Department of Agriculture employee whose spouse is a computer programmer employed by a Department of Agriculture contractor may attend the company's annual retreat for all of its employees and their families held at a resort facility. However, under § 2635.502, the employee may be disqualified from performing official duties affecting her spouse's employer.

Example 2 to paragraph (e)(1): Where the spouses of other clerical personnel have not been invited, an employee of the Defense Contract Audit Agency whose spouse is a clerical worker at a defense contractor may not attend the contractor's annual retreat in Hawaii for corporate officers and members of the board of directors, even though his spouse received a special invitation for herself and the employee.

(2) Resulting from the employee's outside business or employment activities when it is clear that such benefits are based on the outside business or employment activities and have not been offered or enhanced because of the employee's official status;

Example 1 to paragraph (e)(2): The members of an Army Corps of Engineers environmental advisory committee that meets six times per year are special Government employees. A member who has a consulting business may accept an invitation to a \$50 dinner from her corporate client, an Army construction contractor, unless, for example, the invitation was extended in order to discuss the activities of the advisory committee.

(3) Customarily provided by a prospective employer in connection with *bona fide* employment discussions. If the prospective employer has interests that could be affected by performance or nonperformance of the employee's duties, acceptance is permitted only if

the employee first has complied with the disqualification requirements of subpart F of this part applicable when seeking employment; or

Example 1 to paragraph (e)(3): An employee of the Federal Communications Commission with responsibility for drafting regulations affecting all cable television companies wishes to apply for a job opening with a cable television holding company. Once she has properly disqualified herself from further work on the regulations as required by subpart F of this part, she may enter into employment discussions with the company and may accept the company's offer to pay for her airfare, hotel, and meals in connection with an interview trip.

(4) Provided by a former employer to attend a reception or similar event when other former employees have been invited to attend, the invitation and benefits are based on the former employment relationship, and it is clear that such benefits have not been offered or enhanced because of the employee's official position.

Example 1 to paragraph (e)(4): An employee of the Department of the Army is invited by her former employer, an Army contractor, to attend its annual holiday dinner party. The former employer traditionally invites both its current and former employees to the holiday dinner regardless of their current employment activities. Under these circumstances, the employee may attend the dinner because the dinner invitation is a result of the employee's former outside employment activities, other former employees have been asked to attend, and the gift is not offered because of the employee's official position.

(5) For purposes of paragraphs (e)(1) through (4) of this section, "employment" means any form of non-Federal employment or business relationship involving the provision of personal services.

(f) *Gifts in connection with political activities permitted by the Hatch Act Reform Amendments.* An employee who, in accordance with the Hatch Act Reform Amendments of 1993, at 5 U.S.C. 7323, may take an active part in political management or in political campaigns, may accept meals, lodgings, transportation, and other benefits, including free attendance at events, for the employee and an accompanying spouse or other guests, when provided, in connection with such active participation, by a political organization described in 26 U.S.C. 527(e). Any other employee, such as a security officer, whose official duties require him or her to accompany an employee to a political event, may accept meals, free attendance, and entertainment provided at the event by such an organization.

Example 1 to paragraph (f): The Secretary of the Department of Health and Human

Services may accept an airline ticket and hotel accommodations furnished by the campaign committee of a candidate for the United States Senate in order to give a speech in support of the candidate.

(g) *Gifts of free attendance at widely attended gatherings*—(1) *Authorization*. When authorized in writing by the agency designee pursuant to paragraph (g)(3) of this section, an employee may accept an unsolicited gift of free attendance at all or appropriate parts of a widely attended gathering. For an employee who is subject to a leave system, attendance at the event will be on the employee's own time or, if authorized by the employee's agency, on excused absence pursuant to applicable guidelines for granting such absence, or otherwise without charge to the employee's leave account.

(2) *Widely attended gatherings*. A gathering is widely attended if it is expected that a large number of persons will attend, that persons with a diversity of views or interests will be present, for example, if it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter, and that there will be an opportunity to exchange ideas and views among invited persons.

(3) *Written authorization by the agency designee*. The agency designee may authorize an employee or employees to accept a gift of free attendance at all or appropriate parts of a widely attended gathering only if the agency designee issues a written determination after finding that:

(i) The event is a widely attended gathering, as set forth in paragraph (g)(2) of this section;

(ii) The employee's attendance at the event is in the agency's interest because it will further agency programs or operations;

(iii) The agency's interest in the employee's attendance outweighs the concern that the employee may be, or may appear to be, improperly influenced in the performance of official duties; and

(iv) If a person other than the sponsor of the event invites or designates the employee as the recipient of the gift of free attendance and bears the cost of that gift, the event is expected to be attended by more than 100 persons and the value of the gift of free attendance does not exceed \$375.

(4) *Determination of agency interest*. In determining whether the agency's interest in the employee's attendance outweighs the concern that the employee may be, or may appear to be, improperly influenced in the performance of official duties, the

agency designee may consider relevant factors including:

(i) The importance of the event to the agency;

(ii) The nature and sensitivity of any pending matter affecting the interests of the person who extended the invitation and the significance of the employee's role in any such matter;

(iii) The purpose of the event;

(iv) The identity of other expected participants;

(v) Whether acceptance would reasonably create the appearance that the donor is receiving preferential treatment;

(vi) Whether the Government is also providing persons with views or interests that differ from those of the donor with access to the Government; and

(vii) The market value of the gift of free attendance.

(5) *Cost provided by person other than the sponsor of the event*. The cost of the employee's attendance will be considered to be provided by a person other than the sponsor of the event where such person designates the employee to be invited and bears the cost of the employee's attendance through a contribution or other payment intended to facilitate the employee's attendance. Payment of dues or a similar assessment to a sponsoring organization does not constitute a payment intended to facilitate a particular employee's attendance.

(6) *Accompanying spouse or other guest*. When others in attendance will generally be accompanied by a spouse or other guest, and where the invitation is from the same person who has invited the employee, the agency designee may authorize an employee to accept an unsolicited invitation of free attendance to an accompanying spouse or one other accompanying guest to participate in all or a portion of the event at which the employee's free attendance is permitted under paragraph (g)(1) this section. The authorization required by this paragraph (g)(6) must be provided in writing.

Example 1 to paragraph (g): An aerospace industry association that is a prohibited source sponsors an industry-wide, two-day seminar for which it charges a fee of \$800 and anticipates attendance of approximately 400. An Air Force contractor pays \$4,000 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance because (a) the contractor, rather than the association, provided the cost of their attendance; (b) the contractor designated the specific employees to receive the gift of free attendance; and (c) the value of the gift exceeds \$375 per employee.

Example 2 to paragraph (g): An aerospace industry association that is a prohibited

source sponsors an industry-wide, two-day seminar for which it charges a fee of \$25 and anticipates attendance of approximately 50. An Air Force contractor pays \$125 to the association so that the association can extend free invitations to five Air Force officials designated by the contractor. The Air Force officials may not accept the gifts of free attendance because (a) the contractor, rather than the association, provided the cost of their attendance; (b) the contractor designated the specific employees to receive the gift of free attendance; and (c) the event was not expected to be attended by more than 100 persons.

Example 3 to paragraph (g): An aerospace industry association that is a prohibited source sponsors an industry-wide, two-day seminar for which it charges a fee of \$800 and anticipates attendance of approximately 400. An Air Force contractor pays \$4,000 in order that the association might invite any five Federal employees. An Air Force official to whom the sponsoring association, rather than the contractor, extended one of the five invitations could attend if the employee's participation were determined to be in the interest of the agency and he received a written authorization.

Example 4 to paragraph (g): An employee of the Department of Transportation is invited by a news organization to an annual press dinner sponsored by an association of press organizations. Tickets for the event cost \$375 per person and attendance is limited to 400 representatives of press organizations and their guests. If the employee's attendance is determined to be in the interest of the agency and she receives a written authorization from the agency designee, she may accept the invitation from the news organization because more than 100 persons will attend and the cost of the ticket does not exceed \$375. However, if the invitation were extended to the employee and an accompanying guest, the employee's guest could not be authorized to attend for free because the market value of the gift of free attendance would exceed \$375.

Example 5 to paragraph (g): An employee of the Department of Energy (DOE) and his spouse have been invited by a major utility executive to a small dinner party. A few other officials of the utility and their spouses or other guests are also invited, as is a representative of a consumer group concerned with utility rates and her spouse. The DOE official believes the dinner party will provide him an opportunity to socialize with and get to know those in attendance. The employee may not accept the free invitation under this exception, even if his attendance could be determined to be in the interest of the agency. The small dinner party is not a widely attended gathering. Nor could the employee be authorized to accept even if the event were instead a corporate banquet to which forty company officials and their spouses or other guests were invited. In this second case, notwithstanding the larger number of persons expected (as opposed to the small dinner party just noted) and despite the presence of the consumer group representative and her spouse who are not officials of the utility, those in attendance would still not represent a diversity of views

or interests. Thus, the company banquet would not qualify as a widely attended gathering under those circumstances either.

Example 6 to paragraph (g): An Assistant U.S. Attorney is invited to attend a luncheon meeting of a local bar association to hear a distinguished judge lecture on cross-examining expert witnesses. Although members of the bar association are assessed a \$15 fee for the meeting, the Assistant U.S. Attorney may accept the bar association's offer to attend for free, even without a determination of agency interest. The gift can be accepted under the \$20 gift exception at paragraph (a) of this section.

Example 7 to paragraph (g): An employee of the Department of the Interior authorized to speak on the first day of a four-day conference on endangered species may accept the sponsor's waiver of the conference fee for the first day of the conference under § 2635.203(b)(8). If the conference is widely attended, the employee may be authorized to accept the sponsor's offer to waive the attendance fee for the remainder of the conference if the agency designee has made a written determination that attendance is in the agency's interest.

Example 8 to paragraph (g): A military officer has been approved to attend a widely attended gathering, pursuant to paragraph (g) of this section, that will be held in the same city as the officer's duty station. The defense contractor sponsoring the event has offered to transport the officer in a limousine to the event. The officer may not accept the offer of transportation because the definition of "free attendance" set forth in § 2635.203(g) excludes travel, and the market value of the transportation would exceed \$20.

(h) *Social invitations.* An employee may accept food, refreshments, and entertainment, not including travel or lodgings, for the employee and an accompanying spouse or other guests, at a social event attended by several persons if:

(1) The invitation is unsolicited and is from a person who is not a prohibited source;

(2) No fee is charged to any person in attendance; and

(3) If either the sponsor of the event or the person extending the invitation to the employee is not an individual, the agency designee has made a written determination after finding that the employee's attendance would not cause a reasonable person with knowledge of the relevant facts to question the employee's integrity or impartiality, consistent with § 2635.201(b).

Example 1 to paragraph (h): An employee of the White House Press Office has been invited to a social dinner for current and former White House Press Officers at the home of an individual who is not a prohibited source. The employee may attend even if she is being invited because of her official position.

(i) *Meals, refreshments, and entertainment in foreign areas.* An

employee assigned to duty in, or on official travel to, a foreign area as defined in 41 CFR 300–3.1 may accept unsolicited food, refreshments, or entertainment in the course of a breakfast, luncheon, dinner, or other meeting or event provided:

(1) The market value in the foreign area of the food, refreshments or entertainment provided at the meeting or event, as converted to U.S. dollars, does not exceed the per diem rate for the foreign area specified in the U.S. Department of State's Maximum Per Diem Allowances for Foreign Areas, Per Diem Supplement Section 925 to the Standardized Regulations (GC–FA), available on the Internet at www.state.gov;

(2) There is participation in the meeting or event by non-U.S. citizens or by representatives of foreign governments or other foreign entities;

(3) Attendance at the meeting or event is part of the employee's official duties to obtain information, disseminate information, promote the export of U.S. goods and services, represent the United States, or otherwise further programs or operations of the agency or the U.S. mission in the foreign area; and

(4) The gift of meals, refreshments, or entertainment is from a person other than a foreign government as defined in 5 U.S.C. 7342(a)(2).

Example 1 to paragraph (i): A number of local business owners in a developing country are eager for a U.S. company to locate a manufacturing facility in their province. An official of the Overseas Private Investment Corporation may accompany the visiting vice president of the U.S. company to a dinner meeting hosted by the business owners at a province restaurant where the market value of the food and refreshments does not exceed the per diem rate for that country.

(j) *Gifts to the President or Vice President.* Because of considerations relating to the conduct of their offices, including those of protocol and etiquette, the President or the Vice President may accept any gift on his or her own behalf or on behalf of any family member, provided that such acceptance does not violate § 2635.205(a) or (b), 18 U.S.C. 201(b) or 201(c)(3), or the Constitution of the United States.

(k) *Gifts authorized by supplemental agency regulation.* An employee may accept any gift when acceptance of the gift is specifically authorized by a supplemental agency regulation issued with the concurrence of the Office of Government Ethics, pursuant to § 2635.105.

(l) *Gifts accepted under specific statutory authority.* The prohibitions on

acceptance of gifts from outside sources contained in this subpart do not apply to any item which a statute specifically authorizes an employee to accept. Gifts which may be accepted by an employee under the authority of specific statutes include, but are not limited to:

(1) Free attendance, course or meeting materials, transportation, lodgings, food and refreshments or reimbursements therefor incident to training or meetings when accepted by the employee under the authority of 5 U.S.C. 4111. The employee's acceptance must be approved by the agency in accordance with part 410 of this title; or

(2) Gifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. 7342. As a condition of acceptance, an employee must comply with requirements imposed by the agency's regulations or procedures implementing that Act.

(m) *Gifts of informational materials.*

(1) An employee may accept unsolicited gifts of informational materials, provided that:

(i) The aggregate market value of all informational materials received from any one person does not exceed \$100 in a calendar year; or

(ii) If the aggregate market value of all informational materials from the same person exceeds \$100 in a calendar year, an agency designee has made a written determination after finding that acceptance by the employee would not be inconsistent with the standard set forth in § 2635.201(b).

(2) *Informational materials* are writings, recordings, documents, records, or other items that:

(i) Are educational or instructive in nature;

(ii) Are not primarily created for entertainment, display, or decoration; and

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

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

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

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

Example 1 to paragraph (m): An analyst at the Agricultural Research Service receives an edition of an agricultural research journal in the mail from a consortium of private farming operations concerned with soil toxicity. The journal edition has a market value of \$75. The analyst may accept the gift.

Example 2 to paragraph (m): An inspector at the Mine Safety and Health Administration

receives a popular novel with a market value of \$25 from a mine operator. Because the novel is primarily for entertainment purposes, the inspector may not accept the gift.

Example 3 to paragraph (m): An employee at the Department of the Army is offered an encyclopedia on cyberwarfare from a prohibited source. The cost of the encyclopedia is far in excess of \$100. The agency designee determines that acceptance of the gift would be inconsistent with the standard set out in § 2635.201(b). The employee may not accept the gift under paragraph (m) of this section.

§ 2635.205 Limitations on use of exceptions.

Notwithstanding any exception provided in this subpart, other than § 2635.204(j), an employee may not:

(a) Accept a gift in return for being influenced in the performance of an official act;

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

(c) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using the employee's public office for private gain;

Example 1 to paragraph (c): A purchasing agent for a Department of Veterans Affairs medical center routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays, and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than \$6 and the aggregate value from any one manufacturer does not exceed the \$50 aggregate limitation in § 2635.204(a) on gifts of \$20 or less, the practice of accepting even these modest gifts on a recurring basis is improper.

(d) Accept a gift in violation of any statute; relevant statutes applicable to all employees include, but are not limited to:

(1) 18 U.S.C. 201(b), which prohibits a public official from, directly or indirectly, corruptly demanding, seeking, receiving, accepting, or agreeing to receive or accept anything of value personally or for any other person or entity in return for being influenced in the performance of an official act; being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or for being induced to do or omit to do any action in violation of his

or her official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials; and

(2) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality;

(e) Accept a gift in violation of any Executive Order; or

(f) Accept any gift when acceptance of the gift is specifically prohibited by a supplemental agency regulation issued with the concurrence of the Office of Government Ethics, pursuant to § 2635.105.

§ 2635.206 Proper disposition of prohibited gifts.

(a) Unless a gift is accepted by an agency acting under specific statutory authority, an employee who has received a gift that cannot be accepted under this subpart must dispose of the gift in accordance with the procedures set forth in this section. The employee must promptly complete the authorized disposition of the gift. The obligation to dispose of a gift that cannot be accepted under this subpart is independent of an agency's decision regarding corrective or disciplinary action under § 2635.106.

(1) *Gifts of tangible items.* The employee must promptly return any tangible item to the donor or pay the donor its market value; or, in the case of a tangible item with a market value of \$100 or less, the employee may destroy the item. An employee who cannot ascertain the actual market value of an item may estimate its market value by reference to the retail cost of similar items of like quality.

Example 1 to paragraph (a)(1): A Department of Commerce employee received a \$25 T-shirt from a prohibited source after providing training at a conference. Because the gift would not be permissible under an exception to this subpart, the employee must either return or destroy the T-shirt or promptly reimburse the donor \$25. Destruction may be carried out by physical destruction or by permanently discarding the T-shirt by placing it in the trash.

Example 2 to paragraph (a)(1): To avoid public embarrassment to the seminar sponsor, an employee of the National Park Service did not decline a barometer worth \$200 given at the conclusion of his speech on

Federal lands policy. To comply with this section, the employee must either promptly return the barometer or pay the donor the market value of the gift. Alternatively, the National Park Service may choose to accept the gift if permitted under specific statutory gift acceptance authority. The employee may not destroy this gift, as the market value is in excess of \$100.

(2) *Gifts of perishable items.* When it is not practical to return a tangible item in accordance with paragraph (a)(1) of this section because the item is perishable, the employee may, at the discretion of the employee's supervisor or the agency designee, give the item to an appropriate charity, share the item within the recipient's office, or destroy the item.

Example 1 to paragraph (a)(2): With approval by the recipient's supervisor, a floral arrangement sent by a disability claimant to a helpful employee of the Social Security Administration may be placed in the office's reception area.

(3) *Gifts of intangibles.* The employee must promptly reimburse the donor the market value for any entertainment, favor, service, benefit or other intangible. Subsequent reciprocation by the employee does not constitute reimbursement.

Example 1 to paragraph (a)(3): A Department of Defense employee wishes to attend a charitable event to which he has been offered a \$300 ticket by a prohibited source. Although his attendance is not in the interest of the agency under § 2635.204(g), he may attend if he reimburses the donor the \$300 face value of the ticket.

(4) *Gifts from foreign governments or international organizations.* The employee must dispose of gifts from foreign governments or international organizations in accordance with 41 CFR part 102-42.

(b) An agency may authorize disposition or return of gifts at Government expense. Employees may use penalty mail to forward reimbursements required or permitted by this section.

(c) An employee who, on his or her own initiative, promptly complies with the requirements of this section will not be deemed to have improperly accepted an unsolicited gift. An employee who promptly consults his or her agency ethics official to determine whether acceptance of an unsolicited gift is proper and who, upon the advice of the ethics official, returns the gift or otherwise disposes of the gift in accordance with this section, will be considered to have complied with the requirements of this section on the employee's own initiative.

(d) Employees are encouraged to record any actions they have taken to

properly dispose of gifts that cannot be accepted under this subpart, such as by sending an electronic mail message to the appropriate agency ethics official or the employee's supervisor.

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1471

RIN 0551-AA90

Pima Agriculture Cotton Trust Fund and Agriculture Wool Apparel Manufacturers Trust Fund

AGENCY: Foreign Agricultural Service and Commodity Credit Corporation (CCC), USDA.

ACTION: Final rule.

SUMMARY: This final rule makes amendments to the final rule, with request for comments, published in the *Federal Register* on March 9, 2015, that established regulations for the Pima Agriculture Cotton Trust Fund (Agriculture Pima Trust) and the Agriculture Wool Apparel Manufacturers Trust Fund (Agriculture Wool Trust) programs. This final rule is amended based on comments received and to add details for the Refund of Duties Paid on Imports of Certain Wool Products (Wool Duty Refund) payment. The administration of the Wool Duty Refund payment was transferred to the United States Department of Agriculture (USDA) beginning in calendar year (CY) 2016 and assigned to the Foreign Agricultural Service (FAS). It was previously administered by the Customs and Border Protection Agency of the Department of Homeland Security.

DATES: This final rule is effective November 18, 2016.

FOR FURTHER INFORMATION CONTACT: Peter W. Burr, Import Policies and Export Reporting Division, Office of Trade Programs, Foreign Agricultural Service, USDA; email: pimawool@fas.usda.gov, 202-720-3274.

SUPPLEMENTARY INFORMATION:

Background

On March 9, 2015, FAS published a final rule, with request for comments, in the *Federal Register* (80 FR 12321) for the Agriculture Pima Trust and the Agriculture Wool Trust programs. The final rule, with request for comments, was published under RIN 0551-AA86. The final rule, with request for comments, established regulations and

sought comments for the Agriculture Pima Trust program and for three of the four payments under the Agriculture Wool Trust program. The Agriculture Pima Trust and Agriculture Wool Trust programs were established in the Agricultural Act of 2014 (Farm Bill). The Farm Bill transferred to USDA the responsibility for administering the Agriculture Pima Trust and three of the four payments under the Agriculture Wool Trust beginning in 2015, but transferred the fourth payment, the Wool Duty Refund, beginning in 2016.

Discussion of Comments

The following is a summary and discussion of the comments received relative to the Agriculture Pima Trust and the Agriculture Wool Trust programs along with the reasoning for the revisions made.

General

A commenter suggested that applicants not be required as noted in § 1471.1(b)(3)(iii), § 1471.1(b)(4), § 1471.10(b)(3)(iii), and § 1471.10(b)(4), to annually file IRS forms W-9 (U.S. person or resident alien) or the 1199A (direct deposit) with an application for either the Agriculture Pima Trust or Agriculture Wool Trust programs unless a change in the applicant's W-9 or 1199A information had occurred when compared to their previous year's application. This was deemed to be reasonable. Beginning in 2017, IRS forms W-9 and 1199A will only need to be filed if changes in the information have occurred.

A commenter noted that a technical correction is necessary in paragraphs (1) and (2) of § 1471.2(c) by closing the parentheses after the word "insurance." This correction will be made.

Payments to Manufacturers of Certain Worsted Wool Fabrics

A commenter identified an error common to paragraphs (b)(1)(ii) and (b)(2)(ii) of § 1471.11, Payments to manufacturers of certain worsted wool fabrics. The payment formula for payments to eligible persons is provided for under this section. The payment formula mistakenly states in paragraph (ii) that payments will be calculated based on the eligible person's production in the preceding year. However, the payments are actually based on the eligible person's production of qualifying worsted wool fabric during calendar years 1999, 2000, and 2001. This correction will be made.

Free Trade Zones

A commenter suggested that the scope of the monetization of the wool tariff rate quota payment as noted under § 1471.13(a)(2)(i) be expanded to include eligible entities, that are manufacturers and would otherwise be eligible for monetization payments, that import qualifying worsted wool into a free trade zone (FTZ), cut the wool and use it to make worsted wool suits for men and boys within the FTZ.

The monetization payment requires that the eligible entities receiving a monetization payment (1) import into the Customs territory of the United States the qualifying worsted wool directly or indirectly; (2) manufacture in the United States the qualifying worsted wool into worsted wool suits for men and boys; and (3) own the worsted wool at the time it's cut and manufactured.

An entity that manufactures the suits in an FTZ and does not export from the FTZ into the Customs territory of the United States the qualifying worsted wool directly or indirectly, does not qualify for this benefit because by definition the entity avoided paying the import duty on the qualifying worsted wool. However, an eligible entity that manufactures the suits in an FTZ and exports into the Customs territory of the United States the qualifying worsted wool directly or indirectly and thus pays the import duty on the qualifying worsted wool, does qualify for this benefit. For the purpose of the monetization payment, the worsted wool suits for men and boys are manufactured in the U.S. and all environmental, worker safety, and wage protection laws, etc., would apply to this manufacturer.

USDA will also broaden the scope of eligible entities as it pertains to the wool yarn, wool fiber, and wool top compensation payment found at § 1471.14(a)(2)(i) to include those operating within a FTZ.

Definition of Eligible Person

A commenter suggested that the definition of an eligible person found at § 1471.13(a)(2)(i) in the monetization of the wool tariff rate quota payment be modified to allow an eligible person to claim the annual dollar value and quantity of imported qualifying worsted wool fabric cut and sewn if the eligible person owned the wool at the time it was cut and sewn, whether the person actually cut and sewed the imported qualifying worsted wool or another person cut and sewed the wool on behalf of the eligible person. This was deemed reasonable and is already