

Office of Government Ethics Proposes New Rules on Gifts to Federal Employees

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Government Contracts Issue Update

Just in time for the holiday gift-giving season, the Office of Government Ethics (OGE) is proposing to revise and update the rules governing gifts to federal employees. The proposed changes to the Standards of Ethical Conduct for Executive Branch Employees have the potential to impact a broad range of a contractor's interactions with the Government. While Government employees are the primary subject of the proposed rules, contractors are affected by virtue of doing business with the Government and are considered a "prohibited source" under the rules. In addition to OGE's rules, contractors and federal agencies may have their own internal code of ethics, which should also be consulted in planning any gift-giving to Government employees.

The rule's proposed amendments revise the existing regulations to encourage Government employees to consider declining otherwise permissible gifts where a "reasonable person" would question their integrity if they were to accept the gift. The rule also proposes clarifications or changes to whether a Government employee may: attend a contractor's holiday party, gathering, or conference, receive gifts from a contractor with whom they are friends with on a social-networking website, and receive cash-equivalent gift cards.

First and most notably, the proposed OGE rule adds a new provision that encourages Government employees to consider whether an otherwise permissible gift should nonetheless be refused because of the perceived harm to the integrity and credibility of the agency's programs. Under this provision, employees are to consider whether a "reasonable person with knowledge of the relevant facts" would

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question their integrity. Although the proposed rule recognizes that this is a flexible, non-binding standard, it articulates a series of factors that an employee should consider, such as the market value of the gift, the donor's interests in the employee's performance or non-performance of official duties, the gift's fostering a sense of obligation, and whether the gift reflects preferential treatment.

For example, even though it is otherwise permissible for a contractor to give a \$20 national coffee chain gift card to a Government employee, it may be objectionable if the contractor targets specific senior leadership or if it has a matter currently pending before the receiving employee. Because this proposed rule is subjective and fact-specific, contractors are encouraged to consult with counsel to ensure that potential gifts do not create the *appearance* of calling into question the Government's integrity.

While this new provision is non-binding and subjective, the proposed rule further clarifies that notwithstanding this guidance, a Government employee may not solicit or accept a gift in a manner that would violate the federal bribery statute. For example, a contractor may extend an invitation to an employee to attend the contractor's holiday party at which modest food and refreshments are served. On the other hand, a contractor should not extend an invitation to attend the same party if the invitation is conditional on the employee performing or not performing some official duty, such as permitting the contractor to present a demonstration of their product for the agency.

The proposed rule contains a number of assorted changes and codifications of previous guidance (some of which seem to require further clarification).

Holiday Parties, "Widely Attended Gatherings," and Conferences

With holiday season around the corner, contractors are advised to be mindful of the many rules pertaining to gifts to Government employees. Contractors should be sure to consult with counsel early to avoid the many pitfalls of gift-giving and seek clarification as to the rules.

On the topic of "widely attended gatherings,"¹ the proposed rule now requires that a Government employee must obtain written authorization from the agency ethics designee to attend a widely attended gathering. Under the proposed rule written authorization would be required prior to a Government employee attending any such gathering, regardless of whether the person or organization extending the invitation has interests that may be substantially affected by the performance or non-performance of the employee's official duties. OGE is "sympathetic" to the administrative burden generated by this broadened requirement, but maintains that it will promote the public's confidence in Government operations.

The rules surrounding "widely attended gatherings" extend to situations in which the contractor is not the host of the event. For example, if a trade association is holding a conference, a contractor may not provide funds to the association for the purpose of extending invitations to specified Government employees. However, a contractor may provide funds to the association to sponsor the attendance of *any* unspecified Government employees, so long as the employees receive written authorization from their Government ethics designee.

For holiday parties, the proposed rule is ambiguous as to whether a Government employee may accept an invitation to a contractor's party where alcohol is served. While the rule suggests that the purpose of the revision is to clarify that *consumption* of alcohol constitutes an impermissible gift, the rule's proposed example implies that mere *attendance* at a party where alcohol is served is itself an impermissible gift under the gift exclusion for "modest items of food and refreshments." On the other hand, given the new emphasis in the proposed rule that "an opportunity to exchange ideas and views among invited persons" is an essential requirement for an event to qualify under the "widely attended gathering exception," it appears that a holiday party where alcohol is served could qualify under this latter exception if all other criteria of the exception are met. The proposed rule, however, does not make this point sufficiently clear.

The proposed rule also clarifies long-standing OGE guidance relating to Government employees accepting free attendance at a conference or trade show on the day they are presenting information on behalf of their agency. The Government employee's attendance and participation at the conference is considered customary and necessary to permit the employee to carry out official duties. Under the proposed rule, free attendance provided under these specific circumstances would be excluded from the definition of "gift." The Government presenter may also accept a meal ancillary to their attendance, so long that meals are provided to all presenters, and that the meal is hosted by the event's sponsor. The contractor may provide the Government employee with a memento, such as a mug, plaque, or other "presentation" item with little intrinsic value. Subject to certain conditions, the Government employee's spouse may also attend the conference.

Personal Relationships with Government Employees, and Prospective and Former Employees

If a contractor is interested in hiring a Government employee and has interests that could be affected by that employee's performance or non-performance of his job, the contractor may provide customary hiring accommodations—such as airfare, hotels, and meals—if the employee disqualifies himself from work on matters affecting the contractor.

Conversely, if a contractor extends an invitation for a dinner or reception to a *former* employee who now works for the Government, it may do so only if it invited other former employees and it is clear that the invitation was based on the former employment relationship and not otherwise enhanced or extended. As the proposed rule illustrates, if a contractor hosts an annual holiday dinner party, and seeks to invite a former employee who now works for the Government, it may only do so if it typically extends invitations to its current or former employees *regardless* of their current employment.

Contractors and Government employees working in concert may form personal relationships, and there is a long-standing exception for gifts based on "personal relationships," including "personal friendship." The proposed rule updates the application of this exception in some important ways.

First, the proposed rule appears to recognize that the "qualitative" nature of a personal relationship may be as important as the "quantitative" nature; the proposed rule does this by making explicit that, in determining whether a gift is motivated by personal relationship, Government employees and their ethics officials may consider "not only the 'history of the relationship' but also the 'nature of the relationship.'" For example, if a

contractor's employees have tickets to a private golf tournament and intend to invite a Government employee with whom they have developed a friendship, they cannot do so if the contractor pays for the tournament entry fees, as that makes it clear the gift is not of a personal nature but rather motivated by a business relationship.

Second, in a twenty-first century illustration of this exception, OGE notes that if an employee and a contractor are "friends" on a personal social-networking website, but otherwise do not communicate extensively outside of work or meet up for social purposes, their relationship does not qualify as a "personal friendship" and the "personal relationship" exception would not apply. On the other hand, the proposed example suggests, if the two communicate extensively with each other in their personal capacities, or meet socially outside of work, the relationship may be considered "personal" and a gift under the "personal relationship" exception may be permissible. Because the proposed rule requires that the circumstances "make it *clear*" that the gift is motivated by a personal relationship, however, contractors would be well advised to exercise caution when considering giving gifts under these circumstances or under this exception.

Other Types of Gifts

The proposed rule contains an interesting distinction relating to a contractor giving gift cards to a Government employee. The proposed rule, by illustration, explains that gift cards for particular stores, such as a national coffee chain or movie theater, are permissible (so long as they are \$20 or less). However, gift cards issued by a "credit card company or other financial institution" are impermissible because they are a cash equivalent. While it is clear that some gift cards are issued for use at specific stores, and others are issued by financial institutions and are clearly cash-equivalent, a certain number fall into a gray area and have broad, yet non-universal use. Contractors are advised to seek advice of counsel before giving such gift cards.

The proposed rule adds a new exception for unsolicited "gifts of informational materials" where the materials are provided primarily for "educational or instructive, rather than entertainment" purposes. Where the value of such materials exceeds \$100, the proposed rule would require a written determination from the agency ethics designee that acceptance would be permissible.

The proposed rule clarifies that a Government employee may accept an award or honorary degree for meritorious public service, and an item incident to that award, under two conditions. First, the person or organization giving the award must not have interests that will substantially be affected by the employee's performance or non-performance of his job. Second, the item may not exceed \$200, or else an agency ethics official must make a written determination that the award is part of an established program of recognition.

If you want to understand how these new rules could apply to your business, please contact us.

¹ According to the proposed rule, 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 . . . and that there will be an opportunity to exchange ideas and views among invited persons."