good morning and welcome to part two of our series of presentations concerning

0:07

recent changes to subpart B of the standards of ethical conduct for employees of the executive branch what

0:13

we know as the gift from outside sources rules today we're very fortunate to be joined by Lee Francis from OG es Office

0:21

of General Counsel and legal policy division he's going to be helping us understand some of the structural

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changes to the exceptions and also some of the substantive ones to the the the exceptions we commonly use if you've not

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had an opportunity to watch part 1 of this series it is available on our youtube channel at youtube com / GE

0:41

Institute we will also be making the powerpoint slides for this and part 1

0:46

available vilest serve after the presentation so if you have asked us for

0:52

the slides out we're going to be sending them to everyone as a package along with links to both presentations so thanks

0:58

for joining us Lee we really appreciate being here thanks for having me back I hope this session's is the last one was

1:05

I hope excellent well I think we have quite a lot to fit into an hour so shall I pull up the deck and we'll get started yeah we do have a lot to go all right

1:16

excellent so let's commence part two alright so again what we're going to do is we're going to go over some questions

1:22

from part one as I promised and we've selected a few then we're going to go over to subpart beasts the changes to

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the gift exceptions as Patrick already noted we're going to go over the reasons for making those changes again how we

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intend for those changes to be implemented by you out there in the ethics community because without you they will not be implemented and then

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finally we're going to talk about the new gift exception at 26-35 204 m which

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I'll be mentioning quite a bit today and it's gifts of informational materials and we're actually going to take a deep dive on that and actually apply that new

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exception to a few hypotheticals that sort of brand new right then yeah that's that's the big change yeah that's the

2:00

big changes there's other portions of exceptions that are new but that's the real at all the elements there the whole

2:07

the whole cloth is new so I thought it'd be helpful to apply that excellent alright so let's move on excellent

2:18

alright so so to make a question that came in about market value and that is

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if a gift has a retail cost but is also available from an online marketplace something like eBay or some other

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reseller type place should an employee use the retail cost or the cost from the online marketplace to determine the

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market value thanks Patriots that's our first question so I'm going to move on

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here and again this is where we are now or at least where we will be on January won 20-17 last time I discussed tell oh

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do you revise the definition to be a bit more expansive so what I said and what

2:55

I'll reiterate now is for gifts other than tickets market value under the new rule means the cost that a member of the

3:02

general public would reasonably expect to incur to purchase the gift again oh gee did this because some gifts such as

3:09

gifts that come in the form of services or intangibles simply don't have a retail price gifts that are bought or

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sold on websites also may not have retail price if for example they're custom-made like on the website Etsy or

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used or antique items that may be available on websites such as eBay would

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it be fair to say here lieth at four for those items that do have a retail value

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new items that you could reasonably buy at a store we should be really focusing on the retail cost yeah that's exactly

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right Patrick and you've let into exactly what I'm going to talk about right here the answer is you know if a

3:46

gift has a retail cost that's what the employee must use for the market value

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and this is true even if the gift also happens to be available in an online market praise place for a different

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price so some viewers I don't know if they were confused by this but I just wanted to go back over it so again if

4:02

you have a specific gift actually has a retail price then that's what og is viewed and continues to view as the cost

4:08

that a member of the general public would reasonably expect to incur to purchase the gift and I think that makes a lot of sense that we should be looking

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at the retail cost of tangible items that are new um you know just because you get a like

4:20

new item for a discount on an online marketplace or an auction site we're not really that's not the purpose of the the

4:28

market value right we really want to find out you know what does he normally cost yeah that's right and so why would you expand the definition you know to

4:34

make clear that if there's no retail price and it would not make sense to ascertain the market value by reference

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to the retail cost of similar items of like quality because maybe with an antique there's just there is no similar

4:45

item of like quality then you know the employee should ascertain the cost of a member of the general public would

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reasonably expect to occur and I think this change in emphasis really reflects our experienced reality over the last 20

4:57

some odd years that I'd say the majority of gifts determinations we make our for intangibles there are things that people

5:04

are attending events entertainment services that kind of thing yeah so in

5:11

those cases the emphasis on what it would cost in the place makes a lot of sense absolutely so that was our first

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question will do the next one now so our

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next question is if a speaker's meal occurs on the day before or the day after the employees to speak in their

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official capacity may the employee attend the meal under 26-35 two or three

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b8 so this is the sort of threat yes the

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thread that I try to hang out last time but I wanted to reemphasize because we got again a specific question to confirm

5:46

on this point and so the bottom line is the speaker's events that are held on a

5:51

day other than sorry speakers meals that are held on a day other than the day of the speaking event if we allowed people

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to attend those speakers meals that would expand the scope of the exclusion and would have the effect of treating

6:05

speakers meals differently than you know other parts of the event you know in the preamble og stated that's the view that

6:12

it's oh geez view the exclusion is a customary and necessary to allow the

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employee to carry out his or her assignment a speaker's meal the day after an employee presents is not

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customary and necessary to allow the employee to carry out his or her assignment which again is providing a presentation at the same time og notes

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that speaker hold on another day might qualify for this or another exclusion or exception

6:36

or another statutory authority and I think that's something we really need to keep in mind here is that when we're

6:42

looking at b8 we're talking about an employee on official duty giving an official speech right there in their

6:47

official capacity so the gifts rules don't allow the employee to personally

6:53

accept the speaker's dinner if it's the day before the day after unless we use wag or some other exists that's right I

6:59

mean they're being assigned to go that day if it happens to be on that day then they can go to those but if an agency is able to avail themselves with an

7:05

authority to accept that benefit they may do so for example they could use 1353 if the employer was away from duty

7:12

station or they may be able to use their agency gift acceptance authority or some other absolutely nothing nothing would

7:18

preclude that yes I don't think we're saying that this this limitation doesn't say that you can never go to a speaker

7:24

some meal that happens before after it's just saying within the scope of our understanding of this exclusion it's not proprietary okeydoke so there we have it

7:35

all right and this is our last question for you get into the exception so our

7:41

final question here is uh under 26-35 205 a one does destruction mean that no

7:47

one is able to enjoy the prohibited gift and I need to change that slide too I think 206 and I'll do that before we get

7:54

we get it up there the bottom line is you know yes I mean the bottom line is

8:00

yes you can be done by throwing away cutting it up whatever the case may be I

8:05

accession for from an ethics official in the field and this would wanted to confirm that when we say destroy the

8:13

gift we don't mean place the thing of value in a garbage receptacle and maybe notify a colleague that they might enjoy

8:18

it what we mean is that no one should enjoy the gift destruction means

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destruction where we're not in the business of encouraging people to rule beat in this way no this I think that's

8:30

right and we are just trying to make it easier on everybody and hopefully we've done that but again you can't put in the

8:36

receptacle and then fish it out or tell the people about is that they might want to do that and about this this change I

8:43

think one of the big benefits that you mentioned last time is that it creates a strategy for declining gifts and I think

8:49

that's maybe the greatest value is that you know someone offers you something to say you know I really can't take this if

8:55

I did take it I just have to destroy it so please keep it does provide employees

9:00

with a practical strategy for declining gifts absolutely absolutely all right

9:06

now we're going to jump into the exceptions and these are the ones that we're going to go over today I just want

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to flag those and the ones in gold are just like last time the ones we're going to do a deep dive on so first we're

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going to a deep dive just on the framework that Patrick mentioned then later on we're going to do the wily attendant gathering is a deep dive dare

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and then finally as i said the gifts of informational materials so there's other

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minor changes to the rule that obviously are not here and i would just invite everybody to refer to the final rule for

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them I didn't think that they merited going over today and then like I said

9:48

we're going to do some applications of that informational materials because I think it's gonna be very helpful so

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here's where we discussed last week with the prohibitions and I just thought that that was a good place to start about how

10:02

oh gee split the general prohibition on a solicitation or acceptance into two different subsections now oh gee did

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that to emphasize that there are again in fact two prohibited activities and doing so G also sought to address each

10:16

prohibited activity with regards to you know all the exceptions at 26-35 204 as

10:23

such i want to start here in essence oh geez change the language of the exceptions in 204 and i'm going to go

10:30

over this a few times and pastures going to help me tease it out some exceptions are only exceptions to 2635 20 2 b1 and

10:39

b2 which is the prohibition on accepting use on the other hand some exceptions

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are exceptions to 2635 20 2 b1 and b2 the prohibition on accepting yes in

10:52

addition to being an exception to the prohibition on soliciting gifts from primitive sources

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set forth in 26 35 to 0 to a 1 however as I'm going to explain further below

11:03

but I will emphasize at the outset none of the exceptions are exceptions to the

11:09

prohibition on soliciting a gift to be given because of the employees official position and that's found at 26 35 to 0

11:17

2 a 2 finally I want to mention that this change is not a significant change

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to subpart B all it does is it permits employees to ask prohibited sources for

11:28

things certain gifts in a narrow set of situations in which employees by and large already asked for such gifts I

11:35

realize that's a bit complicated so Patrick and I are going to try and unwind that today I'm really glad

11:42

there's a chart you already teased the charts chart will be coming up very soon

11:47

okay so one of the new rules certain exceptions permit employees to solicit and accept gifts and others don't

11:53

however under the coral employees under our current rule right now the

11:59

limitation on the use of exceptions says outright that no employee may solicit gifts and so that's currently in the

12:06

limitations on the use of exceptions at 26-35 to a to c 2 in the rule that's in

12:11

effect right now our current rule so the next two questions that arise our first why did oh gee make this change and

12:18

second as I've already mentioned is it really a substantive change which the answer is now first only change this

12:24

because under the current rule general prohibition could be interpreted to cover situations it just simply was not

12:30

meant to cover and the clearest example is that the solicitation prohibition simply not meant to cover when a federal

12:36

employee asks his or her spouse who works for a private source for a gift

12:42

that has nothing to do with the employees work for the government I think you know we're coming up on the holiday season here so i think we've

12:50

always understood the personal relationship exception to permit an

12:55

employee who say is married to an employee of a government contractor who's prohibited source so if your

13:00

spouse asks you what you would like for the holidays and you name a few items that you might be interested in this

13:07

clarifies that that's permissible absolutely I mean absolutely i mean the personal relationship exception covers acceptance but og just

13:14

didn't intend for that to cover a gift from one spouse another merely because I happen to work for private source so to

13:20

ensure that the solicitation prohibition did not lead to absurd results oh gee has incorporated an exception to the

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prohibition on sustained gifts from private sources as i mentioned set forth in a tomb and as I'll just reiterate all

13:33

that said this isn't really a substantive change the same gifts that were prohibited by the current rule are

13:38

prohibited by the new rule and the same gifts that are permissible under the curler you know under the current role

13:44

are also permissible under the new rule this just brings a little bit of harmony bag to the regulation and so here is a

13:53

quick snapshot of the new de minimis exception at 26-35 204a and the changes

13:59

to the exceptions can be seen here so for the de minimis exception employees may never solicit the gift and this is

14:07

why if you look in the second line the exception says that the gift must be

14:12

unsolicited others exceptions such as the personal relationship exception at

14:17

26-35 204b that we just discussed do not have the requirement that the gift be

14:22

unsolicited so to help ethics officials know which is which Patrick and I have

14:28

created the chart that he mentioned earlier and this should make it clear or at least a little bit clearer for

14:34

everybody who's interested in this change the chart the chart and these are

14:41

a listing of all of our exceptions including the new informational materials exception the exceptions that

14:48

omit the requirement to be unsolicited and thus be solicited may be solicited

14:55

should be considered exceptions again to 26-35 201 a one and only 20 1 a 1 which

15:01

is the prohibition on solution gifts from primitive sources and this is because of limitation the fact that it's

15:08

only a one rather is the reason that that's the case is because of limitation on the use of exceptions that's a 26-35

15:15

205 be employees may never solicit a gift to be given because of the

15:20

employees official position and so in essence there is no exception to that probe 2635 202a to sew and this is exactly

15:31

what that limitation States I'll just read it very briefly no employee may use

15:36

or permit the use of the employees government position or any authority associated with public office to solicit

15:43

or course the offering of the gift and that's the bottom line the employee would violate 202a too because of this

15:49

limitation on the use of exceptions and the last thing we're going to do here is I'll do my best to unpack the

15:55

application of what we're discussing through the use of an example so here's

16:03

our example if everybody out there I'll give you 15 seconds just to take a quick read it's rather short and then we'll

16:08

run through this

16:27

okey doke so this is not a violation of the gift rules because of 26-35 204b the

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personal relationship exception first it's not a violation of 26 35 to 0 to a 1 soliciting a gift from a private

16:41

source because you know from the prior slide that a gift under 2635 204b may be

16:48

solicited under certain circumstances second it's not a violation of 2635 202

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a tus listening gift given because the employees official position because based on our facts here we can conclude that Eric did not use this position or

17:01

any authority associated with public office to solicit or course from Ron the pretzel line so that right I think you

17:09

know folks who have close family members or friends who are technically prohibited sources that they age with socially often i will be relieved by

17:16

this because we can remind our friends that it is their turn to buy the pretzels excellent yeah that's a that's

17:22

not like pretzels very much that would be great if i could get some so finally

17:27

you know this obviously this exception is to the prohibition on acceptance of gifts in 26 35 20 to be that is b1 and

17:35

b2 and if you want to take a look at where we put this in the proposed rule

17:40

then it's on 80 fed rag 7400 nine

17:46

alright and here it is the personal relationship exception exception all the prohibitions except for soliciting you

17:52

have to be given because of employees official position hope everyone was able to follow us through that change and

17:58

that will be the most difficult concept i believe we go over today so that's why i wanted to get out of the way first and

18:03

i think yeah this charge can be really helpful to us and if we're looking for themes here the exceptions that apply to

18:13

a one as well as b1 and b2 the personal relationship discounts outside

18:18

employment etc you know tend to be exceptions that are used kind of far away from the workplace if that makes

18:24

sense you know these are things that the the environment in which these conversations are going to happen is yeah you know yeah you're you're

18:31

involved with an outside employer so you're discussing outside employment and you asked them if they could you know take you out to dinner that makes sense

18:38

right right right yeah and I think you don't some police are necessary for the exception to work properly that's right and again it was

18:44

just because they're how broadly we wrote them in the first instance that were just making this you know like I

18:49

said rather non substance have changed the way worth reviewing the exceptions moving on so here we have our first set

18:57

of substantive exceptions the de minimis exception of personal relationship exception which we've already talked about and for these two there are rather

19:04

simple changes to each and neither these changes are really new first for the de

19:10

minimis exception i was using corporated the guidance had provided in legal advisory 1504 and that is simply that

19:19

general use prepaid cards prepaid gift cards that is may not be accepted under

19:24

the de minimis exception as such prepaid cards or treated as cash and everybody

19:30

knows that the exception is not applied to quote gifts of cash or of investment interest such as stocks bonds or

19:35

certificates of deposit and second for the gift exception based on a personal

19:42

relationship oh gee has incorporated into the regulation its long-standing interpretation that employees may not

19:48

accept gifts are sorry may only accept gifts under the exception from natural

19:54

persons live human beings like you and me simply put employees don't have personal relationships with

19:59

organizations that would justify the acceptance of a gift so it can't be friend to the company no it's not not in

20:07

our view not an are not for purposes of some now for you yeah maybe for other purposes but not for purposes of the

20:12

exception at 26-35 204b so moving all we're to skip over see we're going to go

20:18

straight to D which is awards and honorary degrees n OG has made some non-substantive and substantive changes

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to the exception for awards and honorary degrees I'm going to discuss the big

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changes first OG reordered the subsection four awards to improve clarity you'll have to just take a look

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at the the proposed final rule to take a look at that but a second OG updated the

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citations for the honorary degrees section which were the citations were out update more importantly OG has

20:48

expanded the honorary degrees section to permit employees to accept honorary degrees quote similar foreign institutions of

20:56

higher education and just to provide some guidance to flesh out this example

21:01

in the preamble OG said that a foreign institution of higher education would

21:07

include an institution of higher education that is physically located outside of the united states if it is

21:13

accredited by a recognized quality assurance or accreditation organization so that's the expansion there for

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individuals that might be approached by foreign universities have dealings with foreign universities whether it be at

21:27

state or who knows it at other agencies that have significant dealings with outside parties now parties outside the

21:33

united states that is OG also flags for this new expansion though that name that

21:38

employees need to be aware of the emoluments clause which could potentially apply to this new expansion

21:44

and they need to ensure that that and of itself the emoluments clause would not bar what the exception would not allow

21:54

okay we're moving along at a brisk pace here so we're moving on to 26-35 204 e

22:01

gifts based on outside business or employment relationships and 204 F which

22:06

is gifts in connection with political activities energies made one significant change to each exception for the gifts

22:14

based on outside business or employment relationships oh gee has clarified by adding 26-35 204 e for that employees

22:23

may now attend receptions or similar events put on by a former employer if

22:28

three requirements are met first other former employees must be invited to the

22:35

reception or similar event second the invitation and benefits must be based on

22:41

the former employment relationship and third it must be clear that the benefits being provided have not been offered or

22:48

enhanced because of the employees official position I like to think of this as the retirement party tweak so

22:57

you know you leave a firm or a company you come into government service a colleague of yours for many years back

23:03

of the firm is retiring it used to be kind of difficult to find an avenue so that someone could

23:09

could attend that event and this sort of clarifies I provides a strategy for doing so absolutely with these

23:14

conditions oh jeez determine that to be it situations and unobjectionable attendance in an objectionable gift and

23:20

so you're absolutely right covers those retirement receptions maybe holiday parties may be alumni parties or something like random then the major

23:28

changed the Hatch Act gift exception the exception with political activities it's

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not a big one but it says that employees may bring their spouse or other guests

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when provided in connection with such active participation by a political organization described in 26 USC 527 II

23:47

so we didn't change the requirements of the exception we just added that spouses or other guests may attend if it

23:53

satisfies all those elements okay so we're going to move on to our second

23:59

deep dive of the day which is on the wag gifts of free attendance and widely attended gatherings the changes that

24:08

exception received a lot of comments i believe they received the most comments and i view the changes as three there

24:15

are three major changes that og has put in place first and foremost that

24:20

everybody's probably aware at this point after January won 20-17 all wag

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authorizations must now be or will now be in writing previously that was only

24:31

required that is the writing of the authorizations when the donor of the wag was someone who had interests that may

24:37

be substantially affected by the performance or nonperformance of employees official duties and we said

24:44

you know in the preamble and we said in the final rule that and we had commenters say this that it protects the

24:50

employee protects the ethics program and it also protects the sponsor the provide

24:55

inviting them that they have a written record of what's what was considered in that everybody knows that that person

25:01

was going people thought about it yep the big flag here though is the level of

25:06

detail that is required to be included in that written authorization as far as you know the multi-part legal analysis

25:14

what's actually required to be included in writing that's really up to the discretion

25:19

the agency right so in cases where you have kind of slam-dunk non objectionable

25:25

determinations we're not saying you have to write a 30-page opinion for each of those we just want a records that

25:30

someone look at it and it's happened but of course if it is a sensitive thing or a close call and you had to think about it it's good to document your reasoning

25:37

in case there's criticism later absolutely absolutely so that was the

25:43

first big point now the second all wag authorizations must the agencies must

25:50

make a finding again it's not necessarily required to be in writing but before issuing the written

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authorization agencies agency ethics officials or designee must make a finding in all cases that the agency's

26:03

interest in the employees attendance outweighs the concern that the employee may be or may appear to be improperly

26:10

influenced in the performance of official duties under the current wag role as with the writing authorization

26:17

that I just went over the current wag role agencies are required to make this finding only where the gift is from a

26:26

person who has interests that may be substantially affected by the performance or nonperformance of an employee's official duties so that's

26:32

where we are another court rule we're going to say with the final rule it says that that must be done for all' wags i

26:39

was actually sort of surprised that this was a change i think it's a practical matter we've been doing this kind of

26:46

thinking about wag invitations almost all the time anyway I don't think a lot of people are saying well you know

26:51

that's not a bad prohibited source so I'm not going to think about the appearances um the neither did this just

26:57

clarifies that yeah you should sort of always be thinking that way I think that's right and it's just shifting our

27:02

default a bit yeah we ostensibly you would be thinking about this in all cases but now we have it there that you

27:07

usually that you should shut ya and the last and the last major change i'm going

27:13

to talk about with regards the why the attendant gatherings exception is related to that finding youjizz provided

27:19

to helpful new factors for agency designee to consider and so the first

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new factor is whether acceptance would reasonably create the appearance that the donor is receiving preferential

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treatment and the second new factor is whether the government is also providing persons

27:36

with views or interest that differ from those of the donor with access to the government so I think this you know

27:42

Tizen are changed feelings about 201 B which we discuss yeah last last time and

27:47

just really want people to engage in this kind of ethical decision-making and thinking and I think it also uh

27:52

Qaddafi's some some model practices or best practices I think a lot of agencies have been doing this thing and when I

27:59

was at an agency we certainly consider these factors when making determinations about events and having them written in

28:06

the regulation is a good reminder and I think it brings consistency to the program so now as I said these are the

28:14

three major ones would you did make some other changes to the why they attend a gathering which I'll just briefly mention but it's not reflected upon the

28:21

slide the other thing that I'm going to mention is that og incorporated guidance

28:26

from multiple legal advisories that began in nineteen ninety nine so 99 x 20

28:32

7x14 and 08 x1 those legal advisories all support and state the position that

28:40

a wag must provide an opportunity to exchange ideas and views among invited

28:46

persons and I think the way you describe this as a shorter istic is no entertainment you don't go to a movie

28:52

you don't go to a theater event there yeah there has to be some some opportunity for engagement not just

28:59

sitting and watching absolutely so that's the big changes for the widely

29:05

attended gathering exception feel free if you have questions we'll also have that mailbox open at the very end that

29:11

you can send questions to it if there's something else you're interested about or something that I didn't touch upon that you had concerns about based on

29:18

this exception because again I believe we got the most comments on the rule in regards to this exception so this is the

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second to the last exception that we're going to discuss today and this is the social invitations exception and the

29:36

bottom line is oh geez added one new requirement and before we go into that

29:43

going back to our chart because i think it handy as well again everybody knows and

29:49

this hasn't been changed that the exception here may only be accepted from individuals who are not prohibited

29:54

sources so this is one of the ones where the prohibition being broken out right

30:00

syncs up a lot better here and says well you can only accept it if it was given for because of official position not if

30:07

it was given or not if it was from printed source whereas before that was sort of there was an exception to the

30:12

exception to the exception yeah and now it was right now we can just this point is I know that one and so that that

30:18

check is absent as a work it right on the chart that we provided earlier so

30:23

the substantive change however is that if the invitation is from an

30:29

organization or if the event is sponsored by an organization so if either of those are true the agency

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designee must do a 2635 201 B authorization before the employee may

30:42

attend and we talked about 20 when being in great length last time but just to

30:47

refresh everybody's recollection to OMB says that the agency designee must make

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a written determination the written part is specific to the 20 4 h exception that

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the employees attendance would not cause a reasonable person with knowledge of the relevant facts the question the

31:04

employees integrity or impartiality and again that's consistent with the standard 201 B and I think this provides

31:11

some harmony between the wag exception of the social invitations exception uh in the old regulation we had to do all

31:19

this thinking and analysis to send someone to an event if it was being done as widely attended gathering and if it's

31:25

a social invitation we said there have fun yeah that's right i think yeah right right pushes you in one of the other in a meeting in a meeting right and here

31:31

there there more harmonized so that we you know we're emphasizing that the concerns that we have that motivate the

31:37

thinking we have to do under the wag those concerns don't magically go away because you've moved over one part yeah

31:42

and hopefully absolutely i hopefully you know the core of these two exceptions are clear right you know you know what

31:48

the you know at the margins where are we issue which one which one you know but i think you're right i think this very much helps even in those margin cases to

31:55

know which the core of huge exception is aimed at writing certain activities acceptances and going back to tool 1b

32:02

the consideration of you know declining otherwise permissible gifts again the factors there which are not exhaustive

32:09

not exclusive but we've found to be the most important or four and that's the value of the gift how expensive or cheap

32:15

it is the timing of the gift is it given at a time that you know the donor has a

32:21

business before or seeking to do business with the agency your agency employees agency the again the third one

32:29

is the identity of the donor that's very similar to timing but it's whether the donor is a what I would call a bad

32:34

private source somebody that is affected substantially by the performance or nonperformance of the employees official

32:42

duties and then the last one is access are you giving disparate or disproportionate significantly

32:48

disproportionate and access to the donor in comparison perhaps to other individuals or just other individuals

32:54

don't even have an opportunity I think that makes a lot of sense cuz we're emphasizing these considerations are important always right there aren't

33:00

certain kinds of events that magically make appearance considerations go away that make this disparate access concerns

33:07

go away we really want to be thinking about those all the time absolutely so the last bit of time we're going to

33:14

we're going to go for today which will probably another 10 or 15 minutes at least is going to be focused on our new exception the gifts of informational

33:21

materials and so what I'm going to do is I'm going to try my best to go over the

33:27

reason we have it the elements and then we have I think three hypotheticals that

33:33

we're going to run through excellent and the reason we're focusing here I hope it's helpful excuse me it's because

33:39

again this is brand new so ethics officials would not have applied this to any actual situation ostensibly before

33:47

January won 20-17 okay so the first

33:54

thing i want to emphasize kind of as a prophet or e as a preface rather is that

33:59

it's got to be remembered that the new informational exception informational materials exception is a gift to the

34:05

employee and it's not a gift to the government that's how all subpart B works so this isn't new but I just

34:11

didn't want the line to get cross gifts the government of course would be subject to agency gift

34:17

acceptance authorities or or appropriations law if you know if an agency has such authority in you're not gonna we're not going again and I think

34:23

that's a really good thing to remember and a lot of confusion that comes up with the gift rules where ethics

34:30

officials you know maybe run into difficulty is failing to make that threshold determination is this

34:35

something that's being given to the government or being accepted by the government if so you do your pro creations analysis and we only go to

34:43

subpart B when we're thinking about gifts to the employee that's that's absolutely right and that's the right

34:48

question to be asked at the outset were they who are they giving this right to or they is it for the government to use

34:55

and to help the you know the agency or is it actually being given to the head of the agency were actually be given to

35:00

the right scientist or chief enforcement officer cio so as a as background the

35:07

House of Representatives has a similar exception and OGE determined that creating this new exception was

35:13

appropriate for a few reasons which I hope will animate your thinking and understanding of the new exception and

35:19

those reasons are three first gifts of informational materials are typically

35:25

given with the goal of community at communicating ideas and sharing information they're not primarily given

35:32

to personally benefit the employee that's the first reason the second reason is these gifts though not to the

35:39

government certainly we're down to the benefit of the agency and the government because they're a resource that can

35:45

assist the employee in making decisions or valuating policies among myriad other things that they do or might do on their

35:51

job and then finally OGE recognizes that the exception in many ways accommodates

35:56

the right of citizens to petition their government which is enshrined in the Constitution Oh seem like good reasons I

36:03

appreciate preciate vote of confidence so we talked about the threshold

36:10

question of who's it to to the government it's the employee but now we're actually in the substance and so

36:15

this isn't really broken out as an element but I mean nonetheless it is and at the outset we simply ask whether the

36:21

offered gift provides information which og defined on this point quite

36:27

broadly to include writings recordings documents records or other and i would put in similar items based on canons of

36:34

statutory construction it's not other items that have nothing do with the dryer list so i would definitely hue

36:40

towards an cabin what other similar items might be based on that prior the prior listing we're talking about things

36:46

that exist primarily to convey information yes right f if I if I wrote

36:51

some words on on the back of a car something that doesn't make it informational right we're looking at

36:58

sort of via the Aristotelian essence of the thing as information transfer right

37:04

now and if you have a nice nice polo shirt that happens to have some insignia

37:10

on it or some language supporting or saying something that's interesting t-shirts but teasers are not

37:16

informational material I mean if they convey information and I realize this is quite obvious but I didn't want to

37:22

overlook this point and you know as I said before we're trying to be quite broad but not absurd in this first point

37:30

I guess we're trying to be quite reasonable this is how I would say so

37:36

Patrick and I have come up with this this graphic here to help everybody

37:42

understand the multiple moving parts of this exception and that's what we're going to walk through as far as your elements and that will dive into some

37:48

applications of them so the first question is all the way at the left of

37:54

the beginning of our arrow and it's basically if you look at the exception the gift must be educational or

38:00

instructive in nature so the thing that is conveying information must be educational or instructive in nature and

38:07

whether something's educational are instructive and nature focuses on the objective qualities of the gift so text

38:14

books reference books research and other academic studies and articles those are

38:19

all clearly educational those are all clearly instructive action films romance

38:25

novels sitcoms are usually not educational or instructive in nature

38:30

though I know a lot of people would think sitcoms could be quite instructive so that's the first element in the

38:38

second one is if the gift is these are all these are all required so they're all Ann's these are all required

38:44

elements they all must be satisfied if the gift is educational instructive in nature it still must primarily be

38:51

created for entertainment display or decoration I'm sorry I'm not not be

38:56

printed saree not primarily be created for entertainment display or decoration so that's that's the that's a lot of

39:03

things will get kicked out I think based on this one and that's something that you want to focus on when employees come

39:09

to you an example here is a map of historic DC maybe educational or instructive but if it's antique and it's

39:16

framed arguably it's going to be primarily for display or decoration and that's not going to fit in or exception

39:22

right and we could say the same thing for antique globe or uh uh yeah I think

39:29

I think we know what I mean that's actually gonna be using it for your job you know ya books antique globes antique

39:36

maps they all convey information and there's certainly reference materials but it's not something you're actually going to use right that's what we're

39:42

really interested in that's a good question in fact ask is the employee going to be using are you do their job do you intend to read this I'd use the

39:49

information you gain from it to to be a better employer write better professional better doctor lawyer scientist engineer architect etc third

39:58

the informational material must have a connection with the employees duties or the mission of the employees agency so I

40:04

view this requirement as what it is it's relational and very similar to the definition of related to official duties

40:11

and oh geez prohibition for outside teaching speaking writing at 5 CFR 26-35

40:17

807 a2i so I think that's it's not a perhaps perfect analogue but it's a

40:24

similar lens on which to view this element and it's not something that we're just starting whole cloth that

40:30

we've never done before and I sort of look at this as I saw for boring

40:36

materials right for things that are instructive that help you work better right if it's fun or pretty or-- will

40:43

look really good in your office it's probably gonna fall out yeah so that's the goal is to help employees uh

40:50

be better in their decision-making be better informed and if these things are moving in that direction we may be able

40:57

to use the the new exception if it's fun entertaining pretty or will look really

41:03

cool in my office then where we're concerned that's right so the example I have I don't know if it's fun or

41:08

entertaining or maybe to certain people but the Diagnostic and Statistical Manual mental disorders the DSM the

41:15

dsm-5 is the most recent version it's certainly educational or instructive in nature it's not created primarily for

41:22

entertainment display or decoration but if it is given to an employee at say the SEC who works in the enforcement

41:28

division because they happen to have an interest in psychology it's not going to qualify based on our relatedness prong

41:35

there now if we're given to a doctor at the Veterans Administration there's our

41:41

department of veterans affairs it would probably qualify for this exception and that leads me to this last limitation

41:48

and that's the less than a hundred dollars box so the dsm-5 when it came

41:56

out at least had a retail price of a hundred and ninety-nine dollars and so this is the last this is the I mean it's

42:02

not last in the exception but this is the last thing I would ask after you've run through all these elements which are

42:07

in the definition of informational materials if an employee at the VA as I just discussed wanted to accept the new

42:13

dsm-5 based on 199 dollar price the employee would be required this is the

42:19

last moment to first receive a written determination in which the agency does unis found that the VA doctors

42:25

acceptance of the gift would not be inconsistent with again 26-35 201 B which is what we just talked about my

42:32

social invitations exception and again that's a determination that the employees acceptance would not cause a

42:38

reasonable person with knowledge of the relevant facts to question the employees integrity or impartiality and same

42:45

factors there among others value timing identity and access

42:51

and I just want to go very briefly to the relatedness test because it's very

43:00

broad and we didn't have it up on the last slide and so this is that box three the weather it's relating to the duties

43:06

of the employee or the mission of the agency that the employee works at and so

43:12

you know basically if it contains information relating in whole or in part to these categories which are quite

43:20

broad then you're going to have that element satisfied and again you know

43:31

except for that authorization under 21 be by and large employees are certainly

43:37

going to have questions about that and definitely welcome them because it's a new exception but you know by and large

43:42

employees are gonna be looking at and you know this exception they can no apply to these facts so looks like here

43:49

we have an example SS ah should we work through this yeah absolutely everybody take their take a moment I'll give you a

43:55

little bit of time please read this and we'll take a look at it and just quickly the asterisk just remind everyone that

44:01

og is not endorsing this book just wanted to say that

44:29

all right key doke so we're going to run through what we just presented to you as

44:35

the elements first definitionally in just the gift provide information sure

44:42

yes it's writing yeah definitely now to these substantive elements is it

44:50

educational are instructive in nature it is certainly it's a textbook I don't know that you have a better paradigm

44:56

attic example of that that's right especially if you open them and use them use them so the second question we have

45:03

is was it created primarily for entertainment display or decoration probably not it's textbook yeah it's

45:09

it's a textbook and I guess you can construe it as being entertaining to some people but in any event for

45:15

purposes of the objective person in the reasonable person and now and its purpose is to inform it's not to

45:21

entertain that's right right that's right finally the next one we have is

45:29

does it relate to laura's duties or the work of the EPA to take a book about the

45:36

environment and she works at the Environmental Protection Agency as I think we have the nexus covered excellent excellent and sorry that's the

45:43

third substituent but we always have to ask was it greater than or less than a hundred dollars in value and I want to

45:49

note that it's whether or not the specific gift is greater than or less than 100 hours in value or whether all

45:55

informational materials that the employee received from that one donor in a calendar year right r greater than a

46:03

hundred dollars in value and this goes back in many ways to the aggregation idea with the minimis exception at 204 m

46:08

I can't give give so lunch if you have one source they're sending you a $95 book once a week you you have to start

46:16

doing it we have no starting at 1pm $100 just see like exactly and I didn't I might not have mentioned that before and

46:22

that's a neat rule so obviously if one if one informational materials over 100 you're already there but if multiple

46:29

right over the course of a year are you do the same type of aggregation you would for the to write or a de minimis

46:35

exception and you would have to do the 20 would be and it's in writing has to be a written determination and I think

46:40

this makes a lot of sense because if we're at a particularly the access element of 201 B if we're getting a lot of

46:46

information from just one source there's maybe a danger that they are misusing

46:53

this this element to unduly influence an

46:59

employee we just want to make sure that we think about it not only that but certainly crying favor with more expensive manual right I think that's

47:05

another fact they might not have access to these otherwise and they can be there's books on securities and there's books on other areas along that are two

47:12

three thousand dollars and so we definitely have this this restriction here for that reason and then the other

47:17

thing we also mentioned in that we had a question about or a comment about that animated this requirement was people

47:23

potentially selling these informational materials that have exceedingly high values and then you could be using your

47:29

public office for private gain and there will be a meeting and among other things so that's what that's there for and it's

47:35

just a gut check a reasonable restriction that we put in there so we

47:41

have our second of three examples and I'll also give everybody about 15 or 20 seconds to take a look at this one or

47:55

secondarily I thought you made a mistake is this is just like the last one again

48:04

oh jeez not endorsing tron legacy

48:16

all right I think I got ugly all right wonderful so this one I think is going to be much shorter than our last

48:22

analysis same same question definitionally does the gift provide

48:28

information yeah films can and do convey information certainly sometimes it's

48:34

educational sometimes it's obstructive sometimes it's not so yes definitionally in the layman sense and that's what

48:39

we're really getting out with this broad first question is it a gift that provides information as you said it

48:44

certainly does so nowadays elements is the book education I'm sorry is the film

48:49

educational or instructive in nature what do you think I don't think so i'm

48:56

not sure what it would be helping us learn to do that the trombone said we could read it a manual for I don't know

49:03

it's certainly futuristic and it's certainly creative but objectively I does a sci-fi film it's not it's not

49:10

educational instructed in nature so right then in there we would fall out of the accelerating it's pretty clear and

49:16

so it's a pretty easy example rights why I included it why what employees would come to you and ask if they can accept

49:22

entertainment films because they provide certain information at least in most cases like this clearly it's going to be

49:29

a it's going to fall outside the exception and this also you know double back with the second element which is it

49:35

was it created primarily from entertainment displayer decoration again it's quite clear here the answer is yes

49:40

it's great for entertainment okay so we clearly fall out there and we'll finally

49:47

move on to our third in our last example of the day and we'll give you a moment

49:53

to take a look at that and I'll come back in about 15 or 20 seconds

50:20

hmm Patrick's noting that i forgot to put the asteroid we were not endorsing Rachel Carlson's Silent Spring and I

50:27

will also include that before we provide out all right I think we got it we got

50:34

it excellent definitionally again does

50:40

the gift provide information yep the book it's a book it's right that's what books do that mostly absolutely so to

50:48

our elements is this book educational instructive in nature I'd read it I've

50:54

read it's a great I've heard it's a great book and from my understanding of it it's in a book on environmental science and about the effects of

51:00

pesticides so it would be educational or destructive in nature great the second

51:07

question is was it created primarily for entertainment display or decoration and

51:14

I mean it's a first edition and so between this and the first and second one I think in certain situations you

51:20

might have some questions ask are they actually going to be using it might be educational instructive in nature but i think that gets back to are they

51:25

actually going to be using it right and as an educational or instructive object well if they're not then i think about

51:32

you know very old versions of the dictionary yeah you have beautiful old found dictionary they could put on a

51:38

stand in your office and it's gonna look amazing well I think we have to look at you know is this really a work that's

51:46

going to help you or instruct you or is it something that you're just going to look at from afar and enjoy that's I

51:51

mean that's absolutely right and I think that you know maybe not here but in other cases always something to be aware there is it really just a present is it

51:58

really something that's really valuable that you know that is worth a lot of

52:03

money that's a that's an antique and i think that the motivation for EM is to allow people to receive information not

52:10

to receive valuable objects that may or may not contain useful information that's absolutely right it's kind of

52:16

putting a cart before the horse or throwing probably ahead of itself so it

52:21

wasn't created primarily for entertainment or decoration at the time but as we just talked about what we're really trying to get out with

52:27

educational instructive you know right he animating principle centered music help them do their jobs right and then

52:32

finally the the the question the third one we ask is the relatedness question

52:38

which is really why I included it as the third example does it relate to Loras duties of the work of the SEC probably

52:45

not now Laura you know or here works in the enforcement division securities pesticides environmental degradation and

52:52

environmental science fall outside rangin see the agency's mission and her and her duty specifically so we stop

53:00

there we don't have to go on that relatedness test it's not satisfied and those are the examples that we have for

53:07

you today and that's the substance of the materials that i have i've got eight

53:12

minutes left so thank you all for attending again i'll mention that some of these topics discussed today such as

53:18

the wag the changes the social invitations exception and the informational materials exception will

53:25

be examined in oh geez forthcoming legal advisory on the changes subpart B so please stay tuned for that we would also

53:32

very much like for you to send us questions if you have them about perhaps parts of the rule that we discuss today

53:38

and it's my intention that you know Patrick and I will discuss those either get back to you directly or potentially

53:45

get back via webinar some other fora and I think you know just to wrap up the this series that we've done on subpart B

53:51

and the changes in general it seems that we've really both structurally and substantively put the focus of subpart B

53:58

where it belongs and that's on protecting the integrity of agencies work and the integrity of employees

54:04

contributions to that work subpart B isn't about getting stuff it's it's really aimed at making sure that we

54:11

don't accept things that would harm the agency's reputation the individuals reputation or the work i think if we

54:16

keep that in mind all of these changes really fit together nicely no I think that's absolutely right i mean i I think

54:22

objectively if you ask the simple question do accepting gifts do govern employees the they're accepting gifts

54:29

build the integrity rather the the impartiality of employees or government

54:35

officials does it increase that the answers by and large know right and does it potentially damage that the answer is

54:42

by and large it can't right now come up with some unobjectionable exceptions but that's our starting place

54:47

right it's not though son objections kind of like putting forth the way that

54:53

you should think about nice and I think God yeah they're really clarifies things and I hope folks keep that in mind as

54:59

they implement these rules in their agencies and trained on the rules so thankfully for very much for joining us

55:05

and thank you everyone for joining us and we hope you will join us for future of broadcasts and again if you have

55:11

questions please send them to us I haven't enjoy the rest of your week

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