Amendments to 5 C.F.R. 2635 Subpart B Patrick Shephard: Good afternoon and welcome to this special presentation of OGE’s Institute for Ethics and Government. Today we’re pleased to join you to share with you some recent changes to Subpart B of the employee’s Standards of Conduct, and to help us do that, we’re joined today by Seth Jaffe, the Chief of the Ethics Law and Policy Branch, and Leigh Francis, Assistant council in the Ethics Law and Policy Branch, and today is the first of two presentations that we’re going to provide in this topic. We will join you again next Wednesday at 11:30 a.m. eastern time for the second portion. So welcome, thank you for joining us. Thank you. Patrick Shephard: I think we have a lot to cover today and just an hour to do it. Should we go ahead and pull up the slides and get into it? So thanks. Alright. Seth Jaffe: Hi, I’m Seth Jaffe. I’m Chief of Ethics Law and Policy Branch at OGE, as Patrick mentioned. Welcome to the Advanced Practitioners’ webinar on OGE’s amendments from outside sources rule. Today Leigh Francis and I, mostly Leigh, will review the most recent amendments to the gift rules found in 5 C.F.R. 2635 Subpart B, which were published as final on November 18th. This is the first significant rewrite of the gift rules since they became effective in 1993, and we’re really happy to have the opportunity to provide you all with this guidance and webinar prior to the final rule becoming effective on January 1st. I’ll start out briefly discussing the path that we took to get to the publication of the final rule, and I’ll move on to discuss some of the thought rational that went into our discussion to include new section 201 of the gift rules, addressing considerations for declining, otherwise, permissible gifts. After my brief introduction for much of today and for next week’s webinar on the 14th, Leigh will take you through most of the significant changes in the final rule, including application of these rules. Also in the coming days, OGE plants the issue, legal advisory 16-11, outlining significant changes of the rule and we will give you a preview of these topics that are going to be cover in the upcoming legal advisory. Now in the run up to beginning the regulatory process, OGE believed that it was vital to solicit feedback from agency ethics officials that is feedback from you. We wanted to benefit from your experience over the past twenty plus years, so we could adequately address the issues of most concerned under the ethics community as well as some of the most frequently reoccurring issues, we set up the process early, and we took it very seriously. On May 4th, 2014 we set a survey to all of the DEAOs soliciting comments, and we analyzed the approximately 40 responses we received, determining which section in subpart b to revise as part of our standard of conduct revisions. In September 2014 we held a national government ethics summit, there we held three separate sessions devoted to subpart B, that were attended by over attended by over sixty ethics officials. There we solicited agency comments and suggestions, and we incorporated many of them into a draft regulation. Then, on February 18th and 19th, 2015 we held two meetings at OGE with ethics officials of both small and large agencies. There we discussed many different suggestions that we received and over thirty separate agencies participated in those meetings. We discussed many of the draft amendments and we incorporated many of the agencies’ comments at that time. The comments we received were extremely helpful, and definitely produced a better product as we began the regulatory process. The regulatory process as many of you know can be a little bit like a labyrinth. Hopefully without the Minotaur at its center. The most important part to the process however, from a quality control standpoint, are the parts of the process where we solicit and receive comments on the regulation. There are many opportunities for stake holder comment. The first opportunity came when we submitted a proposed regulation to OMB, for them to circulate the agencies as part of the first ninety day review process. As a result of this circulation, we received over 100 individual comments from a dozen agencies. After reconciling all the comments from the agencies and coming to an agreement with all agencies, on November 27th, 2015, we published a proposed regulation. This then initiated another sixty day comment period, this time a public comment period. At the close of the sixty day public comment period, and I think as a result of your earlier comments and our implementation of many of them, we only received ten public comments. Four from individuals, three from professional associations, two from agencies, and one from a law firm. We then again submitted the potential final to OMB for one more ninety day review process where the regulation was then again recirculated to agencies for comment. At this stage we received approximately ten individual comments from four agencies. After reconciling all the comments from the agencies and again coming to agreement with all agencies, just this past November 18th, 2016, we published the final regulation and the effective date is January 1st. So at its core, what is subpart B, and why do we have restrictions on the ability of federal employees on accepting gifts? Federal employees always have an obligation to protect the integrity of government operations. In under paying for our changes to the regulation, is our recognition that acceptance of gifts by government employees rarely furthers this goal. So subpart can really be understood as a rule established to ensure the communications between the government and the public, as most work done by government employees affecting the public is done in a non-preferential manner. When all is said and done, subpart B comes down to delineating when and under what circumstances acceptance of gifts by government employees may undermine the public’s competence in the integrity of government decision making. People who are thinking about subpart B from this perspective are the framework for which it becomes easy to understand the details of the updated rule. Now it’s been OGE’s experience that employees sometimes focus on whether the gift exception allows them accept an otherwise impermissible gift and not whether acceptance of the gift could affect their perceived integrity or the credibility of the agency programs. To counter this tendency, and to shift the focus of employees, OGE has added new Section 2635.201B Considerations for Declining Otherwise Permissible Gifts. New section 201 sets out a flexible standard encouraging an employee to consider whether the acceptance of a gift could affect the perceived integrity on the employee or the credibility of agency programs. This new approach represents a blending of values based and rules based approaches, enabling employees to engage in ethical decision making whenever presented with a choice of whether to accept a gift. Basically, here’s a simple way to remember and possibly to train employees on this values based edition to the gifts rule. With this change in the gifts rule, OGE is simply asking employees to start their decision making process of whether to accept a gift, not by asking whether they are allowed to do so, but with a more values based question. “Do I think that people might question the integrity of my services, or the credibility of my agency if I accept this gift?” If the answer is no, then the employee can then examine the rules to determine whether the rules allow acceptance of the gift. If on the other hand, the employee’s answer is yes, I do think the people might question the integrity of my services, or the credibility of my agency if I accept this gift, then the employee should not accept the gift. The employee’s analysis is complete, and the employee should not even try to figure out whether acceptance of the gift is permissible under the rules. Now I’ll turn over to Leigh Francis, who will review the substantive changes in our final subpart B regulation, and provide you all with practical tips with applicable for application of these changes. Leigh Francis: Thank you Seth, and there’s going to be a lot of things that spoken about that I’m going to go over again and again, but ultimately I hope that everybody out there finds this helpful to them as they take this challenge of implementing this new rule, starting January 1st of 2017. So this will give you a nice layout of how we’re going to proceed today. I’m going to try and keep us on time and we’ll rely on Patrick for help with that, but we have a lot to cover so I’m going to dive right into it. First, we’re not going to do exceptions today, but I will guarantee you that we’re going to do nothing but exceptions in part two one December 14th at 11:30 a.m. So some of these significant changes that we’re going talk about today, which are up here on the slide, are substantive to nature, and some of them are simply made because they seek to reorganize subpart B and what I consider more intuitive, effective, and efficient fashion. So most of the changes I’ll talk about up here are substantive, but those are the two basic categories, and the first four items up there, I just want to note, those are the ones that we’re going to focus on primary to the last two if we have time if we have time, we will get to them as well, but the first four I consider today, we’re going to get into a deep dive on them, and the first of those four would be what Seth’s already mentioned, it’s new 2635.201(b) Considerations for declining otherwise permissible gifts. Most of the focus and most of the time today will be focused on this new section, and as you’ll see, it changes the analytical framework as Seth mention, for subpart B, so it’s a big substantive change. The next section we’re going to talk about today is general prohibitions on the solicitation or acceptance of gifts, and just a quick preview, OGE split the prohibitions out, solicitation and the acceptance prohibitions, and that’s mostly an organizational change. We’ll get into that. The third major topic will be 2635.203(b)(8), which is free attendance for employees speaking in their official capacities, and we’re going to treat that alongside the new definition of free attendance that is a subpart wide definition. That’s at new 2635.203(g). So that’s primarily a organizational change, both those are primarily organizational changes, but there is a substantive difference that I’ll also mention. The next one we’re going to talk about and the last one that’s going to take probably the most of our time will be the new definition of market value in 2635.203(c). Finally we’ll wrap up with the disposition of gifts with tangible items at 2635.206(a)(1), and we’ve added a way for employees to dispose of tangible gifts that are valued at less $100 by destruction. We’ll go through that. And then finally, time permitting, we’ll go through 203(f), a very small, but meaningful expansion at the definition of indirectly solicitor accepted, and then finally, 2635, we’ll just go over the new location for the limitation of the use of exceptions. So let’s just into what we’ve already talked about a little bit, and what Seth’s gone over, the big change, which is 2635.201(b). This is the new standard that Seth has been talking about, and it’s very similar to what ethics officials out there have seen with 2635.502, partiality concerns, and we did that on purpose so that it’s not such complete change. Take as quick look, this is what we added. Basically what we want employees to do is consider whether their integrity or partiality be questioned by a reasonable person. And what we did was we also wanted to help ethics officials and employees and ethics officials teach employees how to evaluate that standard in a meaningful way, how to apply it, and how to think about it, and how to really be involved and take ownership of other activities. So what we did was we put just after the standard, these four factors which are not exhaustive that we thought were the most relevant to most situations involving gifts, and I’ll just refer to them as value, timing, identity, and access, VTIA, if you will. I think that’s just a good way to think about it perhaps, or maybe not a good way to train, I’ll leave that to your wealth of discretion and knowledge. And I just mentioned these now, I’ll go through, very exhaustedly what each factor is, and more specifically the questions that you will be asking that each of these factors represents. Patrick Shephard: I think this really interestingly, before we go onto to sort of the, improved diagram for the gifts analysis process, that by including this credential thinking at the beginning of the regulation, I think we help clarify for employees and also ethics officials that it is appropriate for the ethics office and for employees when they’re considering an ethical dilemma to consider factors beyond strictly what the rules permit or prohibit, ad that there are considerations about integrity and impartiality that should always factor into our decision making. I’ve worked in an agency before, and it’s always a little bit uncomfortable to say “where do I put this credential thinking? How do I approach that with an employee who I’m counseling?” And this sort of puts it right up front that the time to do that is at the start. Leigh Francis: Absolutely, and I very rarely, if anything, critique what you say Patrick, but I would encourage, not just appropriate, but certainly encourage. So let’s move on and we’ll talk about this change and paradigm. I’ll probably use the words interchangeably, paradigm or framework. Apologizes if I do that. So what we’ve done is really changed the way that the gifts rule works. The old paradigm, the old framework, was first you would ask, “Is this a gift based on our definitions?” Then, “Is the gift prohibited?” either because it’s given because of official position or by a prohibited source, and then finally, if you had to get there you would talk about the exceptions and whether an exception is available. The new paradigm changes all this. Now you ask first and foremost whether the gift would lead reasonable person to question the employee’s integrity or impartiality as a result of accepting. The employee answers yes, the employee’s done, and should either not accept the gift, or as appropriate, properly dispose of the gift. Patrick Shephard: So we’ve really created a threshold question here, where we don’t even need to get into the analysis. An employee can, him or herself, if they determine that their impartiality or integrity would be questioned, that employee would simply not accept the gift. Leigh Francis: Certainly, absolutely. It’s only after that the employee should ask “is it a gift? It is prohibited? Is an exception available?” Patrick Shephard: Excellent. Leigh Francis; So Seth did a great job already and I’m sure I’m going to retread over a lot of the ground that he’s discussed, but let’s talk about the rationale for 201(b), because I think personally it’s very important, it should help you as an ethics official and as somebody who’s going to train employees, understand how this section should be applied and just this change, how meaningful it is to the analytical framework for subpart B. So in the proposed rule, as Seth said, it’s really about focus, and it’s really about shifting the focus. OGE explained that employees and ethics officials sometimes focus on whether an exception permits acceptance, and that’s just not abstract for me. That’s something I’ve experienced myself, whether it’s when I’m at OGE and I’ve gotten a gifts question, or when I was lucky enough to get detailed up to the White House so I got gifts question. I would run that up to the framework we talked about. Usually an issue would arise or I would get a question on whether an exception’s available. That’s usually where most of my questions came up. I don’t know if ethics officials have different experiences, but in that personal experience you would have a really deep dive perhaps, or just a really difficult factual and legal analysis perhaps on whether an exception applies, but it was only after you got through that and the legal question was resolved, and the gift was determined to be acceptable, that I would make sure that either at OGE that the agency and the employee had examined the optics and other provincial considerations, or at the White House that I had considered them personally, and those are the things that you need to consider despite the availability of an exception. We want to make sure that those aren’t forgotten, that those aren’t done at the end, because that can be inefficient and ineffective. It doesn’t make a lot of sense to make ethics officials drive down on these tough exception questions if it just wouldn’t make sense for the employee to accept it in the first case. So that’s one of the real things Patrick Shephard: So we’re sort of returning the horse to its proper place in front of the cart. Leigh Francis: Yes. Patrick Shephard: Right. We’re thinking about protecting integrity at government processes first and the availability of an exception as a secondary or tertiary consideration. Leigh Francis: Absolutely. Put in a cart before the horses is not what we want to do. Patrick Shephard: Absolutely. Leigh Francis: Okay, so again I’m going to do two more slides just on the background because I just want to talk about a little bit about I guess the theory and the thinking. So why is this really important, I’m continuing on, from a policy standpoint, the paradigm shift is very important, and what I thought about and working through this with my colleges over here at OGE is, we’ve looked at some psychological studies, which have become quite popular, and they’ve shown again and again some important concepts about how we, human beings, make decisions. And that’s ultimately what employees and ethics officials are doing when they do or do not accept a gift. It’s a decision. And recently, this scholarship in the psychological area of behavioral economics and behavioral psychology has made its way into the law and regulations. So the first major thing that these studies talk about that I think is important is that the faults are very important. That is the base line rule for a decision. I’ll try and unpack that. Lawyers have known this for a very long time and as a default, that’s why for example in criminal law, a defendant is presumed innocent and must be proven guilty beyond reasonable doubt. It’s just the case that we would live in a much different society, much different world, and much different legal framework if that standard were presumed guilty, which it might be in certain countries, and or that it wasn’t beyond reasonable doubt as a preponderance of the evidence or something along those lines. A lot of consequences flow directly from that decision. And this is true when an individual is forced to make a decision, again as were talking about here, and it helps to know these things when we can craft the framework as a regulation under which the employee decides. So I’ll just give you one more quick example about how important these defaults work. So one of the more pointed out examples is in the area of organ donation. So certain countries, not the United States have a framework under which everybody in that country is an organ donor. Now everybody has the opportunity to opt out, to decide that they don’t want to be an organ donor for any reason, or any reason whatsoever. And I’ll refer to those just very quickly as opt outs countries, opt out jurisdictions. Now as I said, in the United States, we don’t have that, we have what’s called an opt in program, so nobody’s considered an organ donor unless they affirmably chose to become one. You can do this at the driver’s license bureau or whatever your state has set up to do this. And I just want to point out that while that doesn’t maybe seem like a big difference, just changing that defaults, the results on the studies has proven that it is a massive difference. So in the countries not like the United States, where you would have to opt out, the participation rate for organ donation is 90%, in the US, where the framework is an opt in, where you have to choose to become an organ donor, our average is 15% of people donate their organs. Now I’m not interested in whether citizens should or should not donate their organs, all I’m pointing out is that defaults are very important when people make decisions. Patrick Shephard: I think we’ve all seen this in our work as ethics officials when we’re talking to employees. I know many many times I’ve talked to employees in less formals context they say, “oh the ethics office, you’re the twenty dollar rule people.” Right so the default understanding of the gifts rules historically for many employees has been that I can have anything that’s worth less than twenty dollars. So is that kind of the default that we’re trying to shift? Leigh Francis: Absolutely. I mean that’s absolutely right. And in doing so, I think these other two things that I have up there, which we’ll just hit on very quickly is what we’re doing. We’re shifting the focus as you just said. Should I accept it, not is there an exception available. And finally and ultimately what we’re enabling and we’re putting directly in the regulation itself, so we’re really focusing and emphasizing this as a part of the actual legal framework is we just want employees to engage in ethical decision making. Should I do this, think about the facts and the way it would look from a third person perspective, and hopefully that type of thinking I think is easily translatable or transferrable to any other ethics questions or opt as concerns that might come up with your agency risk management that would come before an agency in every given day. And the last thing I’ll point out is, at least from my perspective what I’ve engaged employees and really talked things through with them and really gotten their perspective on what they think and, they’re ultimately the ones that are going to accept it, they’re ultimately the ones in their job, they ultimately know their boss’ concerns and their concerns and their professional ideals and beliefs, I’ve ultimately hoped and seen that you don’t enable employees that take great ownership of their work and of their job. Patrick Shephard: I think that’s great, and I think that puts the onus in the correct place. Right? We’re asking employees to do the thinking, to think about their own circumstances and their own conduct and take responsibility for that and to really slow down and consider that third party perspective, and hopefully that will result in more consistent and better ethical decision making. Leigh Francis: Absolutely. And I think you just hit on the first point that was on my next slide, and this will be the last one of the background. To my mind I think it relieves pressure on ethics officials, and so these are some of the more hoped for results that we have or at least I have in its implementation. And what I mean by relieving pressure is what you just said Patrick, you know the way it usually plays out is, you know, somebody comes in and they want to know immediately, can I accept this gift. Now you should take the time, the initial opportunity to take a step back with the employee and ask them, have you done your analyses, would it question your impartiality or integrity. That’s the first step, not is there an exception available. If they’ve said, “yeah I’ve done that.” Great, that’s a good starting point. Patrick Shephard: So this is should be part of our fact gathering. So when I ask an agency, I’d rate gift opinions, I start with the issue or the set of facts that are provided by the employee. One of the things that I’d want to verify is that the employee has done this thinking, and that that’s occurred, that step’s occurred, and that the employee isn’t sure and they’d like help with that, we could talk through the various, the VTIA Leigh Francis: Thank you. You don’t have to adopt that. That’s right. Thank you. Yeah no I mean certainly. And very quickly I’ll run through, you know, these are some of our other hopes, is that overall fewer gifts will be accepted by employees based on this addition, but that’s not really the goal, the goal is more importantly that less truly problematic gifts will be accepted. After all, OGE’s main mission is ensuring the integrity of government operations. And then as I already mention, really we just want to do more ethical decision making, you’re just taking ownership and being in a moment and being present in what you’re doing while you’re doing it and repercussions of it. Alright, so now we’re going to get into the mechanics and then we’re going to apply the standards and the factors to two quick situations. So first, employees are to apply the standard that’s in the regulation, that’s in our preamble, we say that many times. Just as the case is with 2635.502 as I mentioned before, which is consideration of appearances by the employee. Second, employees may not be punished if they don’t apply the standard, or if the employee’s application of the standard, and say your application, lead to different conclusions. That is if the employee thinks based on the application he can accept the gift, but you as the ethics official think it’s prudent based on the standard to decline. And of course we want you as we’ve said many times to train the employees on the standards and factors, but we really also want the employees to be able to come to you with their own analysis, as we talked about numerous times already. However, I do specifically want to note that 201(b) is unlike 502 in that ethics officials may not, as I said, direct the employee to decline an otherwise permissible gift versus 502(c), which does allow the ethics official rather to do their own analysis. Patrick Shephard: So we’re not trying to set traps for people, we’re trying to make a prudential decision if someone agrees with it down the line, and then they’re punished sort of retro actively and I think that makes sense. We’re asking people to slow down, be considerate, be thoughtful about the acceptance of gifts. The goal isn’t to set traps for the, to make it easier, to penalize them. Leigh Francis: Absolutely. Okay, so this is example one that we have for you today. This was included in the regulation at the request of some commenters, and so we provided it. Take maybe just ten or fifteen seconds if everybody has them just to take a look, and then we’re just going to look at the standards and those factors and the questions that you’re supposed to ask with regards to those factors and the way you should evaluate. Alright, I’m going to take over, because otherwise we’re going to unfortunately run short on time. Again here’s the standard. So I just want to bring that up, that’s what we’re trying to evaluate here. And now these factors, which I promised to you. So with these four factors, the value, timing, identity, and access, for value, what we’re really asking is, is the gift expensive or cheap? Pretty simple, and we’re trying to make these as easy as possible. With timing, is the gift given at a time when the donor is seeking business, or has business before the agency? With the identity of the donor, we call them bad sources at OGE, you might have a different name, but is the donor someone whose interest is affected by the employee’s official duties? And then finally, is the gift going to provide the donor with significantly disproportionate access to the employee and the agency? And that last factor is usually a relative factor, relative, perhaps other people are involved, or other interested parties. Patrick Shephard: In this case, maybe other vendors. Leigh Francis: Yeah, exactly. Thank you. Okie doke, so let’s apply this. Here’s our standard, here are our factors, and we’re just going to take this one easily off the first and we’ll give you more time in the second one. We have a second example, which is maybe a little bit harder. But with the value, is it expensive or cheap? Value’s pretty cheap, right Patrick? Patrick Shephard: Yeah, it will fit under our long existing sort of de minimis sort of standard. Leigh Francis: Right. Patrick Shephard: So we’re not talking about a ton of money here. Leigh Francis: Absolutely not. Then timing, you know, is it given at a time that the donor is seeking business? I think that’s pretty clear, it’s a promotional presentation, they’re trying to get sales to the agency. Patrick Shephard: So the timing element is a little more problematic in this case. Leigh Francis: Absolutely. It’s very similar, I think with identity. The employee is in charge of the purchases, otherwise he probably wouldn’t be invited to lunch in the first place. And so I think that’s probably in my mind, the most important factor. Patrick Shephard: Right. So it seems the vendor, by virtue of their position and their identity is maybe offering this gift to facilitate this sort of business or make it more likely that they get something, so yeah. Leigh Francis: Absolutely. And then finally, as we just talked about, yeah there’s access here. Is it disproportionate? I mean, is he going to lunch with every other vendor that’s interested in selling to him? I doubt it, but Patrick Shephard: we may have other considerations t think about. Leigh Francis: Yeah, that’s right. We might have other thoughts to provide to the employer or supervisor. Excellent. Alright, so let’s move on really quickly. I’m going to give you fifteen seconds, take a quick read on this one and we’ll do the same thing and we’ll move on to our next topic. Okie doke. I’m going to ask for your help a little bit more Patrick. So here are questions, here’s our standard, what do you think about the value? Patrick Shephard: Going to the game and it sounds like the seats are pretty good, so I think here the value situation might be significant. At least from my perspective, it’s a pretty sizable gift and not an everyday sort of occurrence, and not a bagel. Leigh Francis: That’s right. I would love to live a life where going to a skybox is the way I go to every sports event. Patrick Shephard: Right. Leigh Francis: Unfortunately, it’s not for me and I don’t think many people in the United States would have that luxury. Patrick Shephard: You know value, we’re talking about a Leigh Francis: Pretty sizable gift. Patrick Shephard: Pretty sizable, that right. Leigh Francis: What do think about timing? Patrick Shephard: Well the timing’s not great here. Leigh Francis: No, yeah, it’s pretty bad. Patrick Shephard: We have an ongoing matter between the agency and the firm. So I don’t think this one’s an easy dunk either way, but it’s certainly something we want to think about. Leigh Francis: Yeah, and I agree with you completely and made a little bit of nuance here. We might need some more facts. It sounds like it’s probably from the brother in law. It sounds like it’s a benefit that they got, or is it really from the law firm. I mean it’s unlikely it’s directly from the law firm. There’s some other things you want to think about. The bottom line is timing doesn’t look great. Patrick Shephard: Right. Leigh Francis: It just doesn’t. And it’s very similar I think unless you disagree with the identity. They’re clearly affected I mean they’re in litigation. Again the identity and timing are very similar there. And then finally I think pretty much the only perhaps nonfactor is the access. What we’re talking about is access to the employee not access to the employee’s son. Patrick Shephard: Right. I think that’s significant here, because this is one where depending on those specific facts, you might be able to come down either way. Certainly we could take some things away from this fact pattern. For example, say there was no pending matter, there just had been matters in the past, that might agitate maybe in the direction of saying, “you know, maybe this is alright.” We could certainly make things worse. Such that it’s, Leigh Francis: It’d be hard, but we could make things worse, yeah. Patrick Shephard: If the brother in law were assigned directly to this work, Leigh Francis: yeah. Patrick Shephard: On the firm side, and he was taking the employee rather than the son, that would be a different matter as well. Leigh Francis: And the other reason that you and I discussed doing this one is it’s usually never the case. It’s primarily not the case that a personal relationship exception which is what we’re talking about here Patrick Shephard: Right. Leigh Francis: That that would ever be something that you would worry about in providing guidance, but with this new standard, there certainly could be, and so that’s why we want to include it. Think about it occasionally, that it could still be a problem even under that relationship, the personal relationship exception. Patrick Shephard: Yeah and I think that’s something else to think about here is the possibility for other kinds of appearance considerations that don’t have anything to do with the possible gift that this relationship could be problematic to the employee’s participation down the line so we just want to keep our eyes open to attend to issues for ethics officials Leigh Francis: Absolutely. So we’re going to move on to the second deep dive on the prohibition on solicitation or acceptance. I want to just go ahead and lay out for you right now that we have a mailbox that we’ve set up that I would very much like to have you send questions to on the parts that we go over today and Patrick and I will take a look at those and it’ll be on the slide towards the end of the deck, and you can send us questions that you have. I can’t guarantee you that we’re going to look at them all, but we’re going to take a look at them and hopefully address some of them in part 2, because there’s going to be traps, there’s going to be things that you’ve thought of, that you have questions, or that you’re worried about already. Of course with the implementation of that going into January we want to be responsive to that, but we’re going to move on quickly to the second major deep dive. This is purely an organizational change, so there’s nothing changing as far as substance, but we’re looking at the current language and we have here is we have two prohibitions and you have, basically you’re prohibited from getting a gift or soliciting gift from a prohibited source, or given because of the officials position. That’s our current regulation. And so again, what we didn’t change, what we did change, and why. What we didn’t change as I said, the prohibition’s the same, it’s in the statute, it’s in our regs, it’s in the executive order, it’s also in 7353.5 USC 7353. However what we did change, again, what we’re harping on so much today as the focus is we broke out the two prohibitions so that the two prohibitions on soliciting or exception are broken out and the two donors from whom gifts cannot be accepted are remain to be or remain broke out. And so there’s four elements as I view it, and four broken out provisions with the new rule, and so in regards to the considerations as I talked about with 201(b), the organization is really important, and the current, that is the language in our current rule that’s going to go out of effect on December 31st, it’s very efficient. It’s a very efficient organization, but based on my experience and based on my read of it, and the way it looks, the focus is on from whom a gift may not be accepted, those two categories. It’s not as much, or you could argue it’s maybe buried, that there’s actually two prohibition in there. Patrick Shephard: As someone who’s spent the better part of the last decade teaching new ethics officials about how to apply this standard and introducing it to them for the first time, I think this is going to be a very good change for people new to the regulation, because something about the structure in the old way, while being extremely efficient was also very confusing for people to par. I think it’s because we had to distribute terms among two different things, it became very difficult and I think by breaking it out, even though it’s more words, it’s a lot easier to digest and a lot easier to understand. Leigh Francis: That was my take on it, and it just seemed to me, it was very efficient and lawyers love being very efficient, but I guess, maybe I just thought it was counter intuitive to stick the really important prohibitions right there, and again because of your experience, our experience in some of the studies I mentioned before about focus, we just changed the organization, so this isn’t overlooked, if it was before. Patrick Shephard: So the thing you can’t do is the verb at the front of the sentence. Leigh Francis: Sounds clear to me. Alright let’s pop along. Alright, so our third major topic is free attendance to employees speaking in their official capacities and we’re going to take that in tandem with the new definition of free attendance. Okay, so it’s pretty simple what we’re doing here. We’re moving the exception that was at, well it was in the exception section, we’re moving 2635.204(G)(1), which permits employees to accept free attendance to an event if it’s necessary for them to provide a presentation in their official capacities. We’re taking that from the exception section to the exclusion section. This is not a change in OGE’s interpretation, under our interpretation accepting free attendance at an event in which an employee’s speaking in their official capacity, it’s not a personal gift to the employee. It’s also in our understanding at OGE that it’s not a gift to the agency either. I’ll flag as a caveat OGE has no authority to opine on any agency’s gift acceptance authority, or other statutory, or regulatory authorities that may permit them to accept gifts from outside sources. That’s all outside OGE’s purview. I only mentioned this because you don’t have to go to the agency gift acceptance authority in that situation. Patrick Shephard: Right. We’re flagging for folks that’s not a necessary analysis to do, and I think from a training perspective it’s also really nice that we moved this to the exclusions, because usually shortly after I deliver an explanation that exceptions of things that are gifts that may be accepted, we get there and we say it’s not a gift in (g)(1), and that was always confusing and moving it to an exclusion seems like a more appropriate place. Leigh Francis: That’s right. So just too quickly go through that, despite we’d never consider this a gift, the free attendance, it’s currently in the exception section, which logically means it’s a gift in the first place, that’s wrong. Patrick Shephard: Right. Leigh Francis: It’s not a gift. OGE was wrong and so it’s not a gift to the employee. We moved it to the exclusions section to better reflect this interpretation. Now because of that movement, that reorganization, we were forced to remove the definition of free attendance from the WAG exception, where it was and is formerly, or currently. I’m mixing up my verbs a lot here trying to keep that straight. At 2635.204(g)(4) and what we did was we created a subpart wide definition at 2635.203(g), again this is a mirror change in organization with one exception. OGE has added to the definition for free attendance authority for employees who are speaking in their official capacity to attend a separate meal for participating presenters that is hosted by the sponsor of the event, however, as is put up on the slide, for the employee to be able to attend these rival terms, speakers’ meals, the meal must occur on the day the employee is presenting. Not going to get into too much depth on this, but the result flows from the accommodation of the speaking exception at .203(b)(8) and the definition at .203(g). In .203(b)(8), the exception, it’s substantive an employee may accept free attendance, only on the day he or she is speaking in an official capacity. The definition of what may be accepted, that is, what free attendance includes on the day the employee’s speaking, is then defined at .203(g). .203(g) by itself cannot be used as an authority for an employee to accept free attendance to speakers’ meals or anything like that. Patrick Shephard: Yes. Seth Jaffe: As my interject, of course, .203(b)(8) is where the exclusion is. Leigh Francis: Correct. Thank you, sorry. The definition of free attendance is merely descriptive. The substantive authority to accept again in the exclusion at .203(b)(8), which is to permit again only acceptance on the day the employee’s speaking. Let’s move on to our next deep dive topic, and that is market value. Again what we did here wasn’t so much, it is a substantive change, but again we’re changing the focus to make it a better regulation, and what we have right now is this provision for market value, and focus is on retail cost. Retail cost again is a default and that’s what we currently have. And with the current framework, at least this is how I think of it with the rule, first, unless the gift is a ticket, employees look to the retail costs. However, in situations where there’s no retail costs, employees look to the retail values of similar, like items. Now with tickets, the market value of a ticket is the face value, but as many of our listeners know, this too is a nuance, which is the skybox situation. That’s how I’ll refer to it today, and that skybox situation has a separate rule discussed in diagram (40:42) 07-003. If there’s no face value, the diagram provides a rule by which employees can calculate the market value. Patrick Shephard: Excellent. Leigh Francis: So, what have we changed? Here’ where we will be, or here’s where we are now, or on January 1 2017. The first step in the framework for market value will now cover more situations, and to me at least is more intuitive than starting with retail value. First, for items other than tickets, we ask what a member of the general public would reasonably pay to purchase the gift. Very quickly OGE made this change because the definition of a broader application is unnoted. Some gifts such as gifts that come in the form of services or intangibles don’t have a retail price. Gifts that are bought or sold on websites like eBay or Etsy or even things that are bought at a flea market or antique shop, they don’t have retail prices. So while the languages change in this regard, at least to be more encompassing and change where we start, fundamentally I just want to reiterate what has not changed, which is OGE’s position that the market value must be what a member of the general public would pay and not the cost the donor paid to acquire the gift. Now for gifts other than tickets, the second step in the new framework says that if the employee cannot determine what a member of the general public would pay, for example, if it’s not available for purchase on the open market, the employee should take the same step as we currently have, look to retail cost similar items of like quality. Patrick Shephard: I think this makes a lot of sense Leigh, because in my experience working with employees, certainly a plurality and maybe a majority of the gifts policies we do aren’t tangible items that have a retail cost. They’re not frequently things that you can buy at a store that have been delivered in a box. We do a lot of invitations, we do a lot of events, a lot of entertainment and the like, so I think this really reflects our experience with what kinds of things people are analyzing under the gift rule, and as you mention, puts the focus where it should be. Leigh Francis: Right. Absolutely. And so the rules for tickets hasn’t really changed at all. Of course I’m going to gaven that with one quick nuance that I’ll talk about in a moment, but the market value is face value and also, just so we now have it in the rule for you so you don’t have to resort to the diagram. OGE included what I call a skybox situation, where a ticket doesn’t have a face value and the rule that’s in the diagram that OGE holds as its position was included in the rule by way of example for to the regulation. Seth Jaffe: So for the definition of market value, it says the cost to a member of the general public would reasonably expect to incur, but that would not by extension go to how much it might cost a member of the general public to buy something on eBay. Is that right? Leigh Francis: No I think it would. EBay is what a member, I mean anybody can go on eBay, and that’s why it’s more expansive than our prior position, or there’s other websites or antique shops, or anywhere you would go where somebody could walk in in your shoes and say, I mean I think it would cover that as whatever they’re charging. Okay, so this is how I think of the new framework. If it is not a ticket, ask what a member of the general public would pay. There’s no publicly available price, then look to retail costs of like quality, just as before. For tickets the main rule, again, hasn’t changed. There’s no face value, then the skybox valuation and just quickly take the value of the most expensively publicly available ticket, then add the value of any benefits that are included in the skybox. I just want to note that the final flag on this page is that OGE has clarified one point, and that’s if the most expensive publicly available ticket includes benefits such as parking or food and beverages, the employee does not have to double calculate those items. Patrick Shephard: I think that makes a lot of sense because we’ve seen increasingly stadiums and other entertainment venues have added these kind of club level tickets where a ticket holder is entitled to maybe premium parking, they get a buffet, they might get an open bar, or something similar, and that experience is very similar to the experience that someone would enjoy in the skybox. Leigh Francis: Yeah, that’s right. Patrick Shephard: We say you don’t have to take the club level ticket which includes the food and beverage, and then add the food and beverage again. I think that’s Leigh Francis: Yeah, if they’re similar quality, there’s no need to double count. Alright so those are our four major deep dive topics and we’ve got fifteen minutes it seems to go, so we’ll have time to go over these last few items. For disposition of gifts of tangible items at 2635.206, I just want to talk about the starting point, and that is gifts that should not be accept where possible should not be accepted. That said and OGE thoroughly understands that sometimes gifts are mailed to employees, or employees would be placed in a very awkward situation by refusing a gift. Now currently with our rule for prohibited tangible gifts, employees must either return the gift or reimburse the donor the market value of the gift. Now in OGE’s experience since the rule has been implemented in 92’ 93’, we found that sometimes the donor is unknown, perhaps unreachable, or there is processing hurdles for mailing a gift of relatively little value that are sometimes extensive, or it could just be the case of the cost of sending the gift back may be greater than the value of the gift itself. So for flexibility and efficiency purposes, OGE has now added a third way to dispose of a tangible gift if the market value is less than $100, and that is the employee may destroy the gift. So throw it in the trash, throw it in the incinerator, any of those will certainly work. And maybe as a teaching point or a point for you to sell this to your employees, this is also a great way for donors not to give and employees not to receive gifts, that is if the donor knows that the gift will just be thrown away by the employee, who knows if the employee will tell the donor that will the gift is being given, of course the donor is less likely to give the employee the gift. Patrick Shephard: We also kind of have here a strategy for declining a gift right? So if I’m an employee and someone has offered me something, maybe at a meeting, and I know I’m not going to be able to retain that gift, I might be able to say to that donor that I really can’t accept this and if you did give it to me I’d have to go destroy it anyway, so I’d rather not. Leigh Francis: Absolutely. Patrick Shephard: I think that’s always an awkward situation for an employee and it’s nice to have another avenue to communicate the requirement of the rule. Seth Jeffe: And the one thing that’s to address the concern and some people may have, that the employee will say that they’ve thrown away the gift and have not done so is the best practice for the employee to maybe just make a note to themselves or make some sort of documentation that they’ve destroyed the gift. Leigh Francis: Finally, I just want to put this out there since we specifically addressed it and so I didn’t want it to, I just wanted to put it out there. Employees can’t destroy gifts, which makes sense, by giving them to a charity. Donating the gift to a charity instead of destroying it would likely mean under our regulations that the employee indirectly accepted the gift and that’s under 2635.203(f)(2), and so I just want to put that in there and that’s a really good segway to our final substantive slide, which is two topics. So I want to mention these two other changes very quickly. First, OGE added member of the employee’s household to the section on indirect solicitation and acceptance. We broadened that out just a bit, and the very simple takeaway here is that if a donor gives a gift to a member of the employee’s household, who happens to not be a family member, which is all that’s covered right now under the rule, it’s going to be deemed to be indirectly accepted by the employee if the employee, one has knowledge of the gift, and two acquiesces to the member of his or her household accepting the gift. That’s the simple change there. Lastly, OGE has moved the limitations on the use of exceptions from .202, 2635.202 to 2635.205. Fundamentally, in my mind, this just makes the regulation easier to understand when you read from beginning to end, or first page to last page as most people do. An employee or an ethics official does not necessarily need to read the limitations on the use of exceptions if they are in a situation where the gift is not prohibited or where the gift is not a gift. So OGE corrected this by moving the limitation section to .205 after the exception section itself, so that employees can use their time and ethics officials can have a little bit better organization. Excellent, so we got through that with plenty of time as I hoped. I really appreciate and I truly hope that this was helpful to you and that you feel hopefully a little bit more comfortable with some of the changes that we’ve made to the rule in subpart b as Seth said, and I’m going to plug again, we will be having a legal advisory that will be coming out that will discuss a lot of the points, or at least some of the points that we talked about today, specifically the LA, the legal advisory, excuse me, will discuss 2635.201(b)(1), considerations for declining an otherwise permissible gift, on which we spent most of today, we’ll also discuss there the official capacity speaking exception, that now becomes and exclusion, the new definition of free attendance is discussed in that, .206, disposition of tangible items is discussed in that. So pleased stay tuned. Like I said, also very much hope that if you have the time and you have some questions that you can send them to us about what we’ve discussed so far, and we will take a look at those, and we will hopefully answer a few when we take part two on Wednesday, December 14th, 11:30 a.m. and OGE will send out a list or an announcement with that link. Patrick Shephard: Excellent. Well Seth and Leigh, thank you very much for joining us today. I think this has been a really good start to get people familiar with the changes to the regulation. We’d like to thank everyone for joining us today to participate in this webinar, and we do welcome your questions, we’ll be looking at those and addressing as many as we can next Wednesday at 11:30 a.m. eastern time and again that link will be out shortly via listserv, thank you very much and we hope you all have a very nice afternoon.

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