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LEGAL ADVISORY

TO: Designated Agency Ethics Officials

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SUBJECT: Key Highlights of Final Rule – Modernization Updates to Standards of Ethical Conduct for Employees of the Executive Branch

The U.S. Office of Government Ethics (OGE) is issuing this Legal Advisory to highlight some notable updates to the Standards of Ethical Conduct for Employees of the Executive Branch (Standards)¹ that will become effective on August 15, 2024. A final rule published today revises 5 C.F.R. part 2635 based on OGE’s experience gained from application of the regulation since its inception, as well as input from ethics officials over the years. The rulemaking primarily focuses on technical revisions to modernize the Standards, and is the first global update of the regulation since their issuance in 1992.² The amendments also incorporate past interpretive guidance, add and update regulatory examples, improve clarity, update citations, and make technical corrections.

Subpart C—Gifts Between Employees

- *Gifts to superiors*: Since the inception of the Standards, 5 C.F.R. § 2635.302(a) has prohibited employees from giving gifts to an official superior. OGE updated this section to also state that superiors have a responsibility to not accept an improper gift from an employee. This updated framing is consistent with how other provisions in the Standards relating to improper gifts focus on an employee’s responsibility to not accept such gifts.³
- *Gifts from employees receiving less pay*: OGE amended 5 C.F.R. § 2635.302(b)(2) to clarify that the restriction on accepting gifts from employees receiving less pay does not

¹ See 89 Fed. Reg. 43,686 (May 17, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-05-17/pdf/2024-10339.pdf>.

² OGE has, however, amended portions of the Standards through rulemakings that targeted specific subparts. See 88 Fed. Reg. 33,799 (May 25, 2023) (adding new subpart J relating to the creation and operation of legal expense funds, and the acceptance of *pro bono* legal services for certain legal matters); 81 Fed. Reg. 81,641 (Nov. 18, 2016) (revising provisions in subpart B relating to solicitation and acceptance of gifts from outside sources); 81 Fed. Reg. 48,687 (July 26, 2016) (revising provisions in subpart F relating to seeking of non-Federal employment).

³ See, e.g., 5 C.F.R. § 2635.302(b).



apply to a gift from an official superior to a subordinate employee. As a general matter, subpart C has not restricted most gifts from superiors to their employees because employees typically receive less pay than their superiors. However, in consideration of changes to Federal pay systems giving rise to situations in which an employee may earn more than their superior, it was necessary to update 5 C.F.R. § 2635.302(b) to eliminate potential disparity in application of the rule to gifts from a superior.

- *Disposition of prohibited gifts:* OGE also revised subpart C by adding new § 2635.305. The new section notes that the provisions relating to gift disposition in subpart B at 5 C.F.R. § 2635.206(a)(1)-(3) may be referenced when determining an appropriate disposition of a gift that is impermissible under subpart C. The new section is responsive to a suggestion that OGE received during the 60-day comment period, and reflects guidance that OGE has provided in response to agency inquiries. OGE added this new section to offer greater clarity on the disposition of prohibited gifts under subpart C.

Subpart E—Impartiality in Performing Official Duties

- *Consideration of appearances by an employee:* OGE adopted organizational revisions to 5 C.F.R. § 2635.502 to make this section clearer and easier to follow. As part of the structural changes, OGE relocated the regulation’s two primary prohibitions (working on a particular matter involving specific parties in which a member of one’s household has a financial interest and working on a particular matter involving specific parties in which someone with whom one has a covered relationship is or represents a party) and the “catch-all” provision (covering circumstances other than those described above) into separate, adjacent paragraphs.
- *Covered relationships:* OGE also revised 5 C.F.R. § 2635.502(b)(1)(iii) by removing the qualifier “dependent” before “child,” meaning that, for purposes of the impartiality provisions, an employee will have a covered relationship with persons for whom *any* of their children are, to the employee’s knowledge, serving or seeking to serve as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee. This change acknowledges that certain business relations of an employee’s child may raise impartiality concerns regardless of that child’s dependency status. This change also harmonizes the treatment of children and parents⁴ for purposes of covered relationships under the regulation.⁵
- *Covered payments and qualifying programs:* OGE updated 5 C.F.R. § 2635.503 in several respects, including: replacing the term “extraordinary payment” with “covered payment”; removing the limitation that only payments received prior to Government

⁴ Longstanding language in subpart E recognizes that the same business relations of a parent, absent any dependency predicate, could give rise to appearance concerns for an employee. *See* 57 Fed. Reg. 35,006, 35,054 (Aug. 7, 1992).

⁵ As with other covered relationships, “the importance of relevant facts must be emphasized.” 57 Fed. Reg. 35006, 35027 (Aug. 7, 1992). One of the new examples this rulemaking added to § 2635.502(b) illustrates the fact-dependent analysis that employees should engage in before participating in a party matter covered under the updated regulation. *See* 5 C.F.R. § 2635.502(b) ex. 6 (discussing a scenario where an employee has a covered relationship with the employer of their adult child, but could justifiably conclude that a reasonable person would not be likely to question their impartiality in participating in a party matter involving the child’s employer).

service may implicate the recusal requirement; and moving the “qualifying program” concept into a standalone definition at § 2635.503(b)(2).

Replacing “extraordinary payment” with “covered payment” brings the language of this provision in line with terminology used elsewhere in subpart E (*i.e.*, “covered relationship” in 5 C.F.R. § 2635.502). Regarding the second change, OGE removed the timing limitation in recognition of the fact that receipt of a covered payment raises ethics concerns and appearance issues regardless of whether payment occurred before or after start of Government service. The revised scoping therefore imposes the same recusal requirement regardless of whether an employee received the payment prior to or during Government service. Lastly, the updated standalone definition for “qualifying program” promotes better understanding of the regulation, and clarifies that (1) written programs treating individuals entering Government service more favorably than other individuals are not “qualifying programs,” and (2) when there is a written plan, a history of payments to others not entering Government service that is contrary to the terms of such a plan should not be considered in determining whether there is a “qualifying program.”

Subpart H—Outside Activities

- *Teaching, speaking, and writing*: OGE made minor adjustments to 5 C.F.R. § 2635.807 to improve the regulation’s logical organization and facilitate its practical application. As part of the changes, OGE restructured the definition of “compensation” at § 2635.807(a)(2)(iii). Specifically, paragraph (a)(2)(iii)(A) provides a definition of the term. New designated paragraph (a)(2)(iii)(B) identifies exclusions to the definition. Lastly, new designated paragraph (a)(2)(iii)(C) describes the treatment of travel expenses as “compensation” for different categories of employees.

OGE also updated the definition of “receive” at § 2635.807(a)(2)(iv) to clarify that “[r]eceipt of compensation is attributable to the time that the teaching, speaking, or writing occurs,” and that OGE considers an individual to have received compensation while they are an employee if they have “an enforceable agreement to receive compensation for writing” that occurs during Government service.⁶ These clarifications are consistent with existing OGE guidance on outside teaching, speaking, and writing.⁷

- *Fundraising in a personal capacity*: OGE updated the restriction imposed on employees fundraising in a personal capacity by adding a “personal relationship” exception to 5 C.F.R. § 2635.808(c)(1)(i) and (ii). Absent this exception, employees could technically run afoul of the Standards if they ask for a donation from someone with whom they have a personal relationship (*e.g.*, a relative) while knowing that the person happens to work for a prohibited source. OGE believes that such a result does not comport with the fundamental purpose of the restriction, and thus amended the regulation to avoid the sort of scenario just described. The new personal relationship exception in 5 C.F.R. § 2635.808 is similar to the exception in subparts B and C for acceptance of gifts, and

⁶ See 89 Fed. Reg. at 43,728 (to be codified at 5 C.F.R. § 2635.807(a)(2)(iv)).

⁷ See, *e.g.*, OGE Legal Advisory LA-20-06, at 2-3 (Sept. 24, 2020); OGE DAEOgram DO-08-006, pt. I, at 9-10, pt. II, at 11 (Mar. 6, 2008).

requires that “the circumstances make clear that the solicitation is motivated by a family relationship or personal friendship that would justify the solicitation.”⁸

OGE encourages agency ethics officials to review the proposed rule⁹ and final rule for a full overview of the forthcoming changes. Agency ethics officials may contact their OGE Desk Officer if they have any questions about the revisions to the Standards.

⁸ See 89 Fed. Reg. at 43,729 (to be codified at 5 C.F.R. § 2635.808(c)(1)(i) and (ii)).

⁹ 88 Fed. Reg. 10,774 (Feb. 21, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-02-21/pdf/2023-02440.pdf>.