From: Jeffrey Harper
To: 2635 Modernization
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§ 2635.204(a)
OGE should consider revising the $20/$50 thresholds for the de minimis exception of § 2635.204(a). The preamble to the original rule (57 FR 35016) indicates that those numbers were arrived at after considerable deliberation and much comment, going so far as to adjust the thresholds from those originally proposed. OGE considered $10 in 1992 to be "too low to eliminate the necessity to create additional exceptions for certain unobjectionable gifts likely to be worth more than $10," but that the threshold should be low enough to "discourage the restaurant dinners and lavish lunches that concerned some of the commenters." While OGE also stated that it was deliberately *not* implementing a cost of living adjustment in the rule, the effects of inflation in the intervening 3+ decades since the thresholds were adopted, combined with the failure to make *any* adjustment to that figure in the intervening years since those thresholds were adopted means that the rule in its current form no longer reflects the careful consideration and balancing done in arriving at the $20/$50 figures.

OGE declined in 2016 to revise the thresholds in response to comments received (81 FR 81645) writing that the

> "exception was intended to provide a uniform means for employees to accept only inexpensive and innocuous gifts on an infrequent basis. [] OGE believes that the current dollar threshold continues to meet that narrow objective. OGE is concerned that raising the de minimis would encourage employees to accept, and private citizens to give, more expensive and more frequent gifts than employees are currently able to accept."

That analysis, however, fails to consider that what were intended, in 1992, to be considered "inexpensive and innocuous gifts," would today no longer qualify. To put it another way, no one would consider a meal at a fast-food restaurant to be a "lavish lunch," but we are at a point where such an inexpensive and innocuous gift would not, in an increasing number of locations, qualify for a de minimis exception based on a $20 threshold.

I observe too, that the salaries of government counsel are a cost to the taxpayer, and time spent reviewing an increasing number of questions relating to gifts that would have been considered inexpensive/innocuous in 1992, but exceed the threshold in 2023, is time that might be put to more productive use on more consequential issues.

Taking the above concerns into account, thresholds of $40/$100 would seem, in the present day, to better reflect the original, deliberately balanced intent of the rule. The repeated failure to make at least some adjustment would suggest that, in OGE's view, the exception has outlived its usefulness. If that is the case, then the exception should be eliminated entirely.

§ 2635.302(b)
The current rule and the proposed revisions bar employees from accepting gifts from other employees who receive less pay. The term "less pay" is somewhat ambiguous—does "less pay" include or exclude locality pay? Bonuses? Incentive pay? Hazardous duty pay? Because it appears pay is being used in this rule as a mechanism to gauge the relative levels of responsibility of the two employees, I would propose that the rule be amended to specify that base pay be used for the comparison, consistent with the use of pay as a gauge of level of responsibility under 18 U.S.C. § 207(c)(2) / 5 C.F.R. § 2641.104.

§ 2635.304(b)(1)
OGE proposes to revise § 2635.304(b)(1) to add bereavement to the non-exhaustive list of special, infrequent occasions covered by that exception. OGE may want to consider adding "divorce" as well, as that situation is a relatively common occurrence, but, not being addressed in the rule, is likely to raise questions about the potential applicability of § 2635.304 in that situation, and would maintain parallel

structure of the rule (covering both the start, and end, of the relevant life). Some consideration should also be given to amending the rule to offer guidance on whether a traditional religious or cultural right of passage (e.g., baptism, confirmation, bar/bat mitzvah, quinceañera) or other significant achievement (e.g., receipt of an advanced educational degree) is covered by the exception.

§ 2635.501
The proposed note appears to be in potential conflict with §§ 2635.105(a) and 2638.602, subjecting Agency regulations to prior OGE approval. Is the intent of the note to indicate that the OGE recognizes agencies have unfettered authority to assign work as they see fit? Or would OGE consider an agency manager's approach to work assignments based on ethics considerations contrary to § 2635.105 if not subject to OGE review?

§ 2635.502
I support the removal of the qualifier "dependent" when discussing covered relationships with children. A non-dependent child is more likely to have relationships that implicate impartiality concerns than dependent children, who, being dependents as defined at 26 U.S.C. § 152 (e.g., minors or students), are relatively unlikely to have the sorts of business relationships raising those concerns.

I would also suggest that some consideration be given to adding an example after (b)(3) to the effect that a history of litigation between the agency employee and party to the matter (as, for example, a wrongful discharge action) is a situation where the employee's impartiality would be called into question, and that such a concern would potentially extend well beyond any fixed cooling-off period.

§ 2635.603
The current definition provides, at (b)(2)(ii), that an employee is no longer seeking employment if more than two months have transpired from the dispatch by the employee of an unsolicited résumé. In the three decades since that time frame was enshrined in the rule, the mechanisms for job seeking have changed. A review of public sources suggests that at present, two weeks is a typical time within which an applicant will hear back from a prospective employer. Consideration should be given to revising the definition to reflect a more rapid turnaround than may have been the case in the past.

Consideration should also be given to providing an example that clarifies whether an employee who learns from a third party that they are no longer under consideration (e.g., the position has been filled by someone else) can rely on that knowledge to conclude that the prospective employer has rejected the possibility of hiring the employee.

Finally, the definitions inherently assume that the employee seeking employment does so by reaching out to particular persons, as by submitting a résumé to a specific company. The rule does not address how to handle a situation where an employee posts their interest in a new position publicly for consideration by the world (e.g., a social media site such as LinkedIn, or by meeting a recruiter who will be forwarding one's name for consideration by multiple, potentially unknown, companies). Clarifying examples of when the recusal requirement begins (and ends) in that type of situation would be warranted.

§ 2635.704
The proposed rule would remove a reference to a deprecated GSA regulation and to substitute an example hinging on a notional agency policy relating to personal use of government e-mail. I would suggest that, in the absence of a GSA regulation, it would be appropriate for OGE to provide somewhat more guidance than is proposed. With the advent of telecommunications and computing technology that can be carried in your pocket, the standard for what constitutes acceptable personal use of Government resources should change compared to a time when making a personal call necessitated using the phone on one's desk, or leaving the building to use the payphone on the corner. Some definitive guidelines in this area from OGE would be welcome.