

## II. Section-By-Section Analysis

The following section-by-section analysis discusses each section of the new proposed part 2601 regulation.

### A. General Provisions

1. Proposed § 2601.101 would set forth the legal authority under section 2 of the Office of Government Ethics Authorization Act of 1996 for the promulgation of this rule.

2. Proposed § 2601.102 would state that the purpose of this rule is to establish written guidelines regarding OGE's implementation of its statutory gift authority.

3. Proposed § 2601.103 would set forth the policies that would guide OGE's interpretation and use of its gift authority. These policies deal with the scope of OGE's gift acceptance authority, permitted uses of gifts, sources of gifts, endorsement issues arising from the agency's acceptance of a gift, and types of gifts.

Proposed § 2601.103(a) would reflect OGE's interpretation that its statutory authority to "accept and utilize" gifts embraces the authority to accept, receive, hold, retain, utilize, use, administer, manage, sell, spend, liquidate, and dispose of a gift. It also includes the authority to destroy a gift, provided that such action is otherwise in accordance with Federal regulations, as for example, Federal property management regulations contained in chapters 101 and 102 of 41 CFR.

OGE also interprets the "accept and utilize" language as embracing the authority to invest or reinvest gifts. A number of agencies have express statutory language authorizing the agency to invest or reinvest gifts. However, even in the absence of such express language, the authority to "utilize" gifts includes the authority to properly manage property obtained by gift. In the case of monetary gifts or the proceeds of the sale of tangible gifts, this would include prudent investment or reinvestment. OGE will invest any available gift funds in interest bearing securities of the United States, as is the customary practice of executive branch agencies.

In addition, OGE interprets the authority to "accept and utilize" gifts as encompassing the authority to exchange one tangible gift for another. At least one agency has express statutory authority to "deal with" gifts. OGE might, for example, exchange or trade in donated equipment for other more useful equipment. Or, for example, if OGE were given a gift of common stock in a publicly traded company, it could convert that gift of stock to Government

securities. OGE believes that such trading or exchange of gifts would be rare. Other Federal entities might have more occasion to exchange or trade gifts. For example, an agency authorized to accept real property might exchange a particular parcel of donated land for another parcel that abuts other land for which the agency is responsible. Or a Federal museum that received gifts of art objects, gems or other items for its collections, or a Federal visitors center that had exhibits, might apply its authority to utilize gifts to trade or exchange a gift for another item that was more appropriate or relevant to its collection.

The authority to "accept and utilize" gifts also encompasses the authority to solicit gifts. The legislative history indicates that a primary purpose for granting this authority was to further OGE's training activities. In order to utilize effectively this authority for this purpose, it would be necessary for authorized employees to be able to contact persons who may be able to provide training facilities and services. OGE may also use this authority, e.g., to seek gifts of transportation and travel-related expenses. However, under the regulations as proposed, an employee would not be permitted to engage in an official capacity in activities on behalf of a private entity, to raise funds for future donation to the Office of Government Ethics.

Proposed § 2601.103(b) would state the purposes or activities for which gifts may be used. The statute authorizes OGE to use gifts "for the purpose of aiding or facilitating the work of the Office of Government Ethics." Although support of training activities is expected to be one of the most common uses, OGE envisions that this authority may be used for other activities as well. This is consistent with the broad language of section 403(b)(1) of the Ethics Act.

Although the gift statutes of other agencies use somewhat different language, the various agency authorities describe a link to, or connection with, the work of an agency, its programs, activities or functions. Similarly, OGE interprets the language of "aiding or facilitating the work of" OGE to mean that gifts may be utilized to further any activity that has a relationship to the programs, functions or activities of OGE. Gifts may be used by or for the benefit of OGE employees, provided that such use is otherwise permitted. For example, gifts may be used in accordance with this part as proposed to enhance employee morale or to recruit new employees.

Gifts may also be used for official travel other than travel that is covered

by section 1353 of title 31, United States Code. For example, when an OGE employee is engaged in carrying out a core agency function that is outside the scope of section 1353, OGE's statutory authority could be used. See, for example, OGE Informal Advisory Letter 98 x 8 (dealing with acceptance of a gift of ground transportation), which is included in *The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics*, as published by the U.S. Government Printing Office, and is also available in the Advisory Opinions section of OGE's Web site at <http://www.usoge.gov>.

Proposed § 2601.103(c) would state OGE policy with regard to the sources from which gifts may be accepted. The Ethics Act does not impose any restriction with regard to any particular source of a gift. The main concern with regard to the source of a gift is raised by a source that would be a "prohibited source" for the purpose of gifts to an agency employee. As defined by the statute on gifts to Federal employees, at 5 U.S.C. 7353(a), and OGE's regulation implementing the Standards of Ethical Conduct for executive branch employees, at 5 CFR 2635.203(d), a prohibited source is any person who is seeking official action from, doing business with (or, under the Standards, seeking to do business with), or conducting activities regulated by, the employee's agency, or any person whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. The Standards of Ethical Conduct further clarify that an organization made up of a majority of prohibited sources is itself a prohibited source of gifts. See 5 CFR 2635.203(d)(5). Some agencies do bar the acceptance of a gift to the agency from donors who would be considered prohibited sources for gifts to its employees. OGE, however, has determined that barring the acceptance of a gift from a prohibited source or from any other particular class of donors would be unduly restrictive. When a gift is from a prohibited source, there are different considerations if the gift is made to an agency rather than to an individual employee. Accordingly, the identity of the source is evaluated as one key factor in applying the conflict of interest standard to determine whether acceptance of a gift is appropriate. Although the proposed rule would not preclude OGE's acceptance of gifts from prohibited sources, such gifts would be scrutinized to try to ensure that their acceptance would not reflect unfavorably upon OGE or its employees.