

April 26, 1999
DO-99-017

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Stephen D. Potts
Director

SUBJECT: Prizes as gifts -- Guidance concerning the exclusion at 5 C.F.R. §
2635.203(b)(5)

The standards of ethical conduct for executive branch employees, as promulgated by the Office of Government Ethics (OGE) in 1992, provide several exclusions from the definition of "gift," for purposes of the restrictions on receiving items of monetary value from certain outside sources.(1) These gift exclusions, described at 5 C.F.R. § 2635.203(b), recognize trivial, customary, or common-sense situations where items may be readily accepted by Government employees, without regard to the source or the circumstances surrounding receipt.

The exclusion at § 2635.203(b)(5) has periodically raised questions of interpretation and meaning with regard to various factual circumstances. It provides that gifts do not include "rewards and prizes given to competitors in contests or events, including random drawings, open to the public unless the employee's entry into the contest or event is required as part of his official duties." The following discussion examines some commonly encountered factual circumstances that arise under this gift exclusion, specifically concerning prizes from drawings or contests (hereinafter, "contests") entered while in an official duty status.

CONTEST ENTRY MUST BE OPEN TO THE PUBLIC

In order for a contest prize to qualify under this gift exclusion, the first condition is that the contest must be open to the general public. In the final rule preamble to the standards of conduct regulation at 57 Fed. Reg. 35013 (August 7, 1992), OGE emphasized the importance of this requirement: "Where a contest is open to the public,(2) the danger is remote that a prohibited source will use the contest as a means of giving something to an employee or that a reasonable person would question the motive for any prize awarded. Where the contest is not open to the public, appearance issues may arise without regard to whether the contest is related or unrelated to the employee's official duties."

Two examples where openness to the public may typically be an issue are contests entered by an employee while officially attending a conference or trade show and contests that occur in connection with official travel:

1) If a conference or trade show is itself open to anyone without qualification or fee, then a contest held at that event will be considered open to the public. An employee could voluntarily enter a drawing at an individual vendor's booth in his private capacity (see the discussion below about entry related to duty) and keep a resulting prize. If, however, a fee is charged to attend the conference or trade show, or other factors effectively limit who can attend (such as artificial constraints placed on the number of attendees, or attendance restricted to those with certain requisite skills or work assignments), then that event cannot be characterized as truly open to the public. These circumstances effectively narrow the opportunity to participate in the contest by limiting the pool of eligible participants. Under these conditions, the opportunity to enter a contest would have to be extended beyond the conference or trade show participants to any other interested persons, in order to be considered open to the general public. That might occur where a vendor at a conference or trade show makes the opportunity to enter a drawing reasonably available to anyone, such as by providing entry blanks to the general public prior to conducting the drawing.

2) When a Government employee on official travel as an airline passenger voluntarily enters a contest sponsored by the air carrier, it will be viewed as open to the general public if entry blanks were made available not only to ticketed passengers but also to anyone else at no expense, by writing to the air carrier. This was the factual basis in Comptroller General Opinion B-199656 of July 15, 1981, which was cited in the preamble to the standards of conduct regulation at 57 Fed. Reg. 35013 (August 7, 1992) as a background reference. In contrast, if the contest is limited to the airline's customers, it cannot be considered open to the public.

CONTEST ENTRY MUST NOT BE RELATED TO OFFICIAL DUTY

In addition to the requirement that a contest be open to the public, the gift exclusion at 5 C.F.R. § 2635.203(b)(5) specifically does not include prizes where "the employee's entry into the contest or event is required as part of his official duties." The language quoted earlier from the preamble at 57 Fed. Reg. 35013 also suggests this separate concern, but characterizes it as "whether the contest is related or unrelated to the employee's official duties." Thus, the term "required as part of his official duties" was not intended to be restricted to circumstances that mandate participation, but also to encompass other situations where the employee's participation is related to official duties, as described below.

This limitation on the gift exclusion for prizes reflects a number of ethical and legal principles. First, the executive branch standards of conduct contain a fundamental principle at 5 C.F.R. § 2635.101(b)(7) that employees shall not use public office for private gain. Additionally, a criminal statute at 18 U.S.C. § 209 generally prohibits supplementation of an employee's salary from any source other than the United States as compensation for services as a Government employee. Finally, fiscal law considerations, as interpreted by opinions of the Office of Legal Counsel at the Department of Justice and the Comptroller General of the United States, and by regulations of the General

Services Administration, generally preclude an individual employee's acceptance of benefits received in connection with the performance of official duty.

However, not all contests that are entered while on official assignment will be deemed related to or required by duty. As OGE concluded in the above-cited preamble text to the standards of conduct regulation, "an employee may accept a prize in a contest or random drawing open to the general public even though the opportunity to enter the contest occurs while or because the employee is on official duty." Thus, if a Government employee voluntarily enters a contest in his personal capacity during an official assignment, he would not ordinarily be precluded by reason of that duty assignment from accepting a prize. On the other hand, if entry into the contest is related to duty in any way other than the employee's mere presence and opportunity to enter the contest, a resulting prize must be viewed as property of the Government. The following examples illustrate these principles:

1) If an employee on official assignment to attend a trade show or conference voluntarily enters a drawing (open to the public) in his personal capacity at an individual vendor's booth, his acceptance of a resulting prize would not be precluded by his official status, as entry into the contest was not required by or related to duty. If, however, all attendees at a conference are automatically entered in a drawing as a consequence of conference registration, the Government employee who attends officially could not accept any resulting "door" prize, because entry in the contest was required as part of his official duties. Similarly, the employee could not accept a prize received where entry into a drawing was restricted to those attendees who completed a conference evaluation sheet, as the act of completing that evaluation, even if optional, must be viewed as incident to the performance of official duties.

2) In situations other than attending a conference or trade show, the same rules obtain. For example, if a Government employee qualifies for entry into a contest because she purchased a specified quantity of supplies for her agency or planned an agency conference, a resulting prize belongs to the Government, because entry into the contest was related to official duties. Similarly, if members of a military drill team were to officially enter a marching contest, a resulting prize belongs to the Government, because entry into the contest was required as part of their duties. In both of these instances, entry into the contests did not occur through mere official presence and opportunity, but as incident to official duty. These employees did not enter a contest in their personal capacity, but as a requirement or consequence of their official duties.

CONCLUSION

Notwithstanding the gift restrictions at subpart B of 5 C.F.R. part 2635, the gift exclusion at 5 C.F.R. § 2635.203(b)(5) may permit an employee to accept a prize in a contest entered while on an official duty assignment, using the guidance herein. If that exclusion does not apply because the contest was not open to the general public or the employee's entry into the contest was related to duty, then the prize is not acceptable by the employee, unless he pays fair market value or it falls within an exception such as that at 5

C.F.R. § 2635.204(a) for gifts of \$20 or less. Alternatively, an agency may determine that it has authority to accept a prize in its own behalf, but that is an issue beyond the scope of the standards of ethical conduct for executive branch employees that this Office oversees.

1. Under subpart B of 5 C.F.R. part 2635, gifts may not be accepted from a "prohibited source" or if given "because of the employee's official position," as those terms are defined therein, absent circumstances described in one of the exceptions. If a prize is neither from a prohibited source nor given because of official position, its acceptance would not be barred by this regulation, regardless of whether it is excludable from the definition of a gift.

2. As explained in the preamble, the term "public" means general public, not just a broadly defined class of persons, as was first proposed.