

UNITED STATES OFFICE OF
GOVERNMENT ETHICS



July 18, 2016
LA-16-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: Walter M. Shaub, Jr.
Director

SUBJECT: Supreme Court Decision in *McDonnell v. United States*

On June 27, 2016, the U.S. Supreme Court issued its opinion in *McDonnell v. United States*, 579 U.S. ___, 195 L. Ed. 2d 639 (2016), which vacated the lower courts' conviction of former Virginia Governor Robert F. McDonnell on bribery charges. The U.S. Office of Government Ethics (OGE) is issuing this legal advisory to emphasize that the Supreme Court's holding in *McDonnell* does not affect other applicable prohibitions on Federal employees' solicitation or acceptance of gifts, including 5 U.S.C. § 7353 and 5 C.F.R. § 2635.202(a).

The Court's holding in *McDonnell* rested on its construction of the term "official act" as found in 18 U.S.C. § 201(a)(3), which is an element of both the Federal bribery and Federal illegal gratuities statutes. *See* 18 U.S.C. § 201(b)-(c). Citing the statutory definition of the term, the Court noted that "An 'official act' is defined as 'any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.'" *McDonnell v. United States*, 195 L. Ed. 2d at 652-653 (citing 18 U.S.C. § 201(a)(3)). Elaborating on the meaning of this definition, the Court provided the following explanation:

In sum, an "official act" [under the statutory definition] is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That

decision or action may include using his official position to exert pressure on another official to perform an “official act,” or to advise another official, knowing or intending that such advice will form the basis for an “official act” by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of “official act.”

Id. at 660.

Section 201 is, however, “merely one strand of an intricate web of regulations . . . governing the acceptance of gifts and other self-enriching actions by public officials.” *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 409 (1999). For example, 5 U.S.C. § 7353 prohibits an executive branch employee from soliciting and accepting gifts from any prohibited source, unless an exception promulgated by regulation applies. Likewise, the Standards of Ethical Conduct for Employees of the Executive Branch, at 5 C.F.R. § 2635.202(a), prohibit an employee from soliciting or accepting any gift, directly or indirectly, if the gift is given because of the employee’s official position or the person offering the gift is a prohibited source. There is no requirement for the gift to be made in connection with any “official act” for these prohibitions to apply. These prohibitions apply to anything having monetary value unless the item is excluded from the definition of “gift” under 5 C.F.R. § 2635.203(b) or qualifies for one of the narrowly tailored exceptions set forth in 5 C.F.R. § 2635.204.

Violation of 5 C.F.R. § 2635.202(a) may be the basis of corrective action or disciplinary measures, up to and including removal. 5 C.F.R. § 2635.106. The violation may also constitute a breach of fiduciary duties to the Government, which may be the basis of a civil action for disgorgement. *See e.g., United States v. Project on Gov’t Oversight*, 839 F. Supp. 2d 330, 349-354 (D.D.C. 2012), *aff’d per curiam* 766 F.3d 9 (D.C. Cir. 2014).

The Court’s opinion did not address the application of 5 U.S.C. § 7353, 5 C.F.R. § 2635.202, or any other ethics law; rather, the Court opined solely on the construction of 18 U.S.C. § 201(a)(3). Consequently, the *McDonnell* opinion also does not affect OGE’s legal interpretation of the criminal conflict of interest statutes at 18 U.S.C. §§ 202-209 or OGE’s interpretation of the gift prohibitions at 5 U.S.C. § 7353 or 5 C.F.R. § 2635.202(a). As always, if ethics officials have specific questions about the opinion that are not addressed in this advisory, they are welcome to contact their OGE Desk Officers for further assistance.