



Association of Federal Health Organizations

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Established 1983



November 14, 2011

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U.S. Office of Government Ethics
1201 New York Avenue, NW, Suite 500
Washington, DC 20005-3917
Attention: Richard M. Thomas, Associate General Counsel.

Submitted via the Federal eRulemaking Portal

Dear Mr. Thomas:

The Association of Federal Health Organizations ("AFHO") appreciates this opportunity to provide comments on the Notice of Proposed Rulemaking concerning the Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts from Registered Lobbyists and Lobbying Organizations published at 76 Fed. Reg. 56,440 (September 13, 2011). AFHO is a national association of Federal Employees Health Benefits ("FEHB") plan carriers. AFHO's member organizations sponsor FEHB plans that provide health benefits coverage to over three million federal and postal employees and annuitants.¹

AFHO is composed of carriers which would be lobbying organizations within the meaning of the proposed rule and carriers which would not fit that definition. See proposed 5 C.F.R. § 2635.203(h). We wish to call to your attention two common situations in our sphere which merit continued de minimis rule treatment even if the carrier is a lobbying organization – Inexpensive promotional items and low cost business meals in connection with on-site meetings.

Inexpensive promotional items

The FEHB Program is the nation's largest consumer choice market for health plans. Every year, in accordance with the FEHB Act, 5 U.S.C. § 8905(g), and implementing U.S. Office of Personnel Management ("OPM") regulations, 5 C.F.R. Part 890, Subpart C, carriers market their plans to federal employees. The Federal Benefits Open Season for 2012 starts today, as we are sure you know. When engaging in marketing, carriers must adhere to applicable OPM regulations 48 C.F.R. Ch. 16, Part 1603, and contract requirements.

¹ AFHO's members include American Foreign Service Protective Association, American Postal Workers Union, Compass Rose Benefits Group, Government Employees Health Association, Mail Handlers Benefit Plan, National Association of Letter Carriers Health Benefit Plan, National Rural Letter Carriers' Association, Panama Canal Area Benefit Plan, Special Agents Mutual Benefit Association, and Associate Members Blue Cross Blue Shield Association and Aetna Life Insurance Co. AFHO members reserve the right to comment individually on this proposed rule.

Mr. Richard M. Thomas

November 14, 2011

Page 2

The carrier may be deemed to be a "prohibited source" for purposes of the outside source gift rule if an employee works for an agency that does business with the carrier, such as the Office of Personnel Management, or regulates the carrier's activities, such as the Health and Human Services Department's Office for Civil Rights. See 5 C.F.R. § 2635.203(d). Throughout the year, and particularly during Federal Benefits Open

Season, carriers may offer federal employees across the government, regardless of any prohibited source status, free promotional items, such as weight control calendars, as part of their benefit plan marketing and public relations efforts. These cost of these inexpensive items to the carrier fall under the de minimis exception from the outside sources gift rule, 5 C.F.R. § 2635.204(a).

Consequently, although the promotional items in our view are generally available opportunities or discounts exempt from the gift from outside sources rule, 5 C.F.R. § 2635.203(b)(4), carriers can always fall back on bright line – for employees and prohibited sources -- created by the de minimis exception. See 76 Fed. Reg. 56, 332: "OGE cannot deny the convenience of the \$20 de minimis rule as currently applied. It provides a bright line test." However, the proposed rule would deprive carriers that are lobbying organizations of this bright line test. As a result, a carrier which is a lobbying organization may have to adjust its marketing practices based on the agency for which the employee works, which would be an unnecessary burden on carriers and employees and create an uneven playing field among carriers contrary to the best interest of the FEHBP.

Low cost meals in connection with on-site meetings

From time to time, carriers may receive "site visits" from OPM employees whose agency contracts with the carrier for an FEHB plan. The carrier is a prohibited source with respect to these employees. In addition, carriers may also hold other educational events for federal employees from various agencies, such as pre-retirement seminars for those who are contemplating retirement. The carrier may or may not be a prohibited source with respect to these employees.

Carriers occasionally provide low cost food and beverages to site visitors and event attendees from the federal government so that, for example, the meeting or event participants can work through or shorten the lunch hour. Under the outside sources gift rule, providing federal government employee visitors with coffee and donuts is not a gift, but providing those visitors with a bottle of water and a ham and cheese sandwich may be considered a meal subject to the outside sources gift rule. See 5 C.F.R. § 2635.203(b)(1). Carriers and employees currently may rely on the bright line created by the de minimis exception to furnish the sandwich.

In our view, a bright line remains necessary for these common, benign situations that bear no relationship to the reprehensible Jack Abramoff-type violations that lead to these amendments. See 76 Fed. Reg. 56,331, 56,332. We therefore ask OGE to create exceptions from the proposed rule that (1) allow federal benefits carriers that are both prohibited sources and lobbying organizations to distribute promotional items to federal employees for benefit plan marketing or public relations purposes and (2) allow government contractors that are both prohibited sources and lobbying organizations to provide

Mr. Richard M. Thomas

November 14, 2011

Page 3

low cost food and drink to federal employees who are engaged in a site visit, attending an on-site meeting, or an educational event as long as the de minimis exception stated in 5 C.F.R. § 2635.204(a), is met in both situations.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Ermer", with a long horizontal flourish extending to the right.

David M. Ermer
AFHO General Counsel

cc: Board of Directors

Daniel A. Green, OPM

Anne Easton, OPM

Shirley Patterson, OPM

Sylvia Pulley, OPM

William Stuart, OPM