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VIA ELECTRONIC DELIVERY

Ms. Julia Eirinberg
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United States Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3917

Re: Comments on Office of Government Ethics proposed amendments of
Standards of Ethical Conduct for Employees of the Executive Branch
limiting gifts from registered lobbyists and lobbying organizations

RIN 3209-AA04

Dear Ms. Eirinberg:

Through this letter the Consumer Electronics Association (“CEA”) submits comments opposing the proposal of the Office of Government Ethics (“OGE”) to amend the regulations governing Standards of Ethical Conduct for Employees of the Executive Branch, codified at 5 CFR part 2635, to 1) impose restrictions on all employees of the executive branch (other than full-time non-career appointees) on the use of gift exceptions to accept gifts from registered lobbyists and lobbying organizations and 2) incorporate within the Standards of Ethics Conduct the ban on acceptance of gifts from registered lobbyists and lobbying organizations by full-time, non-career appointees who are required to sign the Ethics Pledge prescribed by Executive Order 13490. The proposed rule on which CEA is commenting through this submission was published on September 13, 2011 at 76 FR 56330 and is referenced by Regulation Identifier Number (RIN) 3209-AA04.

CEA objects to the proposed rule on a number of grounds, as discussed below. We wish to emphasize, however, that CEA’s primary concern is OGE’s proposal to prohibit Executive Branch employees from participating in substantive widely attended gatherings sponsored by trade associations and other lobbying organizations (with very limited exceptions). There is no legitimate, rational basis for this prohibition, and the OGE proposal articulates no such basis.

In a time characterized by a weak marketplace and high unemployment, government and the private sector must work as partners to revive the American economy. Instead, the provisions of OGE’s proposed rule will drive a further wedge between policymakers and job creators. As discussed in more detail below, therefore, CEA urges OGE to abandon its proposal to further restrict gifts from lobbyists and lobbying organizations.

I. Summary of comments

- As an organization registered under the LDA, CEA's activities would be affected directly and adversely by the proposed rule. CEA member organizations would also be affected directly and adversely by the rule. Therefore, CEA has standing to participate in this rulemaking, both on its own behalf and on behalf of its members.
- Existing executive branch restrictions on gifts from "prohibited sources" and on gifts given because of official position adequately protect the operation of government from undue influence.
- The proposed rule prohibits executive branch employees from accepting offers of free attendance to "widely attended gatherings" from "registered lobbyists or lobbying organizations," even when such gatherings are inarguably substantive, educational, and informational. As such, the proposed rule:
 - Directly contradicts the underlying, historical purpose of the "widely attended gathering" exception to encourage the flow and exchange of information for the benefit of the operation of the government;
 - Is entirely unsupported by the rationale articulated by OGE in the rulemaking proposal itself that "social events" may be problematic;
 - Irrationally disadvantages executive branch employees, in relation to legislative branch employees, with respect to the receipt and exchange of information essential to the performance of official duties.

The proposed rule should be abandoned or, at a minimum, should be redrafted to eliminate or minimize these concerns while still achieving its expressed purpose.

- Elimination of the de minimis exception for low value gifts from lobbying organizations would competitively disadvantage companies that employ lobbyists.
- Elimination of the "foreign areas" exception for gifts from lobbying organizations would disadvantage companies that employ lobbyists in competing for business in foreign markets.
- All comments set forth herein as to career and other non-political appointee executive branch employees apply with equal force to the provision of the proposed rule incorporating the restrictions on receipt of lobbyist gifts by political appointees set forth in Executive Order 13490.
- The proposed rule is invalid pursuant to the requirements of the Administrative Procedure Act in that it is arbitrary and capricious and contrary to constitutional right and privilege.

II. **Standing: As an organization registered under the Lobbying Disclosure Act, CEA's activities would be affected directly and adversely by the proposed rule. CEA member companies would also be affected directly and adversely by the rule. Therefore, CEA has standing to participate in this rulemaking, both on its own behalf and on behalf of its members.**

The Consumer Electronics Association is a 501(c)(6) organization uniting more than 2,000 companies within the over \$172 billion consumer technology industry. CEA serves as the industry authority on: market research and forecasts; consumer surveys; legislative and regulatory news and issues; engineering standards; and training resources. CEA members include: manufacturers and distributors of consumer electronics or related products; providers of technologies or services that inter-operate with or enhance a consumer electronic device; companies that conduct business within the consumer electronics industry

(for example, consultants, investment firms, and analysts); and companies that sell or install consumer electronics. CEA is registered under Title 2 U.S.C. § 1603 of the Lobbying Disclosure Act (“LDA”). The CEA has a staff of approximately 140 persons, six of whom were listed as lobbyists in the CEA’s LD-2 quarterly lobbying report filed in October 2011. Based on its registration under the LDA, CEA would be a “registered lobbyist or lobbying organization” as those terms are used in OGE’s proposed rule limiting gifts from registered lobbyists and lobbying organizations.¹

CEA provides a wide range of programs, services, and resources, including producing and sponsoring a number of annual events for and about the consumer electronics industry. CEA’s premiere annual event is the International Consumer Electronics Show (“CES”), the world’s largest consumer technology trade show. The International CES serves as the central stage for seeing, demonstrating and understanding the latest technological innovations in both products and services and serves as the world’s largest, and most effective, forum for obtaining industry knowledge and for exchanging information, opinion and forecasts about the continually developing consumer electronics industry.

Within CES, CEA also provides the Leaders in Technology Program (“LIT”). The LIT program offers technology policy leaders, from both the private sector and the public sector, the opportunity to attend the exhibits, educational sessions, panels and events available to other CES attendees, but also provides LIT participants with more focused opportunities to speak directly to top industry leaders and executives and to attend dedicated LIT events.

Both CES and LIT have traditionally drawn wide attendance and participation, not just from the private sector, but also from among employees and officials of both the executive and legislative branches of the federal government. Because OGE’s proposed rule limiting gifts from registered lobbyists and lobbying organizations would eliminate entirely CEA’s ability to offer free attendance to its industry events to executive branch employees – and for other reasons, discussed below, affecting CEA and its members – OGE’s proposed rule would directly and adversely affect the operation and mission of CEA and of CEA’s members. Therefore, for the reasons set forth above, CEA has standing to comment on, and challenge, OGE’s proposed rule, both on its own behalf and on behalf of its members.

III. Existing executive branch restrictions on gifts from “prohibited sources” and on gifts given because of official position adequately protect the operation of government from undue influence.

Since 1992, the existing Standards of Conduct for Employees of the Executive Branch, at 5 CFR 2635, Subpart B, have restricted the solicitation and acceptance of gifts. Under these regulations, an executive branch employee may not, directly or indirectly, solicit or accept any gift either from a prohibited source or given because of the employee’s official position. A “prohibited source” means any person who:

- Is seeking official action by an employee’s agency;
- Does business or seeks to do business with the employee’s agency;
- Conducts activities regulated by the employee’s agency;

¹ At § 2635.203(h) of the proposed rule “registered lobbyist or lobbying organization” “means a person (including an organization) currently registered pursuant to 2 U.S.C. 1603 (Lobbying Disclosure Act) or listed as a lobbyist in such a registration, as found in the databases maintained by the Secretary of the Senate and the Clerk of the House of Representatives . . .” “Registered lobbyist or lobbying organization,” for purposes of the proposed rule, does not include: an organization exempt from taxation under 26 U.S.C. 501(c)(3); an institution of higher education as defined in 20 U.S.C. 1001; a media organization, with respect to a gift made in connection with information gathering or dissemination activities; a “non profit professional association, scientific organization or learned society, with respect to any gift made in connection with the entity’s education or professional activities.”

- Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; or
- Is an organization a majority of whose members are described in one of the above categories.

Notwithstanding this general prohibition, if a gift falls within an enumerated exception an executive branch employee may accept the gift even if from a prohibited source or if given because of the employee's official position.

Plainly, the entire framework of the current executive branch gift regulations rests on the well-reasoned and carefully applied assumption that executive branch employees may accept certain gifts from persons who directly seek to influence them or their agency and may do so without raising any question of real or apparent corruption or impropriety. This framework has been in place and has functioned without essential criticism or question for almost 20 years.

OGE's proposed rule flies in the face of the history and the rationale of how acceptance of gifts are regulated in the executive branch. How does a "registered lobbyist or lobbying organization" differ from any other "prohibited source" seeking to do business with or influence an agency or employee? They do not differ in any relevant way. How does OGE's proposed rule demonstrate a basis for distinguishing between "registered lobbyists and lobbying organizations" and other "prohibited sources" equally intent on influencing the government? The proposed rule does not demonstrate any such basis. It is simply based on the assumption, accepted as if proven, that additional regulation of gifts from lobbyists is justified.

This unproven assumption leads to such broad statements in the proposed rule as: "When . . . gifts are offered by persons who are paid to influence government action, the concerns obviously are magnified." On the one hand, saying these magnified "concerns" are "obvious" is nothing more than a means of avoiding the requirement to provide actual support for the proposal to restrict gifts from lobbyists. On the other hand, accepting that concern over gifts may be magnified when the source is "paid to influence government action," that concern is no greater with "registered lobbyists and lobbying organizations" than it is with any other "prohibited source" paid to influence the government.

IV. The proposed rule prohibits executive branch employees from accepting offers of free attendance to "widely attended gatherings" from "registered lobbyists or lobbying organizations," even when such gatherings are inarguably substantive, educational, and informational. As such, the proposed rule:

- **Directly contradicts the underlying, historical purpose of the "widely attended gathering" exception to encourage the free flow and exchange of information for the benefit of the operation of the government;**
- **Is entirely unsupported by the rationale articulated by OGE in the rulemaking proposal itself that "social events" may be problematic;**
- **Irrationally disadvantages executive branch employees, in relation to legislative branch employees, with respect to the receipt and exchange of information essential to the performance of official duties.**

The proposed rule can, and should, be abandoned or, at a minimum, redrafted to eliminate or minimize these concerns while still achieving its expressed purpose.

In addition to the general prohibition at 5 CFR 2635.202(a) on gifts "from a prohibited source" or "given because of [an] employee's official position," OGE's proposal would amend the current regulation by

adding a proposed clause (6) to § 2635.202(c), on “Limitations on use of exceptions,” whereby, notwithstanding any exception set forth at § 2635.204, an executive branch employee would be prohibited from accepting “a gift from a registered lobbyist or lobbying organization, unless pursuant to paragraphs (b), (c), (d), (e), (f), (j), (k) and (l) of § 2635.204.” Under the current rules, pursuant to § 2635.204(g)(2), executive branch employees may accept “an unsolicited offer of free attendance at all or appropriate parts of a widely attended gathering of mutual interest to a number of parties” even where this offer of free attendance is extended by a “prohibited source” or is extended because of an employee’s official position. Under proposed § 2635.204(c)(h), however, where the “prohibited source” or person extending the offer of attendance because of the employee’s official position is also a “registered lobbyist or lobbying organization,” the executive branch employee would be prohibited from accepting an offer of attendance at a “widely attended gathering.”

Throughout the discussion concerning “widely attended gatherings” in its rulemaking proposal, OGE cites with approval and as authoritative its December 5, 2007 DAEOgram on “Widely Attended Gatherings,” DO-07-047. In that 2007 DAEOgram, OGE – quoting from its own, earlier Informal Advisory Memorandum, 87 x 13 – explained the basic purpose of the “widely attended gathering” exception:

[OGE] believe[s] that there are certain instances where an agency may have a legitimate interest in permitting attendance at certain group events where food is served so that employees may be able to meet on a less formal basis and have an interchange of ideas with a variety of individuals, including members of nongovernmental groups, legislators and other Government agency personnel, who are interested in but may have divergent positions on the same issues.

Simply put, the purpose of the “widely attended gathering” exception was, and is, to promote better government by promoting better informed government.

CEA’s CES and LIT events are exemplary instances of the kinds of informational events the “widely attended gathering” exception was, and is, intended to cover. Take for example, the LIT program at the upcoming 2012 CES. The LIT program itself will meet the criteria of the widely attended gathering exception in that it will be attended by a large number of persons with a diversity of views and interests, from throughout the consumer electronics industry. To be sure, attendance at this multi-day program will involve occasions for meals with the other program attendees, occasions that are entirely permissible under the exception. Of central relevance under the exception, however, is that the informational and educational component of the 2012 LIT, as in previous years, will be inarguably substantial. Throughout any given day of this event, government and private sector attendees will be able to attend such sessions as: addresses by leaders of such industry leading corporations as Microsoft, Qualcomm, Daimler AG, Ericsson Group, and eBay; conversations and panels with agency leaders at the Federal Communications Commission; panels on such topics as online copyright infringement and enforcement responses; digital content and distribution; energy efficiency, innovation, and economic growth; automotive applications of consumer electronics technologies; wireless broadband spectrum issues; current and future advancements in the industry; online privacy; technology and innovation as a roadmap to economic recovery; green standards and consumer electronics; cracking down on counterfeit products; product refurbishment and reuse in the developing world; developments in the cable, broadcast and on-the-go television.

Like other “widely attended” gatherings – in other industries and fields – focused on educating and informing, CES and LIT provide multiple opportunities for face to face and group exchanges between regulators and the regulated community. These events expose government participants to both instructive affirmation and constructive criticism of agency policies and activities. And these events provide invaluable opportunities for government attendees to explain, to persuade, and to engender understanding of and support for these agency policies and activities. Much as this may be the era of the virtual meeting, no number of webinars or video conferences can educate and inform government employees as fully or as

efficiently, or on so broad a range of matters essential to their official duties, as can attendance with peers from throughout an industry at conferences, symposia, or similar educational or informational events.

Promoting better government by promoting better informed government. Opposition to this longstanding rationale for the “widely attended gathering” exception would appear to be impossible to justify. Yet the proposed OGE rule limiting gifts from registered lobbyists and lobbyist organizations would undermine this rationale by prohibiting any so-called “lobbying organizations” – including any organization, like CEA, which employs only a few lobbyists to lobby only for itself or its members – from offering free attendance to government employees even to inarguably educational and informational “widely attended gatherings.” The proposed restrictions on sponsorship of such informational “widely attended gatherings” represent a deliberate, drastic dumbing-down of government and the regulatory process for which the rulemaking offers no even arguably reasonable or sufficient justification.

Insofar as OGE’s rulemaking proposal offers any substantive rationale for restricting application of the “widely attended gathering” exception, that rationale is limited entirely to instances where the exception would be used to offer free attendance to social events, to other events without a substantial informational component, or to events that are not truly “widely attended.” *At no time does the notice of proposed rulemaking suggest that there are any problems with educational events such as the CES.*

For example, in its discussion of the “General Approach” to the “Proposed Amendments to the Standards” at section II.A of the proposal – and, through that discussion, in justifying the broadened application of lobbyist gift prohibitions from the fairly limited class of “political appointees” covered by the Ethics Pledge to the extensive class including all other federal executive branch employees – OGE notes its “belief” that “the most important salutary effect” of the Pledge ban “has been the elimination of *sometimes questionable* ‘widely-attended gatherings,’ ‘social invitations,’ and other gifts that might have been permissible . . . had the gifts not been extended by registered lobbyists or lobbying organizations.” (Emphasis added.) OGE then further explains that the gifts to be included in this “sometimes questionable” category – and the elimination of which in connection with political appointees was accomplished by the Pledge – are “gifts, such as attendance at certain events, *where the nexus to the purpose of the exception is attenuated at best.*” (Emphasis added.) OGE then cites, in support of this thread of argument, its December 2007 DAEOgram, DO-07-047, already cited above in these comments. In this DAEOgram, OGE had cited the types of events to which application of the “widely attended gathering” exception could be problematic: receptions, gala celebrations, and similar social events even if widely attended; charity fundraisers; sporting events; theatrical and musical events; company parties (including, for example, holiday parties); contract-sponsored seminars primarily focused on a given company’s products or service; board meetings; and university events that are limited almost exclusively to the community within one university.

OGE’s past concerns about “social events” (or other similarly non-qualifying events) *never* encompassed clearly widely and diversely attended events with substantial educational and informational components. OGE’s past concerns never encompassed events like CES or LIT. And, with due respect and as explained below, it is obvious from the proposed rulemaking that OGE’s substantive concerns do not encompass such legitimately widely-attended, informational events even now and even when attendance is offered by a lobbyist or lobbyist organization.

Throughout the discussion in the section of the proposed rulemaking devoted directly to the “Exception for Widely Attended Gatherings” it is evident that – to the extent OGE is concerned that attendance by executive branch employees at events with lobbyists could result in what it refers to the “cultivation of familiarity” by the lobbyists of the employees – the forums which OGE views as providing the opportunity for such allegedly problematic cultivation are occasional, “social events” without a clear nexus to government interest. OGE expresses no basis of concern for substantive, officially-related “widely attended gatherings” more generally. For example, at page 56333 of the rulemaking proposal,

OGE reiterates that it “has perceived *some instances over the years* in which the WAG exception was used to permit attendance at events, particularly social events, where the nexus to the government’s interest was attenuated.” (Emphasis added.) OGE then uses the context of “an invitation to a gala ball” to illustrate the alleged “problem”: “the employee will enjoy [the gift of attendance] in the very company of the lobbyist.” This is not language applicable to the context of a substantive “widely-attended gathering.” Of course, this is a problem (if it is a problem) that can be solved by OGE without the need for new regulations. After all, it is already the routine job of an Agency Ethics Officer to determine whether it is in the interest of the agency for agency employees to attend widely attended gatherings.

OGE then, it seems fair to say, basically concedes that its rationale for limiting availability of the “widely attended gathering” exception does *not* apply outside the context of “social events”:

The WAG exception, *at least when used in connection with social events*, can provide the opportunity for a lobbyist not only to discuss any pending issues with the employee but also to foster a social bond that may be of greater use in the long run. Therefore, proposed section 2635.202(c)(6) would preclude the use of the WAG exception where the gift is offered by a registered lobbyist or lobbying organization.

76 FR 177, at 56333; emphasis added.

OGE’s conclusion – to preclude use of the “widely-attended gathering” exception when attendance is offered by a lobbyist or lobbying organization, even where the event is clearly a widely and diversely attended, substantive, educational or informational event – simply does not follow from its repeated premise that attendance at “social events” with lobbyists *may* be problematic. The proposed rule provides no basis for why an event run by a lobbyist organization should be considered inherently bad, whereas an event run by an organization that does not employ in-house lobbyists is not inherently bad. And the distinction made in the proposed rule between trade association “lobbying organizations” – which would be prohibited from providing attendance to widely attended gatherings – and “professional association” “lobbying organizations” – which would be allowed to provide attendance to such events – is not only without any basis, it is, not to put it too strongly, patently unfair and absurd.

Apart from the unsupported, unjustified and irrational effect the proposed rule would have on sponsorship of legitimate educational and informational events by lobbyists and lobbying organizations, OGE’s proposal to prohibit use of the “widely-attended gathering” exception when attendance is offered by a lobbyist or lobbying organization would substantially disadvantage executive branch employees in comparison to their counterparts in the legislative branch. Notwithstanding the amendment of the House and Senate gift rules in 2007 to preclude any gift to a Member, officer or employee of the House or Senate from a lobbyist or lobbying organization unless the gift falls within a specific gift rule exception, *all* the congressional gift rule exceptions permitting gifts from lobbyists/lobbying organizations that were in place before the 2007 amendment of the rules remained in place after amendment of the rules. As specifically relevant here, under the current House and Senate gift rules, Members, officers and employees may accept from an event sponsor – including, without qualification or limitation, a sponsoring registered lobbyist or lobbying organization – an offer of free attendance “at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, if . . . attendance at the event is appropriate to the performance of the official duties or representative function of” the Member, officer, or employee. (Senate Rule 35(1)(d); House Rule 25.5(a)(4).) Unlike in the executive branch, where Agency Ethics Officer must sign off on the event, congressional ethics committee pre-review or clearance of an event to determine that there is a sufficient nexus to official duties or function is not required; the invited Member, officer, or employee him or herself is permitted to make that determination in a reasonable manner.

If executive branch agency employees and officials are precluded from attending educational and informational conferences and events that remain open to their counterparts in the House and Senate, this will create the anomalous and undesirable situation that regulators will be less educated and informed on industry developments and trends than their congressional overseers. The executive and legislative branches must be on an even playing field of knowledge and understanding if the system of agency action and regulation, within the parameters set by congressional legislation and oversight, is to work effectively and efficiently. But this necessary balance would be skewed in favor of the legislative branch by OGE's unparalleled proposal to preclude executive branch employee attendance at educational and informational "widely attended gatherings" where the offer of attendance is extended by a lobbyist or lobbying organization.

OGE's expressed rationale for precluding use of the "widely attended gathering exception" for events sponsored by lobbyists and lobbying organizations is that the "cultivation of familiarity" between lobbyists and executive branch personnel at widely-attended "social events" (i.e., events "where the nexus to the purpose of the exception is attenuated") may create a concern as to the appearance of undue influence. If OGE is offering this rationale in good faith – rather than as an after-the-fact rationalization of a foregone conclusion that the "widely-attended gathering" restrictions set forth for political appointees in the Ethics Pledge must be applied, for good or for ill, to career and other non-political employees – then the proposed rule may be redrafted to achieve this stated purpose directly while minimizing, if not eliminating entirely, the irrationalities and inequities discussed above.

OGE's proposal to restrict the exception for "widely-attended gatherings" when attendance at such gatherings is offered by lobbyists or lobbying organizations may be easily redrafted to apply only where a lobbyist or lobbyist organization offers attendance to a "social event" or to one of the other categories of events cited by OGE in DO-07-047 as having raised occasional concerns of an attenuated nexus to the purpose of the exception. As discussed above, these categories of events are:

- Receptions, gala celebrations, and similar social events (that is, events that do not offer, or are not an integral part of an event that offers, a legitimate and substantive educational or informational benefit), even if widely attended.
- Charity fundraisers.
- Sporting events.
- Theatrical and musical events.
- Company parties (including, for example, holiday parties).
- Contract-sponsored seminars primarily focused on a given company's products or service.
- Board meetings.
- University events that are limited almost exclusively to the community within one university.

As a practical matter, it is not difficult to distinguish these kinds of "non-substantive" events from substantive events that provide a legitimate educational or informational benefit that furthers the interests of an agency. The mechanism for making these distinctions is already in place in each agency in the individual Designated Agency Ethics Offices; the task of making these distinctions would certainly not add to the work burden on these offices, which must already pre-review and approve all proposed attendance at "widely attended gatherings" to assure a sufficient nexus to agency interest. By preserving the abilities of executive branch employees to be fully informed about developments and trends in their fields and, thus, to operate at a level of educational and informational parity with their counterparts in the legislative branch, the benefit of modifying OGE's proposed rule in this simple, practical and rational way would be enormous.

V. Elimination of the de minimis exception for low value gifts from lobbying organizations would competitively disadvantage companies that employ lobbyists.

Pursuant to current 5 CFR 2635.204(a), even where a gift donor is a “prohibited source” or the gift is given because of an employee’s official position, an executive branch employee may accept gifts on one occasion from one source with an aggregate value of \$20 or less, provided also that the aggregate value of gifts received by the employee from that source in a calendar year does not exceed \$50. This is known as the “de minimis” exception. OGE’s proposed rule to limit gifts from registered lobbyists and lobbying organizations would preclude use of this exception where the gift donor is a registered lobbyist or an employee of a lobbying organization.

As the examples illustrating this exception in the Code of Federal Regulations make clear, the exception, in part, was intended to, and is applied in such a way as to, permit acceptance of normal and minimal business courtesies, including inexpensive meals, from entities contracting or otherwise doing business with agencies and offices of the federal executive branch. For example, see: Example 3, regarding receipt by an employee of the Defense Logistics Agency of minimal value gifts from four employees of a corporation that is a contractor with the agency; and Example 5, regarding receipt by a Department of Defense employee attending a trade show of minimal value gifts, including an \$8 deli lunch, from representatives of three separate DOD contractors at the trade show.

In the proposed rule, OGE does not contend that, as a general matter, such minimal value gifts improperly influence government decisions; nor does OGE contend that such gifts, when received from a lobbyist or a lobbying organization, influence government decisions anymore than when the gift is received from any other prohibited source or individual providing the gift because of an employee’s official position. As principal support for its proposal to do away with the “de minimis” exception for gifts from lobbyists, OGE invokes its “respectful” attitude towards the non-binding, entirely rhetorical “Sense of the Congress” in the Honest Leadership and Open Government Act of 2007 “that any applicable restrictions on congressional officials and employees in this Act should apply to the executive and judicial branches.” Honest Leadership and Open Government Act of 2007, Public Law 110-81, section 701. In support of this rationale of inter-branch “consistency,” OGE also cites similar provisions of the Ethics Pledge applicable to political appointees.

The experience of applying a lobbyist de minimis gift rule restriction in the legislative branch or in connection with executive branch political appointees does not translate to application of such a restriction across the board in the executive branch, however, and therefore should not be used as a precedent for doing so. Restriction of the gift exception permitting minimum value business courtesy gifts would have a much different, and much more deleterious, effect, when applied to line executive branch employees, than it has as applied to executive branch political appointees or to congressional employees. If applied to line executive branch employees, the prohibition on such “de minimis,” business courtesy gifts when provided by companies that employ lobbyists likely will have the most frequent, visible and negative effect on interactions between non-lobbyist employees of such companies and agency procurement or contracting personnel. By contrast, relatively few political appointees or legislative branch personnel are involved in the kind of procurement or contracting duties where minimal courtesy gifts are a common place part of ongoing business relationships.

Many CEA member companies would qualify as “lobbying organizations” under OGE’s proposed rule because they employ in-house lobbyists among their many other non-lobbyist employees. Many of these same CEA member companies contract, or will seek to contract, with executive branch departments and agencies. In maintaining or developing business relationships with these departments and agencies, even the non-lobbyist personnel of these member companies will be subject to constraints and impediments that will not be faced by similarly situated personnel of competing companies that do not employ in-house lobbyists but which nonetheless have business before the agency. Moreover, because it would no longer

fall within an exception to the gift regulations, a commonplace business courtesy gift – say an \$8 sandwich and soda – given to an agency procurement official by a non-lobbyist sales employee of a company that employs in-house lobbyists could, at least theoretically, be examined by the government as a potential illegal gratuity, whereas the same lunch from a sales employee of a company that retains only outside lobbyists would be just a cheap lunch.

There is no substantive justification offered in OGE’s rules proposal – and there is no such justification in the real world – for precluding use of the de minimis exception where a minimal value gift is offered to an executive branch employee by a non-lobbyist employee of a company, even if that company employs in-house lobbyists. There is no substantive justification for the disparate treatment, disparate business consequences, or disparate legal consequence that could result from such a rule.

Insofar as there is any reasonable basis for concern as to provision of de minimis gifts by actual lobbyists, this concern could, and should, be addressed adequately in a much more limited fashion. Preclusion of this de minimis exception can be limited to gifts a) from any person listed as a lobbyist on any registration form filed pursuant to 2 U.S.C. 1603 of the LDA or b) from any employee of an LDA-registrant organization where that organization provides lobbying services to clients (as opposed to being an organization that employs in-house lobbyists to serve only its own interests or the interests of its member organizations).

VI. Elimination of the “foreign areas” exception for gifts from lobbying organizations would disadvantage companies that employ lobbyists in competing for business in foreign markets.

Pursuant to 5 CFR 2635.204(i), even where a gift donor is a “prohibited source” or the gift is given because of an employee’s official position, an executive branch employee “assigned to duty in, or on official travel to,” a “foreign area” may accept a gift of “meals, refreshments and entertainment” at a meeting or other event, from a source other than a foreign government, where there is “participation in the meeting by non-U.S. citizens or by representatives of foreign governments or other foreign entities,” and where “attendance at the meeting or event is part of the employee’s official duties to,” among other things, “promote the export of U.S. goods and services . . .” The purpose of this exception is to permit executive branch employees to accept “the customary invitations of hospitality that frequently accompany the transaction of business in many foreign countries . . .” 57 FR 35006, Standards of Ethical Conduct for Employees of the Executive Branch, Final Rule (August 7, 1992).

Many of those CEA member companies who would qualify as “lobbying organizations” under the OGE rules proposal compete to sell goods and services in foreign markets, including to foreign governments. In connection with such business and trade activity in foreign countries, U.S. government personnel – including, for example, personnel of the Commercial Service – often play an invaluable role in facilitating negotiations, meetings, and relations more generally with prospective foreign customers and partners. In this capacity of promoting U.S. business in foreign countries, it is not uncommon for government personnel to attend a meeting or other event with a U.S. company and a prospective foreign customer. As the history of the “foreign areas” exception itself makes clear, these foreign business meetings often necessarily include food and refreshment as an element of traditional, expected hospitality. *Id.* To the extent that relevant U.S. government personnel would be unable to accept such necessary hospitality in – and, thus, would likely be unable to attend – business meetings with CEA member companies that would qualify as “lobbying organizations,” these CEA member companies will be significantly disadvantaged in competing with other U.S., and foreign, companies for business and trade in foreign markets. This could negatively impact the promotion of U.S. trade and, therefore, could negatively impact job creation in and the economy of the United States more generally.

There is no substantive justification offered in OGE's rules proposal for precluding use of the "foreign areas" exception where a meal or refreshments are offered to an executive branch employee by a non-lobbyist employee of a company, even if that company employs in-house lobbyists, in connection with a meeting or event in a foreign country that promotes U.S. business and trade. There is no substantive justification for the disparate treatment, disparate business consequences, or disparate legal consequence that could result from such a rule. Insofar as there is any reasonable basis for concern as to provision of such "foreign area" meals by actual lobbyists, this concern could, and should, be addressed adequately in a much more limited fashion. At most, preclusion of this exception may, and should, be limited to gifts a) from any person listed as a lobbyist on any registration form filed pursuant to 2 U.S.C. 1603 of the LDA or b) from any employee of an LDA-registrant organization where that organization provides lobbying services to clients (as opposed to an organization that employs in-house lobbyists to serve only its own interests or the interests of its member organizations).

VII. All comments set forth herein as to career and other non-political appointee executive branch employees apply with equal force to the provision of the proposed rule incorporating the restrictions on receipt of lobbyist gifts by political appointees set forth in Executive Order 13490.

Through proposed section 2635.202(d), the new rule would incorporate the lobbyist gift ban imposed by Executive Order 13490 on executive branch appointees required to sign the Ethics Pledge. All comments set forth above with respect to the proposed imposition of a lobbyist gift ban on all other executive branch employees apply with equal force to, and should be considered as also having been made with respect to, the proposed imposition of this gift ban on appointees through the new rule.

VIII. The proposed rule is invalid pursuant to the requirements of the Administrative Procedure Act.

If enacted, OGE's proposed rule would likely be held unlawful pursuant to the Administrative Procedure Act at 5 U.S.C. § 706(2)(A) and (B), which provide that a reviewing court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be –

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [and]
- (B) contrary to constitutional right, power, privilege or immunity"

With respect to the likely invalidity of the proposed rule pursuant to § 707(2)(A), as discussed at length above the rulemaking record is scant at best, if not non-existent, with respect to any empirical or other support for the principle factual conclusion of the rulemaking, that is, that gifts to executive branch personnel from registered lobbyists or lobbying organizations pose any potential problems, risks, or concerns beyond those posed by any other "prohibited source," as defined by the current rule, or posed by any other person offering a gift because of a government employee's official position. Registered lobbyists, lobbying organizations, prohibited sources, and other person's seeking official action, all have in common, and to the same extent, a defining characteristic: they are all seeking action from the government, whether on behalf of themselves, an employer, or a client.

And what empirical, practical or rational distinction can be made between, on the one hand, a non-lobbyist employee of an entity that, among its hundreds of employees, employees a handful of in-house lobbyists and, on the other hand, a non-lobbyist employee of a company that pays an outside firm to do its lobbying? No such rational distinction can be made, nor has OGE made any such rational distinction.

As to the rationality or reasonableness of any policy considerations underlying the proposed rule, it is not unfair to conclude, from the text of the rulemaking proposal, that OGE is proposing the limitations on gifts from lobbyists simply because they were required to do so by Executive Order, that is, essentially by fiat.

At points in the proposal, the perceived obligation to abide by this fiat clearly goes against OGE's better understanding and judgment. For example, with specific respect to elimination of the de minimis exception for gifts from lobbyists or lobbying organizations, one of the principal considerations articulated by OGE clearly supports maintaining the current scope of the exception:

Of course, OGE cannot deny the convenience of the \$20 de minimis rule as currently applied. It provides a bright line test, and employees generally can accept a gift within this limit without even having to determine whether the donor is a prohibited source or is extending the offer because of the employee's official position – let alone without having to determine whether the source is registered under the Lobbying Disclosure Act. Nevertheless, where the donor is a prohibited source or is offering a gift because of the employee's position, OGE believes it is not too much to ask of employees and their ethics counselors to determine whether the source also is a registered lobbyist or lobbying organization.

76 FR 177, at 56332.

The best argument OGE can muster here in support of expanding the lobbyist gift ban appears to be, "What's the harm?" This is not a legally sufficient basis for a new agency rule.

In other significant respects, to the extent that OGE articulates a reason or rationale, it does not support the scope of its rulemaking proposal. For example, as discussed at length above with respect to the proposal to preclude use of the widely-attended gathering exception when attendance is offered by a lobbyist or lobbying organization, the rationale put forth by OGE at most might support a limitation of the exception only with respect to attendance at *social events*, or other similar non-substantive events, when proffered by lobbyists or lobbying organization. The OGE proposal offers no support, however, for across the board elimination of the widely attended gathering exception when attendance is offered by lobbyists or lobbying organizations.

Based on the record and rationale expressed in its proposed rule as to the limited harm alleged to arise from lobbyists gifts, the scope of the restrictions on lobbyist gifts proposed by OGE is arbitrary and capricious. Moreover, because OGE proposes to address this alleged harm through what amounts to prohibition of First Amendment protected activities – that is, interactions with government employees and officials that may be viewed as lobbying activities – the arbitrary and capricious nature of OGE's proposed regulatory scheme rises to the level of a constitutional flaw in that, as demonstrated at length above, the proposed rule is not narrowly tailored to achieve its purpose. The proposed rule cannot withstand the strict judicial scrutiny to which it will be subjected.

IX. Conclusion

For all of the reasons set forth above, the Consumer Electronics Association strongly opposes OGE's proposal to amend the regulations governing the gift regulations in the Standards of Ethical Conduct for Employees of the Executive Branch. CEA welcomes the opportunity to respond to any questions from OGE in connection with these comments and would also welcome the opportunity to provide further information or argument upon request.

Sincerely,



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