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By E-mail at: [usoge@oge.gov](mailto:usoge@oge.gov)

Richard M. Thomas  
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Office of Government Ethics  
1201 New York Avenue, NW  
Suite 500  
Washington, DC 20005-3917

**Re: Proposed Amendments to Part 2635 (RIN 3209-AA04)**

Dear Mr. Thomas:

These comments on the proposed amendments to 5 C.F.R. § 2635 are submitted on behalf of the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"). For the reasons set forth below, AFSCME recommends the proposed definition of "registered lobbyist or lobbying organization" included in the proposed amendments to Part 2635 be modified to include labor organizations whose members include federal employees among those organizations excluded from that definition.

### **Introduction**

AFSCME is a labor organization as described at section 501(c)(5) of the Internal Revenue Code ("I.R.C."), 26 U.S.C. § 501(c)(5), and is exempt from taxation pursuant to section 501(a) of the I.R.C. AFSCME's 1.6 million members are primarily public service workers and are employed in a wide range of fields, including as health care workers, social services providers, clerical workers, school employees, corrections officers, emergency first responders and many others. AFSCME and its affiliated unions advocate – through collective bargaining, workplace representation, legislative advocacy and political action – for fair wages, safe working conditions, adequate health care, a secure retirement and the right to a voice on the job for its members and for workers everywhere. AFSCME employs lobbyists and is registered as a lobbying organization in compliance with 2 U.S.C. § 1601(a)(2).

Although the majority of AFSCME members are employed by state and local governments, AFSCME's members also include employees of various federal agencies. These AFSCME members (and other employees) are represented for purposes of Title VII of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 7101, *et seq.*, by AFSCME-affiliated local unions which are recognized as exclusive representatives as that term is defined at 5 U.S.C. § 1703(a)(16). These AFSCME members voluntarily join and pay dues to their local union and to AFSCME, and are entitled and encouraged to exercise their rights to participate in the governance of their union, to vote on collective bargaining agreements and other matters put before the membership for a vote, to vote and be candidates in Local, Council and International Union elections, and to fulfill their obligations as union officers or delegates when elected to serve as such. As members of AFSCME and AFSCME-affiliated unions, they are also invited and encouraged to participate in union social functions and political activities. AFSCME members who participate in such activities are often offered food and drink, educational materials, clothing items (such as hats, scarves or t-shirts) and other objects (such as pens, pins, tote bags, note pads and similar items) with AFSCME insignia. Such items are offered to all members equally, and no member is favored or disfavored based on their status as a federal, state or local government employee or based on their status as private sector or public sector employee.<sup>1</sup>

**A. The Proposed Definition of "Lobbyist or Lobbying Organization" Should be Modified to Exclude Certain Labor Organizations from Its Reach.**

The proposed amendments to Part 2635 are crafted to prohibit (with certain exceptions) federal employees from accepting gifts from lobbyists or lobbying organizations such as AFSCME. AFSCME is supportive both of the Office of Government Ethics' ("OGE") effort at diminishing the exercise of improper influence over the federal workforce through the use of gratuities and/or the exchange of valuable consideration for official action, and of OGE's including in its gift ban rules reasonable exceptions to broadly-written prohibitions where such exceptions are aimed at employees' receipt of items of value that are neither offered nor intended for – and are objectively unlikely to result in – any particular employee or agency action toward the gift-giver, or in actual or perceived improper influence over the gift recipient. AFSCME believes that the inclusion of labor organizations among those organizations excepted from the proposed definition of lobbyist that would be codified at 5 C.F.R. § 2635.203(h) would be such an exception and strongly urges OGE to adopt this recommendation.

**1. Impeding Federal Employees' Participation in their Unions Undermines the Goals of Federal Labor Relations Statutes.**

"[L]abor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a). Federal law protects the rights of certain federal employees to form, join or assist any labor organization or to refrain from doing so. See 5 U.S.C. § 7102.

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<sup>1</sup> For example, at the biennial AFSCME International Convention, which is AFSCME's highest governing body, a rally may be scheduled during the course of the convention so that convention delegates may demonstrate support for fellow union members engaged in a labor dispute. Typically, all members participating in such an event will be provided with a t-shirt bearing an AFSCME insignia to be worn during the rally as a show of unity. These t-shirts are generally valued at \$10 or less.

Permitting federal employees who voluntarily join and pay dues to a labor organization to participate in the governing, social and political activities of that labor organization to the same extent as members who are not federal employees would help fulfill the purposes of Title VII of the CSRA.

Likewise, permitting federal employees who are members of labor organizations to participate fully in the governance and decision-making processes of their unions, along with other activities and events sponsored by those organizations (and funded by those employees' dues payments) fulfills various policy interests outlined in other federal labor laws. Many of the labor organizations whose members include federal employees are governed by statutes other than the CSRA, and those statutes establish as national policy the right of union members to (among other things) choose their own representatives, engage in collective bargaining and to "engage in concerted activities for their mutual aid and protection." See 29 U.S.C. § 401(a). Federal law also establishes a bill of rights for union members, which affords member of a labor organization "equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings...." *Id.* at § 411(a)(1). Members are also afforded the right to "meet and assemble freely with other members" and to vote on an increase in their dues rates. See *id.* at §§ 411(a)(2) – (3).

Many of the gift offers extended by a labor organization to its members, along with the social events and political activities sponsored by labor organizations, are made in connection with attendance at events occurring during the union's governing process or are conducted jointly with union membership meetings or delegates' conventions. If federal employees who are members of a labor organization are prohibited from accepting items of value – paid for with their own dues and those of other union members – from the labor organization such as union trinkets and free attendance at widely attended events sponsored by the union, and are forced to bear certain costs (such as the cost of food and drink) to participate when other members are not, it is foreseeable that fewer federal employees will engage in the governance of the labor organization and other union activities. Suppressing federal employee participation in union activities is likely to result in fewer federal employees exercising the rights guaranteed to all union members, will diminish their voice within the union, and will deprive other members and the union of the view point of members who are federal employees. This, in turn, would tend to undermine the goals of Title VII of the CSRA because denying the labor organization adequate input relating to the needs and priorities of its federal employee members also denies those federal employee members adequate representation in the workplace and the bargaining table. On the other hand, excluding certain labor organizations from the definition of "registered lobbyist or lobbying organization" will promote the policies embodied in various federal labor laws, and amounts to a sensible exception to the lobbying gift ban along the lines of other exceptions proposed by OGE.

**2. Excluding Certain Labor Organizations from the Definition of “Registered Lobbyist or Lobbying Organization” Does Not Undermine the Purpose of the Proposed Lobbyist Gift Ban.**

Excluding labor organizations from the definition of “registered lobbyist or lobbying organization” is unlikely to undercut the purpose of the proposed amendments to Part 2635. First, gifts from labor organizations to their members are typically offered equally to all participants, or sometimes on a first-come-first-served basis. It is highly unlikely that any gift would be offered to a member (or other represented employee) on the basis of that individual’s employment in a particular sector of the workforce. Second, while the consequence of the gift may result in the member taking some action, that action is by and large intended to be engagement with and participation in the union’s activities and *not* to induce a federal or other employee to take some official action in their position as a government employee. Third, the gifts offered are widely available to the union’s membership and are not directed solely at those employed in certain positions; thus, recipient employees are unlikely to construe the gifts as made in connection with their official position or as an incentive to take a particular action on the job. Fourth, unlike gifts that may be offered to federal employees by other organizations, gifts offered by a labor organization to its members are paid for by those members through the remittance of their dues to the organization, and federal employees should be permitted to receive such items on an equal basis as their fellow members who similarly pay dues. Under these circumstances, even an objective observer would find it difficult to say that gifts from a labor organization to its members who are federal employees is likely to result in some the labor organization’s actual or perceived improper influence over the employee.

**3. Exclusion of Certain Labor Organizations from the Definition of “Registered Lobbyist or Lobbying Organization” Is Similar to Current Proposed Exclusions.**

Under proposed 5 C.F.R. § 2635.203(h), four (4) types of organizations would be excluded from the definition of “registered lobbyist or lobbying organization.” These are: (1) 501(c)(3) organizations; (2) institutions of higher education; (3) media organizations “with respect to any gift made in connection with the information gathering or dissemination activities of the organization; and (4) a “non-profit professional association, scientific organization or learned society, “with respect to any gift made in connection with the entity’s educational or professional development activities.” See 76 Fed. Reg. 56339 (Sept. 13, 2011). Because labor organizations are similar in certain meaningful respects to both 501(c)(3) organizations and to non-profit professional associations, including certain labor organizations among those excluded from the definition of registered lobbyist or lobbying organization would accord with OGE’s stated purposes for those exclusions.

In its supplemental information describing its basis for excluding 501(c)(3) organizations and professional associations from the definition of “registered lobbyist or lobbying organization,” OGE points to particular policy interests that would be fulfilled by such exclusions. See 76 Fed. Reg. 56336, 56338 (Sept. 13, 2011). As discussed in depth at section A.1. of

these comments, Congress has set forth various policies and goals in a number of federal labor laws. Excluding certain labor organizations from the definition of “registered lobbyist or lobbying organization” will promote the policies and goals embodied in those laws, and would not diminish the purpose or effect of the proposed lobbyist ban. So, excluding those labor organizations from the definition of “registered lobbyist or lobbying organization” would be a sensible exception to the lobbying gift ban along the lines of other exceptions proposed by OGE.

**B. AFSCME Recommends a Limited Exclusion for Labor Organizations.**

Although a broad exclusion of all labor organizations from the definition of “registered lobbyist or lobbying organization” would certainly be acceptable, AFSCME is of the opinion that such breadth is unnecessary and recommends excluding only labor organizations whose members include employees of federal agencies. Additionally, the exclusion need not apply to gifts made by the labor organization to any federal employee, but only to those employees who are members of the labor organization. We propose adding a new paragraph (h)(5) to 5 C.F.R. § 2635.203 after OGE’s proposed new paragraph (h), as follows:

“(5) a nonprofit labor organization whose members include employees of an agency (as defined at 5 U.S.C. § 7103(a)(3)) with respect to any gift offered to a member of such labor organization.”

In our view, this limited exclusion permits labor organizations and their members who are federal employees to continue to interact in a manner beneficial to the organization, the federal employee members and other members who benefit from the mutual aid and protection of their fellow members without diminishing the purpose or effect of the proposed lobbyist gift ban.

**Conclusion**

AFSCME supports the goals underlying OGE’s proposed lobbyist gift ban, as well as the reasonable exceptions made to that ban. However, we believe it would promote federal policy embodied in various federal statutes without diminishing the purpose or effect of the proposed lobbyist gift ban if certain labor organizations were excluded from the proposed definition of registered lobbyist or lobbying organization.” Thus, as explained above, AFSCME respectfully requests that OGE modify its new proposed paragraph 5 C.F.R. § 2635.203(h) to include a limited exception from this definition for certain labor organizations along the lines of those exceptions made for other organizations.

Respectfully submitted,



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