

## **Comments of the National Small Business Association on the Proposed Rule Regarding Limiting Gifts from Registered Lobbyists and Lobbying Organizations**

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Dear Mr. Thomas:

The National Small Business Association (NSBA) is pleased to provide these comments with respect to the proposed rule (RIN 3209-AA04) regarding proposed amendments limiting gifts from registered lobbyists and lobbying organizations. This proposed rule would make changes to the Standards of Conduct for Employees of the Executive Branch that were initially promulgated by the Office of Government Ethics in 1992 and that are codified at 5 CFR part 2635.

The NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the U.S. The NSBA represents more than 150,000 small businesses throughout the country in virtually all industries and of widely varying sizes. The NSBA is an advocate for the small businesses. Part of that advocacy is lobbying the Executive Branch of government so that officials understand the real world impact of their policies and regulatory actions on small businesses.

### **Summary**

The NSBA is concerned that the proposed rule will constitute a significant impediment to the free flow of information between the representatives of small businesses and those in the Executive Branch that regulate small businesses. The impact of federal regulations and policy on NSBA's membership is enormous.

The proposed rule would impede our ability to explain the real world impact of those regulations on the small business community and increase the likelihood that federal regulators will not adequately understand the impact that their actions will have on small businesses. We are particularly concerned about the revisions affecting widely attended gatherings. These rules will make it highly unlikely that government officials will attend meetings with ordinary business people to exchange views and to ask and answer questions of one another. It will promote isolated, uninformed governance -- not good government.

The rule exempts some of the biggest lobbying organizations in America (lawyers, doctors, large universities, and the like) but treats organizations like the NSBA as suspect. The rule impedes our fundamental right to petition the Government for redress of grievances. The NSBA respectfully urges that the rule be withdrawn.

## **Current Law and the Proposed Rule**

5 CFR §2635.202(a) prohibits an employee from accepting a gift from a prohibited source or a gift given because of the employee's official position.

5 CFR §2635.203(d) defines a prohibited source to mean any person who:

- (1) is seeking official action by the employee's agency;
- (2) does business or seeks to do business with the employee's agency;
- (3) conducts activities regulated by the employee's agency;
- (4) has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or
- (5) is an organization a majority of whose members are prohibited sources.

It is worth noting that items (3) and (4) make virtually every business in America a prohibited source since businesses are regulated and have interests affected by most agencies. Item (5) makes NSBA a prohibited source because our members are regulated and have an interest in federal policy.

5 CFR §2635.204 provides many exceptions to the general rule banning gifts. §2635.204 (g) provides an exception for widely attended gatherings. When an employee is assigned to participate as a speaker or panel participant or otherwise to present information on behalf of the agency at a conference or other event and if (1) more than 100 persons are expected to attend the event, (2) the gift of free attendance has a market value of \$350 or less and (3) there has been a determination that attendance is in the interest of the agency because it will further agency programs and operations, an employee may accept an unsolicited gift of free attendance which may include waiver of all or part of a conference fee or the provision of food, refreshments, entertainment, instruction and materials furnished to all attendees as an integral part of the event. It does not include travel expenses, lodgings, entertainment collateral to the event, or meals taken other than in a group setting with all other attendees.

5 CFR §2635.202(c) places various limitations on the use of exceptions. For example, an employee may not:

- (1) accept a gift in return for being influenced in the performance of an official act;
- (2) solicit or coerce the offering of a gift;
- (3) accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain;
- (4) accept a gift in violation of any statute; or
- (5) accept certain vendor promotional training.

The proposed rule would add a new paragraph (c)(6) to §2635.202 to read as follows:

- (6) Accept 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.<sup>1</sup>

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<sup>1</sup> The exceptions found in paragraphs (b), (c), (d), (e), (f), (j), (k) and (l) are not generally relevant to this discussion.

It would also add a new section (d) to read as follows:

(d) *Other prohibition applicable to full-time, non-career appointees.* In addition to the general prohibitions set forth in paragraph (a) of this section pertaining to gifts from a prohibited source and gifts given because of an employee's official position, a full-time, non-career appointee who is required to sign the Ethics Pledge prescribed by section 1 of Executive Order 13490 shall not accept a gift from a registered lobbyist or lobbying organization, except pursuant to paragraphs (b), (c), (e)(1), (e)(3), (j), (k), or (l) of §2635.204.

It would also add a new definition to §2635.203:

(h) *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 registration, as found in the databases maintained by the Secretary of the Senate and the Clerk of the House of Representatives, but it does not include:

- (1) An organization exempt from taxation pursuant to 26 U.S.C. 501(c)(3);
- (2) An institution of higher education as defined in 20 U.S.C. 1001;
- (3) A media organization as defined in 2 U.S.C. 1602(11), with respect to any gift made in connection with the information gathering or dissemination activities of the organization; or
- (4) A nonprofit professional association, scientific organization or learned society, with respect to any gift made in connection with the entity's educational or professional development activities.

### **The Right to Petition the Government for Redress**

We believe that it is worth moving past the current hysteria over lobbying and briefly re-examine some of the first principles that should govern the operation of a free republic.

The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and **to petition the Government for a redress of grievances.** (emphasis added)<sup>2</sup>

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<sup>2</sup> As Joseph Story noted in his *Commentaries on the Constitution* (1833), the right to petition the government for redress of grievances goes back at least to the *Declaration of Rights* in England adopted after the revolution of 1688, "in which the right to petition the King for a redress of grievances was insisted on; and the right to petition parliament in the like manner has been provided for, and guarded by statutes passed before, as well as since that period."

Petitioning the Government for redress of grievances is a core aspect of what the NSBA does. It is a constitutionally protecting activity and one of our core liberties. Today, it is called lobbying. Lobbying, along with journalism and being a member of the clergy, is one of three occupations protected by the First Amendment. Politicians and government officials love to demonize lobbyists because the many organizations they represent place uncomfortable pressure on them to be responsive. They sometimes resent the discomfort. But the bottom line is that in the absence of lobbying (including grass roots lobbying), they would have little or no idea what the impact of their policy choices were in the real world.

NSBA represents 27 million small businesses in the U.S. that employ half—59.7 million—of all private-sector workers. We do not regard ourselves as a “special interest” in any meaningful sense. To the contrary, we promote policies that we believe are in the public interest. We do not have the lobbying, campaign contribution, public relations or policy research budgets of large corporations or universities with multi-billion dollar endowments. We do not have the vast resources of the medical or trial lawyer lobbies. We do have the right to petition government -- to explain to officials the impact that their decisions will have on the broader public and the many millions of small businesses. The proposed rule would shut down what is in practice one of the most effective and ethically benign avenues of achieving that goal. The proposed rule prohibits government officials from attending widely attended gatherings of small business people unless the government official is willing to spend his or her own funds to do so.

### **Discussion of the Proposed Rule**

The proposed rule means that government officials will be banned from participating “as a speaker or panel participant or otherwise to present information” unless the organization sponsoring the event charges them to do so. This is absurd. It basically means that business organizations (or labor organizations for that matter) will no longer be able to invite government officials to talk to members at their large meetings (100 or more) unless the government official is willing to pay for the privilege out of his or her own pocket. Attendance at small meetings, of course, is not provided an exception under the current rules.

Conferences and meetings cost money to put on. Organizations charge their members a fee to pay for those costs. But forcing the organization to bill government officials personally for those costs means that few will choose to attend. Thus, the rule is effectively preventing government officials from interacting with organizations’ ordinary members.

The idea that a government official is somehow receiving a gift by discussing policy with the business community is foolhardy. Officials that meet with the public are doing their job. They are seeking information and input from those who will be affected by their decisions. Doing so is not a corrupt practice. It is good government. The rule will force them to choose between learning from the outside world and spending limited personal funds. It is a very badly conceived rule. It will isolate policy-makers from the real world and ensure worse policy and regulatory outcomes.

If the rule is going to be adopted, we strenuously object to the exemptions provided to section 501(c)(3) organizations, institutions of higher education (virtually all of whom would be

(c)(3) organizations in any event), media organizations and a “nonprofit professional association, scientific organization or learned society.”

The idea that a “professional association” of lawyers or doctors or any other profession<sup>3</sup> for that matter is somehow more pristine and benign than the NSBA and its membership is simply ridiculous. Lawyers have a large pecuniary interest in policy outcomes. The American Bar Association lobbies. The American Association for Justice (the trial lawyers) lobby. They have billions at stake in various policy outcomes. To think that their policy prescriptions are entirely motivated by altruism or the public interest is the height of naiveté. Doctors make much more than the typical small business person and have hundreds of billions at stake in the health care debate. They too have a pecuniary interest in policy outcomes. They should not be afforded special status and access to government when the small business community is not.

Most institutions of higher learning are vastly larger, better financed and more powerful than our members. Collectively, they have hundreds of billions of dollars annually at stake in education and research funding. They can and do pay high-priced lobbyists. They pay their assistant football coaches more than most small business people earn. The salary that the head coach or university President earns at some of these schools in one year approaches what a typical small business person might earn in a decade or two. It is preposterous to argue that they represent less of a corrupting influence than the small business community.

Media organizations, of course, would remain free to report and to interview public officials even if the rule applies to them. There is no good reason to exempt them. Media organizations also have multi-billion dollar interests in policy outcomes, whether it is how the internet operates, advertising rules, postage rates, television and radio licenses, public radio subsidies, spectrum allocation or the like. They too have the resources, unlike small businesses, to hire expensive lobbyists and lawyers and the power to use their media megaphones to shape policy.

Some section 501(c)(3) organizations are comparable to small businesses. Others are huge enterprises with multi-million dollar budgets and big lobbying budgets. The largest organizations often get tens of millions of dollars (or more) from government and may even depend on government for survival. Collectively, they receive tens of billions of dollars annually and they lobby hard for the money. According to the Independent Sector, not-for-profits receive 32 percent of their revenue in the aggregate from government. They also have a strong interest in federal tax policy and other aspects of government policy. Moreover, many section 501(c)(3) organizations (especially think tanks) exist solely to influence public policy outcomes. They are lobbyists in all but name.

If the rule is adopted, most trade associations will probably end up forming associated section 501(c)(3) organizations. In other words, the rule will become a dead letter for those organizations with the funding and sophistication to navigate federal tax law and the new gift rules. Associations with a Fortune 500 membership will take this in stride. But for smaller organizations, this will be a significant burden. A burden, perhaps, that must be borne to

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<sup>3</sup> The profession of “small business owner” is typically not recognized by the law.

effectively exercise First Amendment rights but a significant and disproportionate burden on small associations nonetheless.

### **Conclusion**

We represent a community of nearly 30 million small businesses struggling to make payroll in a highly competitive market in an extremely difficult economy. We do not ask for much. Most small businesses do not receive a dime from the government. All we ask is the opportunity to interact with policy-makers and federal regulators from time to time in large gatherings with ordinary small business persons. We ask that our policy-makers attending widely attended gatherings be allowed to come before small employers and ask and answer questions and exchange views. Policy-makers and regulators should be aware of what their actions may do to the employers of nearly half of the public. The proposed rule makes that much less likely to happen and forces government officials to choose between their own pocketbook and good government. It constitutes a substantial infringement of our members' ability in practice to petition the government for redress. Finally, the rule will be easy to evade through the expensive expedient of forming an associated 501(c)(3) organization. Thus, it will accomplish nothing save imposing additional expenses on affecting groups and will have a disproportionately adverse impact on small associations.

Therefore, the NSBA respectfully requests that the proposed rule be withdrawn.

Sincerely,

A handwritten signature in black ink, appearing to read "Todd McCracken", with a long horizontal line extending to the right.

Todd McCracken  
President