

COALITION FOR TAX EQUITY

1666 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 887-1400

November 18, 2011

Mr. Don Fox
Acting Director and General Counsel
Office of Government Ethics
1201 New York Avenue, NW
Washington, DC 20005-3917

Re: Office of Government Ethics, RIN 3209-AA04, Comments on Proposed
Amendments to 5 C.F.R. § 2635

Dear Mr. Fox:

The Coalition for Tax Equity appreciates the opportunity to submit comments regarding the Office of Government Ethics' proposed changes to the Standards of Conduct for Employees of the Executive Branch, codified at 5 C.F.R. § 2635. The Coalition, which was established in 1992, is a 501(c)(6) organization representing corporations and trade associations that is dedicated to advocating reasonable and workable standards in the areas of federal election law, lobbying disclosure, and Congressional and executive branch ethics rules.

At the outset, we assert that the entirety of the proposed changes, and the Executive Order that prompted them, are based upon the inaccurate premise that lobbyists pose an inherently corrupting influence on employees of the federal government. While there are certainly several recent and sensational examples of unethical and even criminal conduct by lobbyists, these bad actors represent a mere fraction of the thousands of lobbyists who operate within the highest standards of ethics. Despite the current Administration's quest to vilify the lobbyist profession as a whole, these professionals serve a very important role in educating government employees about issues and positions of importance, which is enshrined in the Constitutional right to petition the government.

As detailed below, the Coalition's position on the proposed changes is that they are unnecessary and unreasonable and will lead to arbitrary and sometimes unintended results. As is evident from the supplementary information provided with the proposed rule, these changes are a solution in search of a problem and will not deter the few bad actors from circumventing the rules, while unnecessarily restricting all lobbyists from engaging in legitimate and appropriate communication with federal employees. Accordingly, we assert that OGE should not adopt these proposed changes, or at a minimum, that they be modified to mitigate adverse consequences.

Widely Attended Gathering Exception

The proposed rule would prohibit acceptance of free attendance at Widely Attended Gatherings (WAG's) when offered by registered lobbyists or lobbying organizations. The Coalition strongly objects to this proposed change for the following reasons:

- The proposed rule recognizes that WAGs can serve "important government purposes" and "provide a legitimate educational or professional development benefit that furthers the interests of an agency." Purportedly in recognition of this, the proposed rule exempts nonprofit professional associations, scientific organizations and learned societies who employ lobbyists from the new WAG rule, but does not exempt corporations or trade associations. However, the supplementary information provided by OGE does not provide any rationale whatsoever for distinguishing between the groups it proposes to exempt, and those it does not. Corporations and trade associations also can and do regularly sponsor valuable educational and professional development events. Such events overwhelmingly serve a legitimate purpose and are intended to educate the public, policymakers, and other interested persons with regard to important topics. To prohibit corporations and trade associations from offering complimentary attendance at such events to government employees unfairly inhibits their ability to petition government on behalf of the interests of the organization and its constituents or employees and arbitrarily gives preferential treatment to one set of organizations who hire lobbyists over another.
- The current WAG rule effectively guards against impropriety or the appearance thereof and does effectively prohibit free attendance at frivolous events when properly applied. The supplementary information for the proposed rule asserts a general concern that existing rules "may have been used to permit gifts, such as attendance at certain events, where the nexus to the purpose of the exception is attenuated at best." However, under the existing rule, for an employee to accept free attendance at a WAG, sections 2635.204(g)(2) and (3) specifically require that there be a finding of "agency interest" in the employee's attendance. This determination must be in writing if the donor has interests that may be affected by the performance or nonperformance of the employee's official duties, and must include a finding that the employee's interest in attendance outweighs any appearance of impropriety. The proposed modifications suggest that this significant independent review process is inadequate and, in an affront to agency ethics officers, implies that many are turning a blind eye to their oversight responsibilities. To the extent that there is concern that agency ethics officers are not properly applying the existing rule, OGE should provide additional training or issue an ethics advisory to further clarify when a determination of agency interest is appropriate and when it is not.
- Neither the Administration nor OGE has provided any evidence to support such a draconian change to the WAG exception with respect to lobbyists. The WAG exception has been in place for twenty years and we are not aware of, nor did OGE provide, any statistical analysis or concrete evidence regarding any reports or claims of abuse or scandal that have resulted from the exception. Indeed, our extensive experience over

the past two decades on behalf of Coalition members in vetting WAG sponsorships is that the agency interest determination is always stringently applied.

- The proposed rules will effectively discriminate against less-senior employees. Under the proposed rules, an employee who is speaking or presenting information at an event on behalf of their agency may continue to accept free attendance at the event. The overwhelming majority of such speaking opportunities are offered to appointees and very senior employees, meaning the rank and file career employees will be excluded from these events and from the educational and professional development benefits that result.
- The exception for employees who speak or participate on a panel reveals an undercurrent of arrogance and underlying bias against the public sector. Implicit in this standard is that it is only relevant to a federal agency for their personnel to impart knowledge and information – that there is never any benefit to an agency for its employees to hear the views of experts who do not work for the Administration.
- Eliminating the WAG exception for entities that employ “at least one in-house” lobbyist, but not for those that retain outside lobbyists, is an arbitrary distinction with an inherent bias toward organizations that hire outside consultants versus those that hire full-time employees. This preferential treatment will result in situations in which government employees may accept free attendance at a social reception from a company that retains dozens of active lobbyists, but may not accept an invitation to a bona fide educational seminar from a company that has one in-house employee who happens to be a registered lobbyist by virtue of having just met the two-lobbying contact registration threshold under the LDA. There is no rational basis for this distinction.

If the current WAG exception cannot be preserved in its entirety, the Coalition recommends that it at least be preserved insofar as to permit acceptance of free attendance from lobbying organizations at the most substantive types of WAGs, such as bona fide educational conferences, symposia, and seminars.¹ This would effectively address concerns

¹ For example, the following language could be added to proposed subsection 2635.202(c)(6):

(c) *Limitations on use of exceptions.* Notwithstanding any exception provided in this subpart . . . an employee shall not:

* * *

(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, or unless the gift is free attendance to a widely attended gathering pursuant to subsection (g)(2), provided that the following additional requirements are satisfied:

(i) The event is a bona fide educational conference, symposium, seminar, or similar event;

(ii) The event does not have a significant entertainment or social component or if it does, the employee will not be participating in that segment of the agenda; and

(iii) A written determination of agency interest is obtained under 2635.204(g)(3).

regarding events that may be perceived as frivolous, while preserving those events that fit most squarely within the WAG rule and serve its underlying purpose.

The *De Minimus* Exception

The proposed rule would remove the exception that currently permits employees to accept gifts valued \$20 or less from a prohibited source, including organizations that employ lobbyists. The Coalition objects to this proposed change for the following reasons:

- The *de minimus* exception allows federal employees and private entities to interact in a reasonable fashion and avoids complicated questions regarding the valuation of items that may or may not have little or no value. For example, under the proposed changes, federal employees will be prohibited from accepting small items incident to a meeting such as a pen, a pad of paper, a thumb-drive or a binder containing informational materials, a brochure or other printed informational materials. There is virtually no chance that a federal employee will be improperly influenced by such items, and may not even realize that such items may be considered a "gift." The *de minimus* exception provides a buffer for such situations.
- This long-standing rule has also been successful, and again, we are not aware of any significant claims of abuse or scandal that have resulted from the rule.

In the alternative, if the *de minimus* exception is eliminated for lobbyists and lobbying organizations, to avoid the results above, the definition of "gift" should be amended to include an exclusion for "informational materials." An exclusion for "items of a nominal value" or "items of little intrinsic value" should also be considered. This would be consistent with Congressional ethics rules. The Honest Leadership and Open Government Act retained these common-sense exceptions in both the House and Senate, even when the donor is a lobbyist. The exceptions for "items of a nominal value" and for "items of little intrinsic value" have been interpreted by the House and Senate ethics committees as generally permitting the acceptance of items valued at up to \$10.

Exception for Meals and Refreshments in a Foreign Area

Coalition members with foreign operations have also expressed concern regarding the elimination of the exception for meals and refreshments in a foreign area when the donor employs a lobbyist. We are concerned that elimination of this exception will unnecessarily inhibit their interaction with overseas state department and defense employees, and may disadvantage them in relation to foreign competitors that do not have registered lobbyists. Coalition members with foreign operations are also concerned regarding potential confusion in applying the rule to overseas parent companies, subsidiaries, and sister-companies.

Conclusion

The Coalition for Tax Equity opposes the proposed rules for the reasons stated above. Executive Order 13490 tasked OGE with adopting "such rules or procedures as are necessary or appropriate...to apply the lobbyist gift ban...to all executive branch employees," but we believe that the proposed rules are arbitrary and unfounded and neither necessary nor

appropriate, and will create negative consequences that far outweigh any perceived benefits. Please do not hesitate to contact us if you have any questions regarding our comments. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy W. Jenkins', with a long horizontal flourish extending to the right.

Timothy W. Jenkins
of Nossaman LLP
on behalf of the Coalition for Tax Equity