

From: [Reller, Eric](#)

To: [USOGE](#)

Subject: Proposed Amendments to Part 2635

Date: Thursday, October 06, 2011 3:51:06 PM

Attachments: [WAG Rule 10-6-11.PDF](#)

Attached, please find the American Hotel & Lodging Association's comments to the Proposed Amendments to Part 2635 of Standards of Ethical Conduct for Employees of the Executive Branch: Limiting Gifts from Registered Lobbyists and Lobbying Organizations (Document ID GEO-2011-0007-0001).

Please let me know if I need to supply any other information-

Thanks,

Eric Reller

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Joseph A. McInerney, CHA

President & CEO

October 6, 2011

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

Re: 3209-AA04; Proposed Rule; Amendments

Dear Mr. Thomas:

I am writing on behalf of the American Hotel & Lodging Association (“AH&LA”) to express concerns with the proposed rule published by the Office of Government Ethics (“OGE”) on September 13, 2011. We have specific comments with respect to generally prohibiting federal employees from attending widely-attended gatherings hosted by organizations that happen to be registered under the Lobbying Disclosure Act (“LDA”).¹ AH&LA, the sole national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members, hotel companies, student and faculty members, and industry suppliers, is uniquely positioned to opine on this topic because, in addition to it being registered under the LDA like thousands of other employers, AH&LA members are frequent venues for the widely-attended gatherings that federal employees would be proscribed from attending.

The concerns with the proposed rule expressed herein range from its inhibition of mutually beneficial communication and informational exchanges between government and the public, which would interfere with the ability of federal employees to effectively administer the programs for which they are responsible, to its overly broad application to events where no lobbyist is present. The proposed rule also is inconsistent with the congressional intent expressed in the Honest Leadership & Open Government Act of 2007 (“HLOGA”) to harmonize congressional, executive and judicial gift laws and rules. In light of all of these concerns, it is perplexing that the restriction on widely-attended gatherings is offered without providing a meaningful rationale for such a measure.

¹ A limited exception to the ban would allow a federal employee to attend a widely-attended gathering if he or she is a speaker at the event.

To begin, it is important to note that the existing rule governing widely-attended gatherings, 5 C.F.R. § 2635.204(g), has been in place for least eighteen (18) years.² It was formulated pursuant to two presidential executive orders (12674 and 12731), a “blue ribbon” presidential commission on federal ethics reform, and the Ethics Reform Act of 1989. During all of the time that has ensued since its adoption, including the period of corrupt practices attributable to Jack Abramoff and his associates during the 2000s, the rule has functioned effectively and without attribution to any misconduct or other ethical lapse.

This success is due, no doubt, to the rule’s rigorous conditions, which, in the case of a “prohibited source”³ (broadly defined to include any person seeking official action by, doing business with, conducting activities regulated by, or having interests before a federal employee’s agency) require a federal employee to obtain the approval of his or her agency’s designated ethics officer and that such approval be given only after the ethics officer determines that (i) the employee’s attendance will further agency interests and (ii) furthering those interests outweighs concern that the employee’s attendance may appear to improperly influence the performance of his or her official duties. In making these determinations, the ethics officer must consider various criteria, which include any pending matter affecting the interests of the event sponsor, the significance of the employee’s role in any such matter, the purpose of the event, the number and identity of the expected participants and the monetary value of the free attendance. *Id.* Given this robust and impartial analysis, the fairly nominal value of any food and refreshment offered at such events and the large number and wide range of attendees who are necessary to constitute a “widely-attended” gathering, it is difficult to discern a need to foreclose this important avenue for federal employees to exchange information with the individuals and businesses they regulate.

The proposed rule appears to be irrationally concerned with the possibility that there may be instances where the sponsor of a widely-attended gathering is registered under the LDA but is not a prohibited source and therefore not subject to the rigorous review and approval process required by regulation. The broad definition of “prohibited source” makes this scenario highly unlikely, but, more importantly, adopting such a policy results in treating a non-prohibited source “worse” than a prohibited source simply because the non-prohibited source happens to be registered under the LDA.⁴ This disparate treatment effectively punishes an organization for being registered under the LDA (*i.e.*, engaging in substantial amounts of constitutionally protected political expression), even where that registration and the lobbying activities have absolutely nothing to do with the agency whose employee(s) is invited to attend the widely-attended gathering. The lack of any rational nexus between the ban and an organization’s desire

² Final Rule, 57 Fed. Reg. 35006-35067 (Aug. 7, 1992) (effective Feb. 3, 1993).

³ 5 C.F.R. § 2635.203(d).

⁴ The illogic of the policy is illustrated by the following: a federal employee may be able to attend a widely-attended gathering if the sponsor has interests that could be substantially affected by the employee’s agency (subject to his ethics officer’s approval), provided the sponsor is not an LDA registrant, but a federal employee may *not* attend a widely-attended gathering under any circumstances, even if the sponsor has no interests before the employee’s agency, if the sponsor happens to be registered under the LDA.

simply to engage in political expression, evidenced by its LDA registration, raises First Amendment concerns.⁵

Contrary to popular belief, there are actually relatively few meaningful opportunities for the public to express their views directly to and obtain information from the federal employees who administer the policies and programs affecting them. A widely-attended gathering provides for an in-person mutual exchange of information about programmatic issues and policies, offering both the federal and public attendees the opportunity to ask questions, offer suggestions and raise concerns informally. AH&LA events often include a wide and diverse attendance that includes company CEOs, hotel general managers, industry suppliers, and other specialized experts that can provide an in depth understanding of specific policy issues from an industry perspective. This serves to facilitate better implementation and administration of federal policies and programs and, importantly, levels the playing field for small businesses which might not otherwise have the opportunity, time or resources to arrange and attend individual meetings with the federal attendees.

Given the mutual benefits associated with widely-attended gatherings, the lack of any history of misconduct or ethical lapses by federal employees or lobbyists involved with such events, and the infringement on “free expression” that will result from any further restriction, one would presume there must be an important government interest served by proscribing federal employee attendance when a widely-attended gathering is hosted by an organization registered under the LDA. This is sadly not the case. Other than a thin, tenuous claim that widely-attended events are somehow used for “the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients,” 76 Fed. Reg. at 56333, the proposed rule offers no factual or other tangible support for banning federal employee attendance at such events, and there are serious problems even with this one claim, as explained below.

First, federal employees do not attend widely-attended gathering with such frequency that this should be of any concern. And even if a federal employee were attending such events too frequently, this would be weighed when the agency’s ethics officer made the determinations required under the regulation. In fact, an existing regulation already addresses this concern, stating: “[n]otwithstanding any exception provided in this subpart, ... an employee shall not ... 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.” 5 C.F.R. § 2635.202(c).

Second, many, if not most, widely-attended gatherings do not involve any lobbyist participation. Rather, widely-attended gatherings normally are intended to facilitate informational exchanges between federal employees and non-lobbyists who are seeking to understand and comply with programmatic mandates (current or anticipated),

⁵ Adopting a rule that treats LDA registrants unfavorably because of their registrant status will only fuel the proliferation of “stealth lobbying” by persons who are incentivized to avoid registration by engineering their activities to remain outside the scope of the LDA and/or adopting aggressive legal interpretations to the same end.

or, in other cases, to demonstrate and inform federal employees about new products, services and other capabilities offered by the private sector. It is highly unlikely that lobbyists would attend these events because there is no political or policy agenda. Indeed, unlike political appointees, who have policy-making responsibilities, *career* employees' duties are limited largely to administering established federal policies and programs. They do not, therefore, constitute the "political leadership" to which "one could envision strategic efforts to cultivate access" by lobbyists. 76 Fed. Reg. at 56322. Given the thousands of companies and trade associations that exercise their constitutionally protected right to express their views and positions to Congress and federal policy-makers, and are therefore registered under the LDA, a rule generally banning federal employee attendance at any widely-attended gathering sponsored by an LDA registrant is overly broad and insufficiently tailored to draw an appropriate distinction between events where lobbyists are in attendance and those where they are not.

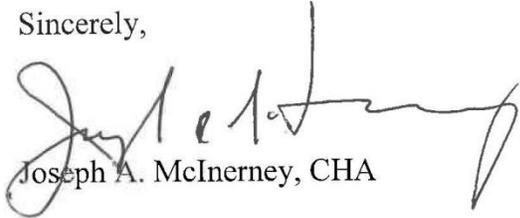
The proposed rule also is inconsistent with stated congressional intentions. In justification for other revisions to the executive branch gift rule, the proposed rule cites respect for the "Sense of the Congress" expressed in section 701 of HLOGA that "any applicable restrictions on congressional officials and employees ... should apply to the executive and judicial branches." *Id.* 56332 (proposing to eliminate existing exception for *de minimis* gifts). But in the case of widely-attended gatherings, a policy is being proposed that would actually vary from the congressional rules governing such events. Congress has long recognized the importance of providing opportunities for public interaction and the need for informal exchanges of views and information. Accordingly, both the House and Senate gift rules make exceptions for attendance at "widely-attended events," even when those events are sponsored by organizations registered under the LDA. In fact, the congressional rules are less restrictive than the existing executive branch rule with regard to the conditions that must be satisfied in order for members of Congress and congressional staff to attend such events. Thus, the proposed rule would actually widen, not narrow, the gap between congressional and executive branch ethics rules and is therefore inconsistent with section 701 of HLOGA.

Finally, because AH&LA represents the lodging industry, we have heard first-hand the concerns of our hoteliers. AH&LA's members are frequent venues for the widely-held gatherings that federal employees would be proscribed from attending. Many hoteliers believe that such a rule would create a chilling effect that would deter meetings and events to be held at our venues resulting in serious economic consequences.

In sum, the proposed rule fails to articulate a significant public interest for further insulating and isolating government from its people by prohibiting federal employees from attending widely-attended gatherings sponsored by any of the thousands of companies and organizations that happen to be registered under the LDA. Rather than operating to make a more informed and responsive civil service, the proposed rule erects yet another barrier to communication and interaction that will adversely affect the ability of career employees to implement and administer federal policies and programs effectively. Given the lack of a meaningful rationale for revising a rule that has been operating without incident for almost 20 years, the overly broad nature of the proposed

restriction and the impediment to free expression it presents, the proposed rule, at minimum, should be revised to delete any changes to the existing regulation governing widely-attended gatherings.

Sincerely,

A handwritten signature in black ink, appearing to read "Joe McInerney", written in a cursive style.

Joseph A. McInerney, CHA

