United States Government

Bonneville Power Administration

memorandum

DATE: November 14, 2100

REPLY TO ATTN OF: BPA-L-7

SUBJECT: Proposed Rule, Amendments Under 5 CFR part 2635

Richard M. Thomas, Associate General Counsel, Office of Government Ethics

Thank you for the opportunity to comment on the Office of Government Ethics' (OGE) proposed rule amendments, reference RIN 3209-AA04, that would extend the lobbyist gift ban beyond the core political personnel by adding a lobbyist limitation to the existing limitations in section 2635.202(c)(6) on the use of the gift exceptions in the OGE regulations. "The proposed rule would limit the ability of employees to rely on certain gift exceptions when a prohibited source--or a person giving a gift because of the employee's official position—also happens to be a registered lobbyist or lobbying organization."

As explained in the proposed rule published in the Federal Register on September 13, 2011, OGE believes that the most important salutary effect of the lobbyist gift ban has been the elimination of sometimes questionable "widely-attended gatherings," "social invitations," and other gifts that might have been permissible under applicable gift exceptions in section 2635.204 had the gifts not been extended by registered lobbyists or lobbying organizations. Further, OGE believes that it is reasonable to ask employees (and their ethics counselors) to determine whether a particular donor is a registered lobbyist or lobbying organization before the employee may rely on certain exceptions to the OGE gift prohibitions.

After review and careful consideration on the impact on its business needs, BPA is concerned about the proposed amendments, RIN 3209-AA04, that would eliminate section 2635.204(a), the \$20 de minimis exception; section 2635.204(g)(2), the widely attended gathering exception (WAG); and section 2635.204(h), the social invitation exception when the prohibited source or the person giving the gift because of the employee's official position also happens to be a registered lobbyist or lobbying organization.

BPA has a direct interest in the OGE's proposed amendments. BPA is a federal power marketing agency, separate and distinct entity within the Department of Energy. BPA's primary business mission is to assure the Pacific Northwest: (1) an adequate, efficient, economical, and reliable power supply; (2) a robust high-voltage transmission system; and (3) mitigation of the system impacts on fish and wildlife. BPA's service area covers four Northwest states, Oregon, Washington, Idaho, Western Montana, and portions of four other States. BPA markets about 30 percent of the electrical power and operates over 75 percent of the high voltage transmission

lines, making BPA the Pacific Northwest's largest power marketer and high-voltage transmission provider.

BPA's customers include: 146 consumer-owned utilities (cooperatives, municipalities, public utility districts, and tribal utilities); 6 investor owned utilities; several direct service industries; 130 power and transmission marketers; and 419 transmission customers. In order to operate its business effectively and to assure it continues to meet its core business objectives, BPA must be an active participant in energy policy discussions and development. Many of the electric industry's policies, practices, regulations, and procedures are developed through participation in national nonprofit professional organizations, a regulatory corporation, or customer or industry trade associations. BPA routinely engages with these organizations to support BPA's and the industry's business objectives.

Many of these organizations, such as the Public Power Council, American Public Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, Energy Bar Association, National Hydro Power Association, American Wind Energy Association, and Alliance to Save Energy have registered lobbyists on their staff, registered lobbyists who are members and attendees at their WAGs or social functions, and lobbyist organizations who may sponsor their WAGs or social functions. Some of BPA's power and transmission customers also have registered lobbyists on their staff or have contracted with an organization or individual to lobby on their behalf. In the ordinary course of business, BPA frequently interacts with its customers through organizations and their representatives on issues that pertain to BPA's statutory business obligations. BPA is concerned that the OGE's proposed amendments may unnecessarily hinder its communication between and among BPA and regional and national energy organizations.

Currently, the exceptions stated in sections 2635.204(a), 2635.204(g)(2), and 2635.204(h) have been effective at providing guidance regarding a variety of circumstances, including employee acceptance of offers of free attendance at certain WAGs where an agency has determined that attendance is in the interest of the agency. These long-standing exceptions have been used by BPA to permit its employees to participate in many of the organizations that are critical to its mission success. The proposed amendments, RIN 3209-AA04, however, would remove these gift exceptions with respect to, *de minimis* gifts, social events, and WAGs that directly involve registered lobbyists or lobbying organizations and put an unnecessary chilling effect on BPA's ability to effectively engage and collaborate with its own business stakeholders.

Consequently, BPA respectfully opposes the proposed amendments. The OGE's proposal to remove a federal employee's reliance on certain gift exceptions with respect to invitations to social events or WAGs extended by lobbyists and lobbying organizations represents a transition away from long-standing and easy to implement bright-line rules. Instead of improving the transparency of Federal employee relationships with lobbyists and lobbying organizations, with de minimis if any ethical concerns, the removal of these exceptions would create the appearance that any Federal employee interaction with lobbyists or lobbying organizations, including certain energy trade organizations, constitutes a de facto ethics violation regardless of that there was no actual or appearance of ethical impropriety involved in the interaction. For example, it is unreasonable to assume that the acceptance of a sandwich at a WAG sponsored by a registered lobbyist or lobbying organization and attended by multitudes of electric industry professionals

for the purpose of developing industry insight and policies for successful wind integration would raise questions of ethical impropriety or even the appearance of such impropriety. BPA is concerned that the proposed amendments are overly broad and should not be extended to the ranks of career employees for whom different considerations are relevant.

For instance the overly broad definition of lobbying organizations is likely to preclude BPA's participation in routine industry events that are pertinent to BPA's business. As noted above, BPA attends WAGs or social events sponsored by registered lobbyists or lobbying organizations to discuss industry policies, concerns, initiatives, and trends with key industry participants. Sometimes key industry participants who are sponsors of such forums are registered lobbyists or they work for organizations that have registered lobbyists on staff. For example, BPA's core customers are members of an organization called the Public Power Council. The PPC meets regularly to discussion BPA's business relations with them, the rates we charge them, capital expenditures, industry trends and impacts, load forecasts, energy policy direction. Registered lobbyists representing their respective utilities attend PPC meetings. BPA would lose one of its key forums for effective stakeholder engagement if it was unable to attend these meetings, simply because the forum was sponsored by a registered lobbyist or lobbying organization.. And, BPA's absence from these energy industry events would have the unintended consequence of uninformed passage or support for rules or regulations that negatively impact BPA's and the Pacific Northwest's energy objectives.

A BPA decision to permit (or not permit) participation in any WAG or to accept a social invitation from an outside organization hosted by a lobbyist or lobbying organization is informed by many considerations, most importantly the degree to which the activity will further BPA's business objectives. As such, BPA employees attend these events precisely because of their official position. It is BPA's business to be an active participant in energy policy development and BPA employees attend these events to further BPA's participation in energy policy. Nevertheless, that fact alone does not subject BPA's employees to violation of Federal ethics standards. The exchange of pertinent industry information, ideas, and perspectives should not create a de facto ethics violation. The OGE's proposed amendments, however, fails to recognize these important considerations.

BPA believes that the harm it describes would not be limited to BPA. Other elements of the executive branch that have day-to-day dealings as a business with private sector entities would suffer the same chilling effects. Any regulatory agencies, for example, would be put in a similarly negative position, precluded from freely engaging with their core constituencies many of whom are registered lobbyists.

BPA strongly recommends that the OGE affirm its long-standing and effective ethics regulations and associated exceptions in lieu of the proposed amendments. OGE should conclude that its proposed amendments are not appropriate in light of the potential harm to key Federal business needs and the minimal positive impact, if any, of these amendments. In the alternative, BPA recommends that OGE expressly clarify that the exception for non-profit professional associations, scientific organization, and learned societies, at least with respect to educational and professional development activities of those entities, as proposed in section 2635.203(h)(1) would include participation in nonprofit trade associations for substantive mission and business related discussions.

BPA thanks the OGE for their consideration of our comments. If you have any questions, please contact Sonya Baskerville, Manager, National Relations at (503) 230-5640.

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And Fish and Wildlife

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