

November 14, 2011

VIA EMAIL

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

Re: Propose Amendments to Part 2635, RIN 3209-AA04

Dear Mr. Thomas,

Thank you for this opportunity to comment on the proposed revisions to Part 2635 of the Code of Federal Regulations related to the executive branch gift laws and prohibitions. While SAS is fully supportive of federal ethics laws and the goals that the Office of Government Ethics (OGE) is seeking to achieve, we believe that there might be more narrowly tailored means of accomplishing these goals than what has been proposed. Described in greater detail below, our primary concerns are that the proposal does not harmonize ethics requirements in the federal space, creates more uncertainty for federal employees as to compliance, fails to improve transparency or resolve unethical behavior by those outside the government while creating incentives to circumvent the proposal, and constrains the use of legitimate and critical information resources. As such, we ask the OGE to drop its proposal to eliminate the “widely attended event” exception to the general gift rules. Instead, we ask that OGE consider putting in stricter requirements as to parameters an event must meet to be eligible for the exception as a better means of controlling potential abuses.

Like all Americans and taxpayers, SAS expects that government officials in the executive and legislative branches observe the highest level of ethical behavior. We believe that government decisions should be based on the merits at hand and what is in the public’s best interests rather than reasons based on “special access”, financial incentive, or other conflicts of interest. As such, SAS supports the ethical frameworks that have been adopted to date by Congress, the President, and the Office of Government Ethics. We further appreciate that the government’s correct response to lobbying abuses in recent times has been to limit the “loopholes” in federal ethics rules that may have been exploited for personal gain.

Because the issues that the federal government faces are increasingly complicated, SAS believes that one of the best services that it can provide is to educate and inform our citizen legislators and decision makers. The business in which SAS engages – advanced analytics – is complex and may not always be well understood by those outside of the information technology sector. Advanced analytics has potential to aid decision-making in many areas – education, health care, the environment, finance, and manufacturing and services efficiency enhancement, among others. A person may not need an advanced math or statistics degree to see the benefits, but it certainly could help policymakers to have someone with such a degree explain these concepts. In addition, policymakers may at times be asked to make decisions for which advanced analytics would be a help to them. Thus, SAS has chosen to exercise its First Amendment right to “petition the government” so that policymakers have more complete information when considering various policy proposals.

As important, SAS helps those in both the executive and legislative branches better understand what advanced analytics are and how they could be used to help understand the complex challenges that our governments confront and the likely outcomes of various solutions. We believe that these conversations are important to help government understand the “state of the possible”, appreciate developments and innovations in the private sector that have relevance in the public sector, and ultimately, become more effective and efficient at providing products and services that are genuinely desired by taxpayers. These activities are fully disclosed, and all SAS employees are required to comply with ethics rules, including

government gift requirements. The company has mandated ethics training for all employees, requiring documentation that the training has been completed. The company feels strongly that the only way for us to operate is to observe the highest, most rigorous ethical standards.

With that background, SAS supports the Office of Government Ethics review of its standing gift rules, and generally supports expanding the President's transparency initiative to non-political appointees. We appreciate the OGE's efforts to harmonize the executive branch requirements with those of the legislative branch. From a compliance standpoint, it is much easier for us to help our employees understand a consistent set of principles and to design programs to monitor and report employee activities.

SAS is, however, very concerned about the OGE's proposal to eliminate the "widely attended event" exception to the executive branch gift rules, at least for those for-profit entities that employ or engage lobbyists. We raise several concerns about the proposal.

OGE Proposal Fails to Achieve Its Objective of Harmonizing Federal Ethics Requirements.

First, the proposed elimination goes well beyond the very restrictive protocols that apply to the Congressional branch. The legislative branch continues to recognize a "widely attended event" exception even in those cases where lobbyists might be present. In contrast to the OGE approach, Congress has developed guidance documents that are easily understood and fairly clear cut in terms of those events that will pass muster, and those that will not. The focus of these rules is on the event, not on the job roles of all employees of the event sponsor. In short, what OGE proposes does not harmonize the rules that are applicable in the federal space.

OGE Proposal Creates Greater Uncertainty For Government Compliance.

Second, while we appreciate the desire to create bright line tests, the proposed elimination creates much greater uncertainty about compliance requirements for the executive branch official. OGE asserts that the government employee simply needs to consult a database to see if the entity employs lobbyists. It is certainly true that any government employee can go to either the House or Senate website to find lobbying databases. However, the rule provides no clarity as to what element the employee is supposed to search—is it the registrant, or is it the actual lobbyist? What happens if an entity does not employ lobbyists in-house (who bear no separate registration requirement), but does engage outside lobbying firms? What search requirements and conclusions is the government executive supposed to draw if he or she finds the registrant but not necessarily the lobby shop? As problematic, these databases do not provide any information in terms of the registrant's organizational structure. So, while one might be able to guess whether certain enterprises are "educational", one cannot conclude from these databases whether these entities are 501(c)3. Thus, these sources provide limited help to the government executive in understanding whether the proposed invitation is on the right or wrong side of the ethical dividing line.

Exclusive Focus On Employment of Lobbyist Won't Resolve The Underlying Ethics Issue.

While SAS clearly acknowledges that there have been lobbying abuses by some individuals, our strong belief is that the proposal by OGE focuses on the wrong problem. The issue is not whether an organization has a lobbyist; the issue, as identified by OGE, is that occasionally the widely attended event exception has been invoked in circumstances that might be questionable. If that is the problem OGE is trying to address, focusing on lobbyists does not, without more, improve how the exception might be utilized. More important, the exclusive focus on the actor—in this case—the existence of a lobbyist—does not guarantee that decisions made by the government executive are free from undue influence, which should be the primary focus of any effort to police ethics. Conversely, the proposal automatically assumes that if an organization has no lobbyist, the event can be attended without any analysis of whether other forms of improper influence were exercised to encourage the executive's participation, or certainly whether the event itself is appropriate.

As problematic, the OGE proposal assumes that the employment of the lobbyist, without more, is what created the ethics problem in the first place. There is no analysis or discussion as to whether the lobbyist had any nexus to the government official and that official's presence at the event. We believe that there

should be, at a minimum, some showing that the lobbyist had a direct connection between the presence of the government official and the event, and that there are other facts and circumstances to either suggest the event is not credible or that there was the potential for undue influence.

As Drafted, the OGE Proposal Creates Clear Incentives to Circumvent the Requirements.

SAS notes that the proposal both designs perverse incentives, and actually attempts to “legitimize” certain lobbying activities while invalidating others. Thus, a non-profit or educational entity would still have the right to offer widely attended events for government employees, but for-profit enterprises would not. The incentive then becomes to find non-profits that could host events on behalf of the for-profit, which essentially means that enterprises would comply with the letter of the requirement but not the spirit. It also says that lobbying for a non-profit carries less potential ethical risks for government than lobbying for a for-profit, an assumption that SAS rejects. We note, for example, that some of the worst abuses involving Jack Abramoff did not, in fact, involve for profit enterprises. The potential unintended consequence of driving for-profit enterprises to use non-profits to conduct events reduces rather than enhances transparency in government and diminishes true democratic interaction rather than promoting it.

More Narrowly Tailored Means Exist to Achieve OGE’s Intended Result.

At the end of the day, the OGE should be focused on how to help the government official make the most ethical decision about attending events; what it has instead done is create a confusing and artificial test that does not guarantee a good decision by the government employee. SAS believes that a better approach would be, at a minimum, to set out potential red flags for the government employee to consider. For any enterprise (regardless of profit-making incentive), OGE might instead consider the extent to which there is a nexus between the lobbyist and the government executive (in addition to other considerations described below.) If there is no nexus between the two, the concern about undue influence certainly diminishes, although other facts and circumstances may raise considerations. If there is a connection, was the relationship used and, if so, how? If it was not utilized, the event should be permissible, absent other factors. If the relationship was utilized, are there other facts that would suggest inappropriate or unethical consideration? Additionally, OGE could provide greater guidance about those events that will pass muster. Like the Congressional ethics requirements, guidance should focus on the type and nature of the event, the relationship of the event to the executive’s job and duties, audience participation, and location. By more narrowly tailoring the proposal, the OGE would achieve its desired goal of clamping down on questionable events, and enhance overall ethical compliance without raising First Amendment challenges that the current, overly-broad proposal raises.

The fundamental problem with the current proposal is that by banning any event OGE will be limiting the ability of government executives to attend events that have real informational value, to the detriment of that official, that agency, and ultimately to the taxpaying public. SAS, for example, hosts a number of events in a variety of industry areas that are intended to share best practices among all users of advanced analytics. These events (generally held at the company’s headquarters, but sometimes in other locations around the US to suit the convenience of our intended audience) highlight the experiences and learning of noted experts, thought leaders, customers and government officials, and provide opportunity for informed dialogue and information sharing. By way of one example, SAS hosts an annual forum on anti-money laundering and terrorist financing that is well attended by a variety of law enforcement officials from the local, state, and federal levels, bank officials, SAS partners, and other IT companies. All participants have the chance to better understand what is happening in these areas, the challenges that law enforcement and financial institutions confront in trying to deal with these issues, and what solutions – technological and other – might exist that could help deal with these issues. SAS believes that these events are invaluable sources of information and that it would be a disservice to our government partners and to the taxpayer to simply eliminate them because of some perceived past abuses by some organizations that have employed lobbyists.

Similarly, while SAS appreciates that OGE's proposal would let government officials attend such events to speak, the real value of these events, from the government's standpoint, is the ability to stay and listen and interact with other panelists and audience members. None of that would be permissible under the proposed OGE rule, to the detriment of the government employee and the public at large. We note that the OGE itself recognizes certain events can be educational—we just argue with the premise that the only events of value are those offered by nonprofit organizations. Additionally, while SAS believes that the lobbying reporting rules already provide significant visibility into lobbying activities, if necessary, the forms could be amended to include sections relating to events at which lobbyists encouraged executive branch representation.

As a related matter, the OGE proposal is directly at odds with other initiatives being launched by the executive branch designed to encourage greater interaction with the private sector. For example, one of the core recommendations of the CIO's 25-point plan to improve how information technology is procured and deployed is increased communication with "industry". While specific to the IT sector, the assertion is that by engaging with the private sector, IT officials can better understand not only what exists today and what is in development, these individuals can ultimately formulate requirements that are realistic and achievable, and hopefully will stop the cycle where the government procures technology that does not really do what was intended (and costs significantly more than was budgeted.) We can point to other examples emanating from organizations within the executive branch, but the point is that government officials are being encouraged to meet with all sorts of stakeholders to better understand the problems and the solutions. The OGE proposal creates an unsolvable conundrum for these officials: they must interact with the private sector but will be in potential ethical jeopardy if they do precisely this. It also puts "industry" in an awkward spot – businesses must decide whether to decline to host interactions that officials request, or they may agree to host such events through third parties to meet the officials' requests, but thereby risk ethics rule violations. It seems like a more narrowly tailored solution that preserves the widely attended gathering exception and allows review of whether the official has been unduly coerced by a lobbyist to attend or would not receive any content beneficial to the official's constituency would better serve all.

In our view, clearer standards and more rigorous disclosure would promote the greater transparency that OGE seeks. We appreciate the opportunity to comment and would be happy to provide any additional information.

Sincerely,



Brian Zuercher
Assistant General Counsel