

KING & SPALDING

King & Spalding LLP
1700 Pennsylvania Ave, NW
Suite 200
Washington, D.C. 20006-4707
Tel: +1 202 737 0500
Fax: +1 202 626 3737
www.kslaw.com

Thomas J. Spulak
Partner
Direct Dial: +1 202 661 7948
Direct Fax: +1 202 626 3737
tspulak@kslaw.com

January 26, 2016

Christopher J. Swartz
Assistant Counsel
Vincent J. Salamone
Associate Counsel
Office of Government Ethics
1201 New York Avenue, NW
Suite 500
Washington, DC 20005-3917

RE: Standards of Ethical Conduct for Employees of the Executive Branch;
Amendment to the Standards Governing Solicitation and Acceptance
of Gifts From Outside Sources. RIN 3209-AA04. Proposed Amendments to
Subpart B of 5 CFR Part 2635. 80 FR 74004. November 27, 2015.

Dear Messrs. Swartz and Salamone:

King & Spalding LLP (“King & Spalding”) appreciates this opportunity to comment on the Office of Government Ethics (“OGE”) proposed rule RIN 3209-AA04 (the “Proposed Rule”) which amends portions of the regulations that govern the solicitation and acceptance of gifts by Executive Branch employees (“Employees”). We appreciate OGE’s efforts to provide for a high-level of public confidence in the integrity of Executive Branch programs and operations and support OGE’s mission of providing leadership and oversight of the Executive Branch and its programs to prevent and resolve conflicts of interest.

In this instance, however, we believe that OGE has erred. On behalf of several of King & Spalding’s for profit and not for profit clients, we state our reasoning below.

Introduction

The Proposed Rule represents a significant and harmful departure from the original purpose and intent of the Standards of Ethical Conduct for Employees of the Executive Branch originally promulgated in 57 FR 35005–35067. The goal of the original rule and subsequent amendments

has been to assure that Employees are able to freely and appropriately interact with regulated industry in order to foster the exchange of information essential to the optimal performance of their governmental duties. Such information exchange is essential to fulfilling the important work of Employees and helps assure that their work advances the public interest while maintaining public confidence in Employees and the agencies that employ them.

The current rules provide a fair and appropriate balance intended to encourage helpful engagement between Employees and regulated industry while recognizing the need to avoid improper influence or bias, or its appearance.

The proposed rule dramatically and unnecessarily shifts the balance fostered in the current regulations that promote meaningful interaction between the private sector and Employees toward one that imputes a negative inference in every situation in which Employees and the private sector interact. The current rules, which have been in effect for over 20 years, have worked well. Considering the thousands of Employees and the innumerable opportunities for their interaction with the private sector, there have been few known instances in which there has been a violation of the administrative rules found in 5 CFR part 2635.

Importantly, the Proposed Rule is at odds with the original purpose of this section. As it is often said, "If it isn't broken, don't fix it." The current rules are working as OGE originally intended. To the extent OGE sees room for improvement, a more effective approach would be to forcefully enhance and support employee training and education efforts and through other compliance program enhancements undertaken by OGE and the various executive branch agencies. Such efforts would not only foster better understanding and application of the rules but would advance the aims of its original purpose. Thus rather than amend the rules, there should be a heightened focus on ensuring that all Employees are familiar with and understand the existing regulations,

We fear that issuance of this rule, as proposed, will have a chilling impact on essential and appropriate interactions between Employees and regulated industry and will negatively impact the ability of Employees and their agencies to perform the vital work in which they are engaged.

Discussion

The amendments to the portions of the Standards of Ethical Conduct for Employees of the Executive Branch, codified at 5 CFR part 2635, contained in the Proposed Rule will likely cause Employees to default to refusing to accept an otherwise permissible gift or benefit. This would upset the careful balance that is contained in the current regulations.

The current regulations prohibit Employees from accepting gifts from a prohibited source or given because of the Employee's official position. The regulations provide, however, several exceptions to this rule under which an Employee may accept a gift, but only if it is not accepted in return for being influenced in the performance of an official act, solicited or coerced, or accepted on such a basis that would lead a reasonable person to believe that the Employee was using his or her public office for private gain.

The exceptions are guided by a powerful principle found in the preamble to § 2635.204 which instructs that “it is never inappropriate and frequently prudent for employees to decline a gift offered by a prohibited source or because of his or her official position.” Guided by that principle, section 2635.204 permits Employees to accept certain things of value, *i.e.*, gifts, either by excepting them from the definition of gift, or by specifically allowing them.

Permissible gifts are generally of nominal value, for example, greeting cards or plaques, or a meal with a value of less than \$20. (To avoid repetitive gifts, such as meals, there is an annual limit of less than \$50 from any one source, *e.g.*, a corporation.)

Permissible gifts are not only tangible items but opportunities as well. These include the ability to attend a reception or a dinner hosted by a private source. The source can be a non-profit organization, such as a charity, a trade association, a school or a for profit corporation.

The exceptions that permit Employees to attend such events are not designed to enrich Employees. They exist to permit Employees to interact with the community that they regulate. At such events, Employees can meet with and discuss government and corporate issues with representatives of those whom they regulate. They are fact-finding opportunities. They provide opportunities to ask questions and obtain information that perhaps is not evident in formal pleadings and other documents submitted for the record.

There are safeguards built into the current regulations. Before attending an event, an Employee must receive the approval of the relevant agency official.

Given their busy work schedule, many Employees who are not political appointees do not have the occasion during their workday to interact orally with those they regulate. The opportunities provided in the current regulations afford them those opportunities.¹

Our concern is that the thrust of the Proposed Rule turns what currently is a neutral framework for determining whether an Employee may or should attend a privately sponsored dinner or reception into a rule that presumes attendance at such events is impermissible or must be avoided. As such, Employees will feel that there is no other choice but to refuse to accept an invitation to an otherwise permissible and valuable opportunity—valuable for the government. Valuable because educated and informed Employees can make better decisions for the public at large.

Why do we say that there will be a presumption of non-attendance? For example, regarding the exception found at section 2635.204(g)(2)) permitting Employees to attend dinners sponsored by a private source, *i.e.*, a Widely Attended Gathering, there are numerous factors that must be satisfied before an Employee may attend. First and foremost, there must be a determination that

¹ The Employees at issue are not policy makers or those who can decide the direction of an agency or department. Those Employees are typically political appointees and, under the terms of Executive Order 13490, already are not permitted to attend receptions and dinners which are sponsored by organizations that employ registered lobbyists.

attendance is in the interest of the Employee's agency "because it will further agency programs and operations". The Employee does not make this decision for herself—a disinterested agency expert does. In order to receive approval to attend, there must be a large number of attendees who share a diversity of views or interests. Finally, the attendance must be on the Employee's own time or, if authorized by the agency, as an excused absence or otherwise without charge to the Employee's leave account

The Proposed Rule, at new section 2635.201(b)(2), superimposes a set of eight additional factors ("Factors") which are purely subjective in nature and would be extremely difficult to apply. We believe that Employees will either ignore them because they are so ambiguous or always demur when an invitation is extended due to a fear that they will make the wrong decision. Neither outcome is desirable or promotes good government.

For example, the first proposed Factor asks the Employee to consider whether the gift has a high or low market value. This begs the question, relative to what? By definition, the value of permissible gifts is low. Another Factor is whether acceptance of the gift would lead the Employee to feel a sense of obligation to the donor. It is difficult to believe that again, given the low value of gifts that are acceptable, any Employee would feel an obligation to the donor. Yet another proposed Factor is whether acceptance of the gift would reasonably create an appearance that the Employee is providing the donor with preferential treatment or access to the government. Some reasonable persons might always say that the acceptance of a gift by an Employee will cause him or her to provide preferential treatment. In today's world, cynicism against the government runs high and many well-reasoned individuals will find fault with the acceptance of any gift provided to an Employee by a private source. But that does not mean that there is anything sinister or wrong if, under the proper circumstances, an Employee does so.

Two other Factors relate specifically to attendance at events. One asks whether the government is also providing persons with views or interests that differ from those of the donor. Does that mean that the host of a dinner would have to seek out and invite individuals that it knows disagree with its positions? Another Factor relating to events asks if the event is open to the public or representatives of the news media. Does this mean that if the host of a reception does not invite members of the general public to an event that the Employee may not attend?

It is hard to see instances where, after considering the eight Factors, an Employee would not feel reluctant to accept an invitation to an event. Employees are being asked to prove a negative in many of those instances.

Of course, some may say, what is the harm in an Employee refusing to attend a dinner or reception? If one has no faith in our government or its Employees, that may seem like a fair question. But if one sees a value in government and the education and betterment of the individuals who operate its levers, then denying Employees an opportunity to meet with representatives of the industries and companies that they regulate is to deny them the information needed to perform their jobs most effectively.

Accordingly, we request that the eight Factors be eliminated from the final rule.

Conclusion

Thank you for the opportunity to provide comments on the Proposed Rule. We appreciate your consideration of these importance concerns. Please do not hesitate to contact me should you have any questions about our submission.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas J. Spulak', with a long horizontal flourish extending to the right.

Thomas J. Spulak
Partner