

NTEU

The National Treasury Employees Union

November 10, 2011

VIA E-MAIL (usoge@oge.gov)
AND FIRST CLASS MAIL

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

RE: RIN 3209-AA04 -- Proposed Amendments to Part 2635

Dear Mr. Thomas:

On behalf of the National Treasury Employees Union (NTEU), I submit these comments in response to the proposal by the Office of Government Ethics (OGE) to amend the standards of ethical conduct by executive branch employees. See 76 Fed. Reg. 56330 (Sept. 13, 2011). OGE proposes to extend to all Executive Branch employees many of the restrictions on gifts imposed on political appointees by Executive Order 13490. More specifically, the proposed regulations would limit the use of some of the gift exceptions currently found in its regulations at 5 C.F.R. § 2635.204 when the donor is a lobbyist or a lobbying organization. As a result, certain types of gifts that Executive Branch employees are currently permitted to accept would be prohibited if they came from lobbyists or lobbying organizations.

NTEU is the nation's largest independent federal union, representing approximately 150,000 employees in 31 federal agencies in the executive branch. NTEU has analyzed the proposed regulations from two perspectives. First, as the representative of those employees, NTEU has examined whether the regulations would impose an undue burden on employees who are generally not the target of lobbyists intent on currying favor. Second, NTEU has studied the potential impact of the proposed regulations on itself as an institution, for NTEU--like virtually all federal sector labor organizations--employs lobbyists on its staff and therefore falls within OGE's proposed definition of a "lobbying organization." As such, NTEU is deeply concerned that the regulations might adversely affect its

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ability to represent federal employees and interfere with its relationship with its membership.

I. Impact of the Proposed Regulations on Federal Employees

As described in this section, NTEU objects to the proposed elimination of the *de minimis* exception when the "gift"--valued at less than \$20--comes from a lobbyist or lobbying organization that is also a prohibited source or when it is given because of the employee's official position. 5 C.F.R. §§ 2635.202(a)(1), (2); 2635.204(a). NTEU also is concerned that the proposed regulations would prevent federal employees from attending valuable educational and professional development events as a result of the elimination of the "widely attended gatherings" exception. 5 C.F.R. § 2635.204(g)(2).

A. Narrowing the *De Minimis* Exception Would Create a Trap for Federal Employees

In the Supplementary Information accompanying the proposed regulations, OGE acknowledges the "convenience" of the \$20 *de minimis* rule, for it provides a "bright line test": employees know that they can accept token items without having to determine the nature of the donor (whether it is a prohibited source) or the reason for gift (whether it is given because of the employee's official position). 76 Fed. Reg. 56332. OGE, however, now states that "it is not too much to ask of employees and their ethics counselors to determine [not just the nature of the donor and the reason for the gift but also] whether the source also is a registered lobbyist or lobbying organization." *Id.* NTEU strongly disagrees. The burden is far greater than can be justified, given the insignificant nature of the gift at issue and the insubstantiality of any risk to the government's ethical standards.

If the *de minimis* exception is narrowed, the risk is high that employees could unwittingly commit an ethical violation. For example, if a federal employee attends an event where items of little value, such as calendars or pens, are being passed out, the employee would have to remember, first, that OGE ethics rules could be triggered by such inexpensive items and, then, determine (1) whether the item has enough intrinsic value to qualify as a "gift"; (2) whether the individual giving out the item falls into any of the five categories of prohibited sources; (3) whether the gift was given because of the

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employee's official position; and if so, (4) whether the individual giving the gift is a lobbyist or works for an organization that has a lobbyist on staff; and, if so, (5) whether any of the four exceptions to the definition of "lobbying organization" apply. Even well-informed employees who recently received ethics training would find this analysis to be challenging. It is unlikely the employee would have had the foresight to check with the ethics counselor in advance, since *de minimis* "gifts" are rarely anticipated. Thus, the proposed rule would have the practical effect of encouraging employees to decline even the smallest token offering. Although OGE declares that this kind of "prudential attitude" is salutary (*id.*), it places an unreasonable burden on employees. Moreover, it is likely to result in ethical standards being ridiculed or ignored. If enforced, it could lead to absurd and highly unfair disciplinary actions.

The *de minimis* exception was created in 1991 so that federal employees could more easily comply with the standards of ethical conduct. In OGE's words:

This *de minimis* exception has the virtue of establishing a standard that can be easily understood and applied to any gift situation. . . . OGE believes it is a reasonable and simple standard that reduced the need for employees to become aware of a number of technical exceptions dealing with specific situations.

See 56 Fed. Reg. 33778 (July 23, 1991). Since the *de minimis* exception was created, the gift regulations have only become more technical and difficult to comply with. But most employees are never offered "gifts" of more than *de minimis* value, and so most have never been in danger of violating the gift regulations. Significantly, OGE can point to no problem with any ethical abuses occurring under this regime. Its justification appears to be simply symmetry with the House and Senate rules (although it admits that the circumstances of the Executive Branch ethics program "often are unavoidably different from those of Congress") and with the rule for political appointees. 76 Fed. Reg. 56332.

Despite the absence of any record of abuse, OGE now proposes a rule that will require almost two million Executive Branch employees, for the first time, to analyze and apply the complicated gift regulations. Many employees will not even

recall, when receiving an item of little value that the gift rules potentially apply. Others will remember the gift rules but apply them incorrectly. Such employees could then be subject to disciplinary action. Without a countervailing showing of a significant governmental interest that would be advanced, there is no justification for such an outcome.

Accordingly, NTEU urges OGE to retain the *de minimis* exception in its current form.

B. Narrowing the Widely Attended Gatherings Exception Would Unnecessarily Prevent Federal Employees from Attending Valuable Educational and Professional Development Activities

OGE further proposes to eliminate the exception for offers of free attendance at widely attended gatherings (WAGs) if they are hosted by lobbyists or lobbying organizations that are also prohibited sources or if the offer is extended because of the employee's official position. NTEU believes that federal employees should be allowed to attend widely attended gatherings, free of charge, where the primary purpose of the WAG is educational, no matter who sponsors the WAG.

By definition, a WAG is an event that has been determined, by an agency designee, to be in the interest of the agency because employee attendance will "further agency programs and operations." 5 C.F.R. 2635.204(g)(2). Nonprofit professional associations, scientific organizations, and learned societies do not have a monopoly on sponsoring valuable educational events. Corporations, trade associations, and labor organizations may also host events that would be of value to agencies. For example, a computer security specialist may want to attend a conference, sponsored by Microsoft, that compares ways to combat internet hacking. It makes little sense to discourage the employee from attending that training just because it is being sponsored by a corporation that has lobbyists on staff. Agencies are sophisticated enough to evaluate whether a WAG will provide useful training to agency employees. OGE has provided no justification for prohibiting agencies from approving the acceptance of free attendance at these kinds of events.

OGE in its Supplementary Information states that it has perceived some instances "over the years" when the nexus between the WAG and the government's interest was attenuated. 76 Fed.

Reg. 56333. The perceived abuse, OGE states, is in the "cultivation of familiarity and access" that a lobbyist may use in the future "to obtain a more sympathetic hearing for clients." Id. It does not, however, point to educational events as the culprits; it identifies only "social events" as providing such an opportunity to lobbyists. Id. Thus, the true purpose of the proposed rules is to reduce opportunities for lobbyists to socialize with federal employees. But substantive training sessions are unlikely venues for socializing. At an educational course, participants typically sit in a meeting room and learn from experts; they do not cultivate links to lobbyists. Accordingly, the benefits of keeping this exception, at least with respect to educational and professional development activities, outweigh any possible benefit that would be achieved by further narrowing it.

NTEU thus urges OGE to preserve the WAG exception, at least qualified as outlined above. Alternatively, NTEU urges OGE to make it clear that employees should be permitted to attend, free of charge, gatherings hosted by labor organizations or umbrella associations composed of labor groups. It can accomplish that goal by excluding labor organizations exempt from taxation pursuant to 26 U.S.C. § 501(c)(5) from the definition of "lobbying organization" in Section 2635.203(h).

II. Impact of the Proposed Regulations on Federal Sector Labor Organizations

NTEU is deeply concerned that the regulations could be interpreted to have a possibly unintended but nevertheless unconstitutional impact on federal sector labor organizations in their relationship with their membership and potential members. The problem exists in the current regulations but is significantly aggravated by the proposed regulations. A literal interpretation of those regulations could dramatically interfere with the ability of federal sector labor unions to conduct their internal operations as they see fit and to fulfill their statutory right to represent federal employees. Accordingly, NTEU urges OGE to clarify that the regulations related to gifts found in 5 C.F.R. Part 2635 do not apply to gifts given by federal sector unions to actual or potential union members. In the alternative, NTEU urges OGE to create an exception to the definition of "lobbying organization" so that the proposed regulations do not apply to labor unions.

A. OGE Must Clarify that the Gift Regulations Do Not Apply To "Gifts" by Federal Sector Labor Organizations to Employees in Current or Potential Bargaining Units

Federal sector labor unions routinely distribute items, usually with little intrinsic monetary value, to federal employees who are actual or potential union members. These items include t-shirts, coffee mugs, caps, and key chains, typically emblazoned with a union logo or message. The goal is to build solidarity and to raise the union's visibility in the bargaining unit. They are common tools during a union organizing drive, but are also used in the course of representational activity. As such, they assist federal employees in better advocating for labor unions in general and for their union in particular.

Federal sector unions also routinely provide food and drink at organizing events, membership meetings, and rallies held in conjunction with other labor unions or other organizations. The meals range from a slice of pizza to a sandwich to a buffet lunch or dinner, but can occasionally include a formal meal as the capstone of a conference. The provision of food at these events fosters camaraderie, encourages attendance, enables employees to participate during their lunch break, and rewards employees for their efforts on their union's behalf.

Federal sector unions, in addition, provide discounts to members only on various commercial offerings, as part of their member benefits program. These discounts fulfill an important role in promoting membership, which in turn strengthens a union's ability to perform its representational functions.

Finally, it is common for federal sector unions to provide food, drink, and expense reimbursement in connection with its internal governance, such as conventions, board meetings, and training sessions, to federal employees in their union-leader capacity. Without reimbursement for out-of-pocket expenses incurred in attending board meetings or other union-related events, these union leaders might not be able to fulfill their responsibilities on behalf of the union.¹

¹ Reimbursement of the travel expenses of federal employees who are union officials, as part of the union's internal governance, seems more akin to the payment of expenses related to "outside employment," which is generally permitted under OGE regulations.

As an initial matter, it is NTEU's firm belief that none of the items above should be classified as "gifts" within the meaning of the OGE regulations. If they are "gifts," then NTEU questions whether they fall within the proscriptions of 5 C.F.R. 2635 Subpart B, "Gifts from Outside Sources." NTEU argues that it is not a "prohibited source" and is not giving the gifts "because of the employee's official position." Clarification by OGE in this respect would avoid the need for regulatory amendment. As we explain below, if the "gifts" to current and prospective members do fall within the regulatory prohibition, serious problems of constitutional magnitude would arise. Although not a complete "fix," OGE must, at a minimum, modify its proposed regulations by adding an exception for labor organizations from the definition of "lobbying organization."

1. The proposed regulations modify Subpart B, entitled "Gifts from Outside Sources," and leave unaffected "Gifts Between Employees," in Subpart C. The term "outside source" is not defined. It is not clear to NTEU, as an initial matter, that it is an "outside source." We point out that federal sector unions are associations of federal employees, funded by dues from those employees, run by officers elected by the employees, and largely staffed by federal employees who serve as local leaders. At NTEU, for example, all union officials except for the two top elected leaders and the National Office staff are federal employees. For these reasons, a gift to employees from a union of employees is not a gift from an "outside source." Rather, it is similar to a gift "between" employees.²

In any event, it is no more appropriate to term as gifts such token presents such as t-shirts or pizza lunches than it would be to label the benefits of union representation as a "gift" to federal employees. Union representation in a grievance meeting, union negotiation of a collective bargaining agreement, and union provision of a lawyer to provide representation in a lawsuit are all benefits to federal employees who enjoy union representation. If their benefit

See 5 C.F.R. §§ 2635.204(e), 2635.603(a). Payments associated with membership on a corporate or nonprofit board of directors do not ordinarily create a conflict of interest; neither should payments related to participation in the leadership of a labor organization.

² Indeed, "gifts" by a union to its members are paid for by the members themselves, though their dues.

could be quantified in monetary terms, it would be far greater than the value of those items defined as gifts in the OGE regulations. See Section 2635.203(b) ("gift" includes any "gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value"). NTEU is confident that no one would contend that these valuable benefits of union representation are impermissible "gifts." It makes no sense to label as "gifts" subject to ethical restrictions the less valuable benefits extended by a union to union members or potential members, such as free meals or key chains.

2. NTEU further argues, in the alternative, that 5 C.F.R. 2635, Subpart B, is not applicable to gifts by federal sector unions to their members or potential members because unions are not "prohibited sources" and/or are not giving the gifts because of the employees' "official position." It urges OGE to clarify the meaning of these terms in the explanation accompanying its final rule.

"Prohibited source" is defined broadly in Section 2635.203(d) to include any person seeking official action by an agency or who does business with the agency. A federal sector union representing an agency's employees is naturally seeking action by that agency on the employees' behalf; that is a union's *raison d'être*. The type of action sought, however, is not the type contemplated by the regulations: it does not involve the issuance of regulations, the granting of a contract, or the granting or denial of a benefit pursuant to a program administered by the agency. Instead, it involves only an agency's internal labor relations.

Moreover, while the individuals who are the recipients of a union "gift" are federal employees, they do not receive the gift "because of their official position" in the sense that OGE evidently intended. Instead, they receive the gift because of their membership in a labor organization (or would-be membership) or their leadership role in the organization.

Provision of gifts under these circumstances would not create any of the harms that the gift regulations seek to prevent. The gift regulations were originally promulgated to prohibit employees from participating in activities that would make them appear corrupt.³ In OGE's words, "[a]ccepting a gift

³ Other statutes prohibit actual corruption. See, e.g., 18 U.S.C. § 201 (criminal statute prohibiting illegal gratuities).

offered because of one's official position creates an appearance of using public office for private gain." 56 Fed. Reg. 33778 (July 23, 1991). As discussed above, a gift to a union member is a benefit of representation, typically paid for through union dues. The employee's public office is not at issue; no action by the employee in his or her official capacity is sought. Thus, there is no specter of corruption.

3. Should OGE determine, contrary to the arguments above, that tangible union "gifts" to federal employees are covered by the current gift regulations, the proposed regulations would compound the problem. Thus, as discussed, NTEU is a "lobbying organization" within the meaning of the OGE regulations. It--like most (if not all) federal sector labor unions--employs registered lobbyists on its staff; their purpose is to advance the interests of federal employees before Congress. As a lobbying organization, NTEU would be barred from giving even *de minimis* gifts to employees should the proposed regulations be finalized. This would create an untenable situation, for it would preclude employees from accepting any of NTEU's membership-building paraphernalia.

4. NTEU points out that if OGE takes an expansive interpretation of its regulations as covering "gifts" from a union to its members and prospective members, those regulations would not only be unworkable, they would be unconstitutional.

A prohibition on the giving of gifts by a federal sector union to its membership would interfere with both the union's and its members' right to free speech and freedom of association, in violation of the First Amendment. The wearing of logo or message-inscribed t-shirts, for example, constitutes expressive activity within the meaning of the First Amendment. Barring the distribution of such items impermissibly burdens the First Amendment rights of members and the union. Barring the reimbursement of travel expenses to a union meeting--or even barring the provision of a free meal--discourages attendance and burdens the right to freely associate and to communicate ideas at that meeting.

When the government issues a regulation designed to be a prophylactic measure to guard against the potential of harm, and that regulation burdens expressive conduct, the government bears a heavy burden to justify the regulation. As the Supreme Court explained in United States v. National Treasury Employees Union,

When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and the regulation will in fact alleviate these harms in a direct and material way.

513 U.S. 454, 476 (1995) (internal quotation marks, brackets, and ellipses omitted) (quoting Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994)). It is notable that OGE has not cited any alleged harm or otherwise provided any justification for restricting the First Amendment rights of labor unions and federal employees.

In addition, of course, if the OGE regulations are determined to apply to union activities, they would interfere with the ability of unions to understand the needs of their members and fairly represent them. Accordingly, the OGE regulations would infringe upon rights granted by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq.

Finally, because there is no justification for applying these regulations to the "gifts" described above, such an application would be arbitrary and capricious, in violation of the Administrative Procedure Act. See 5 U.S.C. § 706(2)(a).

B. The Gift Regulations Can Be Easily Clarified so that They Are Lawful

OGE could easily avoid the problems outlined above by including in the explanation accompanying its final rule a disclaimer of any intent to cover federal sector union "gifts" to current or potential members. It could accomplish that in a variety of ways. At a minimum, OGE should adopt the amendment proposed below.

One option is to explain that items paid for by union dues and given in the course of the union's organizational and representational functions do not fall within the definition of a "gift" in 5 C.F.R. § 2635.203(b); do not fall within the gift regulations' general prohibitions, found at 5 CFR 2635.202(a); are not covered at all by 5 C.F.R. § 2635 Subpart B because federal sector unions are associations of federal employees, and

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not outside sources; and have not been offered or enhanced because of the employee's official status.

OGE could, in the alternative, explain that such "gifts" are not from a prohibited source and are not given as a result of the employee's official position. In that event, there would be no barrier to the employee's acceptance of the items or reimbursement.

If OGE declines these options, then at a minimum it should allow federal sector labor unions to use the existing exceptions to the gift regulations, as other nonprofits would be allowed to do under the proposed regulations. OGE could accomplish this by adding the following exception to the definition of "lobbying organization" found in proposed 5 C.F.R. § 2635.203(h):

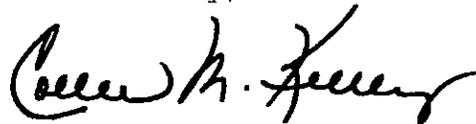
(5) A labor organization exempt from taxation pursuant to 26 U.S.C. § 501(c)(5), with respect to gifts given to actual or potential union members.

This course of action would not eliminate the burden imposed by an interpretation of "gift" to cover items or services provided to union members by labor organizations, but it would at least permit members to accept gifts of *de minimis* value (should the regulations be promulgated in their current proposed form).

In sum, NTEU finds the gift regulations in general to be quite unclear in their application to federal sector labor organizations in their relationship to represented employees. In order to avoid a serious constitutional question, it is incumbent on OGE to clarify its regulations and to incorporate amendments as necessary.

NTEU thanks OGE for the opportunity to submit these comments. Please do not hesitate to contact us if you require any further elaboration of these views.

Sincerely,



Colleen M. Kelley
National President