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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



November 14, 2011

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

RE: RIN 3209-AA04 [Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts From Registered Lobbyists and Lobbying Organizations]

Dear Mr. Thomas:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the Proposed Rule that the Office of Government Ethics (hereinafter "OGE") originally issued on Sept. 13, 2011. In short, the Proposed Rule would amend the Standards of Conduct for Employees of the Executive Branch, which is the regulation governing ethical conduct for executive branch employees of the Federal Government, to impose limits on the use of gift exceptions by all employees to accept gifts from registered lobbyists and lobbying organizations, and to implement the lobbyist gift ban for appointees required to sign the Ethics Pledge prescribed by Executive Order 13490. AGC is greatly concerned that the administration views associations as nothing more than lobbying groups working to exert undue influence over federal agencies and their employees. AGC is also concerned that the proposed OGE policy would result in public policy being created in an airtight vacuum and we urge OGE to withdraw its proposal as currently written.

AGC is the leading association for the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration and other federal departments and agencies that solicit and award contracts for construction services. Most of our members are small and closely-held businesses.

AGC Impressions on the Proposed Rule

AGC supports OGE's mission to promote high ethical standards for executive branch employees and generally understands the intent of amending the standards of ethical conduct to restrict the solicitation and acceptance of gifts, such as invitations to social events, from outside sources where the nexus to the government's interest is attenuated. However, AGC is greatly concerned that the proposed rule OGE has issued is overreaching and will ultimately hinder the ability for the government and private sector to openly and effectively communicate with each other.

We are concerned over the reasoning and intent behind the proposed rule. OGE asserts that adding a new lobbyist limitation to the existing limitations on the use of gift exceptions "would extend the 'real' benefits that OGE has already 'perceived' as a result of the gift ban on political appointees." However, the proposed rule does not provide any evidence or examples of actual benefits achieved from the "Ethics Pledge" signed by political appointees. Moreover, there is no indication that the current rules governing the standards of conduct of executive branch employees are in any way flawed or inadequate. Instead, the severe restrictions imposed by the proposed rule amount to regulatory overkill. Rather than achieve a benefit, these restrictions would erect a new barrier to the free flow of ideas between regulators and the regulated community.

AGC is encouraged by OGE's acknowledgement that exceptions are appropriate for widely attended gatherings (WAGs), where an agency designee has determined that attendance is in the interest of the agency. OGE justly asserts in its proposed rule that federal employees, including political appointees, should be able to accept offers of free attendance to "substantive events that would provide a legitimate educational or professional development benefit that furthers the interests of an agency." We agree wholeheartedly that it is important for the federal workforce to leave the confines of their offices and speak to the regulated community to get a better understanding of their perspective whenever possible.

In crafting that exception, OGE proposes to allow government employees to accept invitations to attend educational and professional development activities held by Section 501(c)(3) organizations, institutions of higher education, nonprofit professional associations, scientific organizations and learned societies, without regard to the Lobby Disclosure Act (LDA) registration status of these entities. In explaining the widely attended gathering (WAG) exception, OGE correctly points to the valuable educational and professional development opportunities at these types of programs, but then explicitly excludes trade associations from the WAG exception.

OGE also contends in its proposed rule that trade associations "may sponsor educational activities for their members and even the public, but the primary concern of such associations generally is not the education and development of members of a profession or discipline, which is the focus of the proposed exclusion." AGC, however, as a Section 501(c)(6) organization, believes the proposed changes, if implemented, would prove to be detrimental to the development of agency policies and procedures. These proposed rules unfairly sequester trade

associations from their traditional role and fundamental first amendment freedom of association – the right to engage with the Federal government – and would stifle the free exchange of ideas and expertise that is so crucial in the construction industry. We urge OGE to withdraw the proposed rules so as not to create an environment where public policy is created in a vacuum.

Overriding Concern about the Omission of Trade Associations in the Exception

Our experience is that trade associations are extremely focused on education and development of members. AGC in particular is very active providing educational opportunities that advance the profession whether it is management training, estimating training, Building Information Modeling, Lean Construction, Green Construction, and certification. The fact that we are a Section 501(c)(6) organization and employ registered lobbyists does not change our impact on the industry. OGE's narrow reading of trade association activities ignores the important role these organizations play in virtually every industry the government seeks to regulate. AGC members have joined our trade association to promote common interests, share best practices, learn about the latest developments in their industry and foster relationships with each other and the federal government. While most trade associations engage in advocacy, they also help resolve industry-wide issues that could otherwise threaten economic growth, and set safety and technical standards that benefit everyone in exactly the same way as professional associations, scientific organizations and learned societies.

A considerable intersection exists between government and trade associations' interests. Today's mixed economy – where government and business both play important roles with regard to production, consumption, job creation, and investment – requires mutual understanding and a free exchange of ideas, knowledge and expertise to ensure informed policymaking and economic progress. Trade association meetings, whether they are Section 501(c)(3) organizations or Section 501(c)(6) organizations, facilitate these exchanges of ideas in both the formal and informal settings.

Trade associations often sponsor programs in consonance with government interests and Federal employees' professional development aspirations. They regularly hold seminars, conferences, trade shows and other programs that forecast industry performance and spotlight concerns. Government employees tasked with promulgating regulations most assuredly benefit from attending programs where they can learn about latest developments, see new product demonstrations, and understand how industries might be impacted by rulemaking. At the same time, trade association members have the opportunity to learn more about agencies' interests and processes, and are better prepared to comply with federal regulations. AGC believe OGE's proposal would actually impede better understanding of industry.

Limiting Opportunity for Collaboration

The proposed elimination of the \$20 “de minimis” exception and “widely attended gathering” exception for a lobbyist or lobbying organization would prohibit agency employees from attending most lunch briefings, evening receptions, and other types of these events when hosted

by an organization registered under the Lobbying Disclosure Act (LDA). In addition, an agency employee would no longer be able to accept complimentary attendance from the event organizer at a conference hosted or organized by a registered lobbyist or lobbying organization, even if the lobbyist or lobbying organization have no matters pending before that agency, unless the agency employee is a speaker at the event. Nor would an agency employee be permitted to attend social events sponsored by any registered lobbyist. OGE contends that these broad prohibitions are necessary because “social events of this type sometimes are used as lobbying tools,” and while the lobbyist may not have pending matters before the employee’s agency, “[t]he potential for harm, while perhaps latent, is nonetheless real.”

We believe these assertions could not be further from the truth. First, of significant concern, the new rules would have the effect of distancing advocates registered to speak out on behalf of their clients from agency decision makers who consider and enact regulations that affect businesses and individuals across the country. At the outset, the rule will have a chilling effect on the willingness of Federal agency employees to agree to accept any invitations to speak before trade associations for fear of inadvertently violating the new rule. Such an approach creates an environment where decision-makers are not provided with the full measure of relevant information necessary to a balanced, effective decision. This would be particularly detrimental to those small businesses far beyond the beltway whose voices would not be otherwise heard. An unintended consequence of this proposed rulemaking could result in registered advocates to tailor their activity in a way that could permit them to deregister, undermining the stated interest in transparency by the administration and the Congress.

On the other hand, those unregistered lobbyists who fall under the relevant registration thresholds would be subject to fewer restrictions than those registering and complying with existing federal law. Such a result seems contrary to the stated goals of the proposed ethics rules and the purported rationale behind the proposal. The existing regulations already provide effective standards that allow an individual Designated Agency Ethics Officer to determine whether an employee’s attendance at an industry-sponsored widely attended gathering is in the interest of the agency. These determinations allow officials with individual agencies to seek out new information and use their judgment on whether an employee’s participation in an event is appropriate, rather than broadly excluding federal agency employees from participating in an event when the host employs a lobbyist.

In addition, OGE’s proposed limitations on those companies that utilize lobbyists are inconsistent and unfair. For example, large, profitable companies that use outside lobbying firms to communicate with federal covered officials would not be penalized by the proposed limitations, while those events hosted by small, non-profit, industry-focused trade associations like ourselves that are registered would be prohibited from important idea exchanges with federal agency employees. Such a result only penalizes those members of the small association who have banded together to get their voices heard in Washington.

The AGC Experience

As it is with AGC, our organization offers many conferences each year that not only provide educational opportunities to its members, but serve important government purposes as well. As mentioned at the outset of these comments, AGC was founded in 1918 at the request of President Woodrow Wilson. President Wilson recognized the construction industry's national importance and desired a partner with which the government could discuss and plan for the advancement of the nation. AGC has been fulfilling that mission for the last 90 years. A key component in fulfilling our mission is by fostering meetings and conferences where contractors and federal agency personnel can meet in collaborative forums to review construction contracting issues and trends from around the United States. These insightful and highly productive exchanges have solidified the need for both Federal construction contractors and the Federal construction agencies to share information on a wide variety of issues, foster better communication, and create real solutions. Such meetings also enable Federal agency personnel to engage in conversations not only with contractors, but with other agencies as well.

AGC is concerned that OGE's stipulation that appointees still may accept offers of free attendance only on the day of an event when they are speaking or presenting information in an official capacity will undermine the unmatched opportunities for federal agency personnel to attend multiple days of the conference and sit in on other agency meetings to learn from that agency's experiences in federal contracting. Allowing federal agency employees free attendance to a conference in its entirety, not just on the day they are speaking or presenting information on behalf of the government, would allow more educational opportunities for those employees.

While AGC appreciates OGE's stipulation that government employees can accept free attendance at events where they are speaking or presenting information on behalf of the administration, the unbalanced treatment of trade association programs in the proposed rulemaking will likely discourage federal employees from availing themselves of these opportunities. It discourages government employees from seeking out new information and new points of view. It also does a great disservice to the employees who are typically trying to use their best judgment to advance the goals of their agencies. Further, the implication in the proposed rule that trade associations use invitations to events as a means of cultivating access by registered lobbyists, not only undermines the professionalism and legitimacy of trade associations and their employees, but also makes it very unlikely that federal employees would pay out-of-pocket to attend these types of programs and events, even if they would benefit from attending.

Conclusion

There are countless examples of legitimate, substantive trade association programming that intersect with the government's interests. Trade associations exist for every industry that the federal government regulates, from food safety and insurance to energy and telecommunications, just to name a few. These organizations and the industries they represent want to work with the administration to grow the economy, reduce unemployment, and protect America's standing and

credibility in the world. In order to work together, we need the administration to recognize associations as something more than lobbying groups working to exert undue influence over federal agencies and their employees. AGC urges OGE to withdraw its proposal as currently written. OGE policy should not create an environment where public policy is created in a vacuum.

Thank you again for entertaining AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Marco A. Giamberardino". The signature is fluid and cursive, with a large initial "M" and "A".

Marco A. Giamberardino, MPA
Senior Director
Federal and Heavy Construction Division