

Office of Government Ethics
1201 New York Avenue N.W.
Suite 500
Washington, D.C. 20005

November 14, 2011

Att: Richard M. Thomas
Associate General Counsel

RE: RIN 3209-AA04, Proposed Amendments Limiting Gifts to Employees of the Executive Branch

Dear Counsel Thomas:

These comments are submitted by the following organizations – Campaign Legal Center, Common Cause, Democracy 21, Public Citizen and U.S. PIRG – in response to the Office of Government Ethics Regulation Identifier Number (RIN) 3209-AA04, proposing to extend the gift restrictions of Executive Order 13490 beyond political appointees to career employees of the executive branch.

Our organizations support the Office of Government Ethics (OGE)'s proposed gift rule and encourage its adoption into the Code of Federal Regulations. It applies the spirit and tone of the original Executive Order to career employees in a fair and workable fashion – preventing gift-giving from becoming a means of influence peddling by those with business pending before the agency, without unduly burdening executive branch employees or businesses.

OGE's proposed gift rule appropriately modifies the manner in which the gift restrictions are applied to career employees as opposed to political appointees. Most notably, the proposed rule does not create a third general prohibition for lobbyists and lobbying organizations. The rule maintains the present two general prohibitions on gift-giving to career employees of "prohibited sources" – anyone who has business pending before the agency – and giving gifts because of an "employee's official position." Instead, OGE proposes that the restrictions against gift-giving by lobbyists and lobbying organizations be integrated into the prohibited source category, only in that certain exceptions to the gift rule be reined in when the prohibited source is also a lobbyist or lobbying organization. The most significant exceptions that would be eliminated for prohibited sources who are also lobbyists or lobbying organizations include (i) the widely attended gathering exception (allowing such persons to provide free meals and entertainment at events and social invitations) and (ii) the \$20 per gift/\$50 aggregate gift exception (allowing such persons to buy lunch or dinner for agency employees). This modification to the gift rule captures the intent of the Executive Order while narrowing the application of the restrictions given the differences between political appointees and career employees.

However, our organizations are concerned that one significant element of the proposed rule could be used to undermine the gift rules. The most troublesome element is the sweeping exception from the gift rule for 501(c)(3) nonprofit organizations. This exception is far too sweeping and provides an easily abused avenue for lobbyists and lobbying organizations to get around the gift restrictions. The 501(c)(3) exception should be limited in scope by not applying to entities established, financed or controlled by a lobbyist or lobbying organization.

Furthermore, this rulemaking provides OGE the opportunity to take two more steps for strengthening the executive branch ethics rules. First, OGE should encourage the President to include gifts of travel under the gift rule of the Executive Order for political appointees. The current rulemaking for career employees notably includes travel. Second, OGE should initiate serious discussions on how to ensure reasonable uniformity in the interpretation and enforcement of ethics rules among the legions of “independent” ethics officers by making those officers largely accountable to a single authority – preferably, the Office of Government Ethics.

A. Background: Gift Restrictions for the Executive Branch

On the first full day of his Administration, President Obama issued Executive Order 13490, entitled “Ethics Commitments by Executive Branch Personnel.” The Executive Order established a series of sweeping and, in some cases, first-of-its-kind ethics reforms applied to presidential appointees in the executive branch, including revolving door restrictions, conflict of interest standards and restrictions on gifts from registered lobbyists and lobbying organizations.

The Order further instructs the Office of Government Ethics to promulgate rules applying comparable gift restrictions to all executive branch employees. Pursuant to section 4(c)(3)(ii)-(iv) of the Executive Order, OGE is required “to adopt such rules or procedures as are necessary or appropriate, to extend the lobbyist gift ban in paragraph 1 of the Ethics Pledge to all executive branch employees, to authorize limited exceptions to the ban for circumstances that do not implicate the purposes of the ban, and to provide that employees who dispose of lobbyist gifts as provided in 5 C.F.R. § 2635.205 will not have violated the ban.”

OGE recognizes some important differences between political appointees and career employees, and it proposes gift restrictions that are modified accordingly for career employees. The most significant modification comes from the recognition that career employees are already subject to gift restrictions from a broader class of persons beyond lobbyists and lobbying organizations. Career employees are currently subject to restrictions on gifts from “prohibited sources” – any person or group that has official business pending before the agency. As a result, the proposed rule would reaffirm the broader restriction on gifts from prohibited sources across the board, while curtailing existing exemptions from the gift limits for lobbyists and lobbying organizations.

Currently, full-time career employees of the executive branch are subject to two general restrictions on receiving gifts that were promulgated by OGE in 1992. First, employees may not accept gifts from a **prohibited source** – defined as any person seeking action from the agency or subject to regulation by the agency, including any organization a majority of whose members are prohibited sources. Gifts provided by persons who have business pending before the agency have the appearance, if not actuality, of attempts to influence official decisions affecting that particular business. Second, an employee shall not accept a gift from anyone that was given because of the **employee’s official position**. Gifts given because of an employee’s official position in government directly implicate undue influence peddling. This gift rule for career employees was largely derived from federal statute.¹

A number of exceptions to the gift rule are spelled out in 5 C.F.R. § 2635.204. Gifts may be accepted without limit, for example, from family and friends. Gifts of “*de minimis* value” may be accepted from prohibited sources, generally defined as gifts of \$20 or less per source per occasion, provided that the aggregate value of all gifts from a prohibited source does not exceed \$50 in a year. And gifts of food and entertainment received at a “widely attended gathering (WAG),” generally defined as a large gathering of people open to members from a given industry or profession, provided that attendance at the event is in the interest of the agency because it will further the agency’s programs and operations.

Career employees are welcome to attend events, conference or receptions sponsored by prohibited sources if they pay their own way. When career employees of the executive branch reimburse the sponsors of an event for the costs of attendance, or no meals or other gifts are provided free of charge at the events, then no gifts are provided. Career employees need not invoke any of the exceptions to the gift rule, such as the widely attended gathering exception, when no gifts are accepted or provided.

1. Gift Ban for Political Appointees

Executive Order 13490 essentially banned gifts to full-time non-career appointees from lobbyists and lobbying organizations. Regardless of whether a lobbyist or lobbying organization is a prohibited source, political appointees sign an ethics Pledge not to accept gifts of any value from lobbyists or lobbying organizations, including gifts of *de minimis* value and free attendance at widely attended gatherings or social invitations. A few exceptions remain for gifts from lobbyists and lobbying organizations to appointees, such as gifts based on a personal relationship or gifts resulting from a spouse’s business or employment.

In all cases, including the Executive Order for political appointees, the restrictions apply to accepting things of value free of charge – a gift. Career employees and political appointees may

¹ 5 C.F.R. § 2635, derived from federal statute 5 U.S.C. § 7353(a).

indeed attend events sponsored by prohibited sources or lobbying organizations that would otherwise run afoul of the gift rule as long as the attendees pay their own way at market value and do not accept meals, entertainment or other gifts free of charge. An event honoring President Obama's former ethics czar, Norm Eisen, sponsored by several of the same lobbying organizations signing this comment is a case in point. Eisen simply reimbursed the organizations for his share of the costs.

The gift restrictions for political appointees under the Executive Order have been widely accepted by the appointees themselves. An analysis by the Office of Government Ethics found that of the 2,863 full-time presidential appointees required to sign the ethics Pledge at the end of 2009, all had done so – a track record replicated in 2010. Agencies reported that nine appointees who declined to sign the ethics Pledge left federal service in 2009. These individuals included eight persons appointed by President Bush and one appointed by President Obama who left government after serving very briefly.²

2. Issues of Interpretation and Enforcement of the Gift Rule for All Executive Branch Employees

One major problem area for implementation of the gift rule, especially as it applies to career employees, is the general absence of a central authority to interpret and enforce the ethics rules in the executive branch. The Office of Government Ethics serves primarily in an advisory capacity to executive agencies and their ethics officers.

The ethics code and gift rule are interpreted and enforced by some 6,000 individual ethics officers within the executive branch, each appointed by the heads of various agencies. These ethics officers are then charged with overseeing compliance to the gift rule not only by the staff of the agency, but even by the appointing authority of the agency. While OGE offers training and advice to these ethics officers, the ethics officers usually are not compelled to accept the training – and many do not.

This absence of a central authority in interpreting and enforcing executive branch ethics rules is a major reason for this new rulemaking. On numerous occasions ethics officers have interpreted exceptions to the gift rule extremely broadly, sometimes leading to the exception swallowing the rule itself. Because of inconsistencies in interpretation and enforcement of the gift rule, OGE is now proposing to narrow the exceptions for those who raise particular concerns of undue influence peddling – prohibited sources who also are lobbyists or lobbying organizations.

² Office of Government Ethics, Annual Report on Executive Order 13490 (2009) and (2010), available at: <http://www.usoge.gov/DisplayTemplates/SearchResults.aspx?query=annual%20report%20of%20Executive%20Order%2013490>

While the Office of Government Ethics enjoys a high level of professionalism, the agency's institutional structure as an advisory "partner" with executive agencies in interpreting and enforcing the ethics code has caused numerous problems. For example, while OGE has developed guidelines for granting waivers for employees from the conflict-of-interest laws governing future employment, these are only guidelines. Each executive branch agency promulgates its own waiver procedures, which are then interpreted and enforced by the specific ethics officer appointed within that executive office. As a result, there is no one set of procedures for seeking and receiving waivers from conflict-of-interest laws, and each set of waiver procedures is interpreted differently by different officers. The resulting inconsistencies prompted the White House in 2004 to issue an executive order requiring that all waivers be reviewed by the White House counsel.

On several notable occasions, the gift rule has been interpreted and enforced inconsistently by different ethics officers. Some of the recent violations of the gift rule for career employees of the executive branch are legendary. For example, the Office of Inspector General in 2008 found a "culture of ethical failure" among employees of the Mineral Management Service. The Inspector General found that "between 2002 and 2006, nearly one-third of the entire RIK staff socialized with, and received a wide array of gifts and gratuities from, oil and gas companies with whom RIK was conducting official business."³ Some felt their free attendance at industry functions was an absolute necessity given that it was industry's practice to conduct business over lunch, dinner, and golf outings. One RIK employee opined that because RIK regularly paid a major producer to transport oil, it was perfectly appropriate for him to attend a "treasure hunt" in the desert with all expenses paid by the producer.⁴

In another example, on September 29, 2008, CIA Executive Director Kyle Foggo was convicted of honest services fraud in awarding a substantial government contract to his friend, Brent Wilkes. Wilkes, a government contractor and lobbyist, rented suites at the Watergate Hotel and provided Foggo and others with meals, entertainment and poker parties.⁵ Foggo himself had previously served as an ethics officer for the CIA.

There is also the typical case of gifts of free travel provided by otherwise prohibited sources to agency officials. Former Chairman Hal Stratton and Chairwoman Nancy Nord of the Consumer Products Safety Commission (CPSC), for example, accepted gifts of dozens of trips at the expense of the toy, appliance and children's furniture industries and others that the CPSC regulates. Lavish hotels, dining and travel were all provided free of charge by the industries. Some of these trips were even aboard corporate jets. An agency spokesperson said that the trips

³ Earl Devaney, Inspector General, OIG Investigations of MMS Employees (Sept. 9, 2008), available at: <http://www.doioig.gov/images/stories/reports/pdf/RIKinvestigation.pdf>. Royalty in Kind (RIK) is a program within MMS.

⁴ Id.

⁵ United States v. Kyle Dustin Foggo, sentencing memorandum, United States District Court for the Eastern District of Virginia, No. 1: 08cr0079 (Feb. 13, 2009), available at: http://s3.amazonaws.com/propublica/assets/docs/foggo_139_1.pdf

were subject to “a full conflict of interest analysis” by ethics officers and they stand behind their decisions of approving the gifts.⁶

The Office of Government Ethics recognizes the problems of inconsistent interpretations and enforcement of the gift rule among the many executive branch agencies, as determined in part by past experience and in part by the large number of requests for clarification of the gift rule. As noted in the RIN request:

“While all of the exceptions [to the gift rule] in section 2635.204 have their appropriate uses, OGE has indeed become concerned that some of the exceptions may have been used on occasion to permit gifts, such as attendance at certain events, where the nexus to the purpose of the exception is attenuated at best. When such gifts are offered by persons who are paid to influence government actions, the concerns are obviously magnified.”⁷

OGE’s concerns of abuse of the gift rule today are focused more on career employees rather than political appointees. OGE observes that there has been a notable decrease in pressure to extend exceptions to the gift rule for political appointees ever since the ethics Pledge was enacted under the Obama Administration – and thus far fewer, if any, allegations of abuse involving political appointees. The ethics Pledge simply makes some of the major exceptions to the gift rules unavailable for gifts provided by lobbyists and lobbying organizations.

Not so for career employees of the executive branch, many of whom continue to show some confusion about the gift rule and its exceptions and raise questions with OGE about various recurring scenarios.

Largely as a result, OGE proposes to rein in exceptions to the gift rule for prohibited sources who are also lobbyists or lobbying organizations – those most likely to abuse gift-giving as a means of influence-peddling. Narrowing the exceptions to the gift rule will not only squarely address many of the abuses cited above, but will also put all ethics officers on alert that the gift rule is to be taken seriously for all other prohibited sources and that exceptions to the gift rule should be provided cautiously and with the intent of furthering legitimate purposes of the agency.

B. Proposed Modifications to the Gift Rule for Career Employees

Due to some of the important differences in service and functions between political appointees and career employees within the executive branch – the duties of most career employees, for example, are less politicized than those of political appointees and thus less subject to direct lobbying activity – OGE does not propose to apply the gift restrictions imposed in the Executive Order in the same manner or fashion for career employees. Unlike the Executive Order for

⁶ Elizabeth Williamson, “Industries Paid for Top Regulators’ Travel,” *Washington Post* (Nov. 2, 2007).

⁷ Office of Government Ethics, RIN 3209-AA04, *Federal Register*, Vol. 76, No. 177 (Sept. 13, 2011) at 56331.

political appointees, the OGE proposal would not single out “lobbyists and lobbying organizations” as a third general prohibition on gifts for career employees. The proposed gift rule maintains the current two general prohibitions on gifts from “prohibited sources” and those made because of an “employee’s official position,” reasoning that these two general prohibitions effectively capture the potential sources of undue influence peddling through gift-giving.

Instead, OGE proposes that the restrictions against gift-giving by lobbyists and lobbying organizations be integrated into the prohibited source category, only in that certain exceptions to the gift rule not be available when the prohibited source is also a lobbyist or lobbying organization. Exceptions to the gift rule that would *not* be available to prohibited sources who are also lobbyists or lobbying organizations include: (1) the widely attended gathering exception (WAG exception); (2) the \$20 per gift/\$50 annual exception for gifts (*de minimis* exception); (3) the social invitation exception; and (4) the exception for gifts given from non-U.S. citizens in foreign areas. The widely attended gathering and the *de minimis* exceptions are the most commonly exercised for gifts from prohibited sources, and these are the areas of the gift rule most likely subject to mischief.

Some exceptions to the gift rule would continue to be available to prohibited sources who are also lobbyists or lobbying organizations. These are standard, noncontroversial exceptions such as instances of personal friendship, gifts given in the course of a spouse’s normal business activity, and customary refreshments or travel provided by prospective employers.

Eliminating the widely attended gathering exception (referred to as the WAG exception) for events sponsored by prohibited sources who are also lobbyists or lobbying organizations is perhaps the most significant improvement in the gift rule. The WAG exception is employed frequently, allowing industries, businesses and special interest groups with official matters pending before agencies to pay for meals, travel and entertainment for career employees of the same agencies. WAG has been, and continues to be, invoked for a wide array of events, ranging from educational conferences to purely social functions, such as company parties, galas and fundraisers.

Ethics officials have often been quick to approve WAG exceptions to the gift rule, especially for tantalizing social functions for their bosses. The sheer number of WAG approvals in the executive branch, as well as inconsistencies in standards for such approvals across agencies, prompted a concerned OGE to issue yet another memorandum in December 2007 to clarify for ethics officials how this exception is really supposed to be applied.⁸

But problems continue.

Some agencies have so routinely received approval for WAG exceptions to certain industry-sponsored social events by their ethics officers that free attendance at these events seems beyond

⁸ Office of Government Ethics, “Widely Attended Gatherings,” DO-07-04 (Dec. 5, 2007).

question. The Motion Picture Association of America (MPAA), a lobbying organization, has for decades treated executive branch officials, lawmakers and their staff to free “dinner-and-a-movie” nights with Hollywood celebrities and movie industry executives in its exclusive 70-seat theater near the White House as a means to ingratiate itself with policymakers whom it frequently lobbies. According to a news article in the *Los Angeles Times*, former MPAA Chief Executive Dan Glickman, himself a former member of Congress (who has since been replaced as MPAA Chief Executive by former Sen. Christopher Dodd), intends to continue the free screenings for policymakers, modified only slightly in light of the new ethics rules passed by Congress and imposed by the Executive Order. Instead of dinner, policymakers will be plied with appetizers and drinks and shown a short five-minute educational trailer before the feature film.⁹ A January 17, 2008, request by Public Citizen to OGE to scrutinize potential violations of the gift rule at MPAA dinner-and-a-movie events resulted in a polite response letter to Public Citizen explaining WAG criteria, but little else.¹⁰

The proposed strengthening of the gift rule under consideration today would squarely address this abuse and others like it. The WAG exception would not be made available to prohibited sources who are also lobbyists or lobbying organizations, like MPAA, to agency employees who deal with those special interest groups. Just as importantly, the additional scrutiny of when and how the WAG exception should be applied that would result from the proposed gift rule, will itself cause ethics officers to be more careful in approving exceptions for others.

While OGE’s proposed gift rule would address abuses, the proposed rule is also a very practical and generally non-obtrusive extension of the gift restrictions of the Executive Order to career employees. Under the proposed gift rule, it is expected that the WAG exception will still be approved frequently in situations where such a direct conflict of interest does not exist, albeit ethics officers likely will be more attentive to potential conflicts in each particular case. Lobbyists and lobbying organizations that do not have business pending before agency employees are not subject to the new gift restrictions and may continue providing free attendance at educational and social events for career employees. Furthermore, the gift rule does not at all apply if the career employee is speaking at an event hosted by a prohibited source, whether or not the prohibited source is a lobbyist or lobbying organization. And even in cases where there is a direct conflict of interest posed by a prohibited source who is also a lobbyist or lobbying organization, a career employee who is not speaking at an event may simply pay his or her own way and thereby not run afoul of the gift rule.

The \$20 per gift/\$50 annual gift exception for gifts from prohibited sources – known as the *de minimis* exception (sometimes referred to as the “free lunch” standard)¹¹ – is almost identical to the former gift exception allowed to members and staff of Congress prior to the Abramoff

⁹ Jim Puzzanghera, “Film Industry Lobbies Within a Movie Lobby,” *Los Angeles Times* (Jan. 1, 2008).

¹⁰ David Arkush and Craig Holman, Letter to Robert Cusick, Office of Government Ethics (Jan. 17, 2008), available at: http://www.citizen.org/documents/MPAA_Complaint.pdf

¹¹ Brody Mullins, “No Free Lunch – Ethics Rules Vex Capitol Hill,” *Wall Street Journal* (Jan. 29, 2007).

lobbying scandal, which allowed up to \$50 per gift and \$100 in the aggregate. The Honest Leadership and Open Government Act (HLOGA) of 2007 has since repealed that exception as applied to Congress for lobbyists and lobbying organizations. This type of exception is deemed nearly impossible to monitor and enforce. When Rep. Bob Ney, for example, received dinner at Table 40 of Jack Abramoff's Signatures Restaurant, no outsiders could reasonably determine whether the dinner cost more than \$50. As a result, HLOGA eliminated that exception for lobbyists and lobbying organizations. House and Senate ethics committees have replaced this *de minimis* standard with a much narrower "incidental value" standard (and even with a "no cup of coffee" standard that still applies in many circumstances in the House).

In applying the "incidental value" standard, wining and dining by lobbyists and lobbying organizations are expressly prohibited as are most other gifts of any notable value, making it quite obvious that the gift rule has been violated if a lobbyist buys lunch or dinner for a member of Congress. Only items of nominal value, such as a souvenir trinket or baseball cap, are now permissible from lobbyists and lobbying organizations to members and staff of Congress.

This movement in Congress from a *de minimis* standard, allowing lobbyists to buy lunch and dinner for members of Congress, to today's incidental value standard, allowing only items of nominal value, has slowly evolved in Congress. In its report prior to the original enactment of this provision in 1995, the House Rules Committee indicated that the exception covers reception food. Soon after the new gift rule was adopted, the Committee indicated that the types of food that could be accepted under the provision include: coffee and donuts, hors d'oeuvres at a reception. In 2000, the House Standards Committee issued further written guidance that specifically described the kinds of food and refreshments that may be accepted under the provision, including coffee, juice, pastry, or bagels usually offered at a breakfast reception or meeting, and hors d'oeuvres, appetizers, and beverages usually offered at an evening reception.

The intent of the gift rule enacted at the beginning of the 110th Congress to ban most gifts from lobbyists and organizations that employ them should be taken into account. Accordingly, food and refreshments of the nature described above may be accepted under this provision only when offered at a business meeting, reception, or similar gathering. It is now impermissible, for example, for a Member or staff person to accept food or refreshments under this provision in a one-on-one setting with a registered lobbyist.

Even if offered in an appropriate setting, food or refreshments that exceed a nominal value may not be accepted under this provision. The congressional rules do not clearly define nominal value, and Members and staff are accordingly cautioned to exercise reasonable judgment in accepting food or refreshments having a value greater than the examples given above.

OGE's proposed gift rule for career employees in the executive branch eliminates the \$20 per gift/\$50 annual gift exception for prohibited sources who are also lobbyists or lobbying organizations for precisely the same reasons that HLOGA eliminated a similar standard for

Congress. While our organizations may have differing opinions on whether the *de minimis* exception should be replaced with the strict “no cup of coffee” standard or the slightly more lenient “incidental value” standard, we agree with eliminating the \$20 per gift/\$50 annual gift exception for prohibited sources who are also lobbyists or lobbying organizations to all career employees. The restriction on this exception as applied to lobbyists and lobbying organizations works for Congress and it should work for the executive branch as well.

OGE’s proposed gift rule addresses a serious problem in a fair and balanced manner and without imposing overly burdensome constraints on career employees and the regulated community.

Our organizations strongly agree with OGE’s assessment that the two general prohibitions – “prohibited sources” and “employee’s official position” – can effectively capture the problem areas of undue influence peddling through gifts, if they are properly interpreted and enforced. Appropriately, the proposal does not add lobbyists and lobbying organizations as a third general prohibition on gifts, but instead narrows the exceptions to the gift rule available to prohibited sources who are also lobbyists or lobbying organizations, focusing on two exceptions in particular – the WAG exception, and the \$20 per gift/\$50 aggregate limit exception – where the opportunities for abuse are most ripe. The proposed gift rule is a fair and manageable application of the Executive Order to the much broader category of career employees, and it is likely to produce a more careful reading of the rule and its exceptions by ethics officers.

C. Areas Where the Proposed Gift Rule Should Be Further Strengthened

While our organizations are very supportive of the heart of OGE’s proposed gift rule, additional steps can and should be taken to strengthen the ethics code generally and the gift rule in particular. One very important step entirely within the scope of this rulemaking is to rein in the proposed blanket exemption from the gift rule of 501(c)(3) nonprofit groups. Other steps include encouraging President Obama to include travel within the gift restrictions of the Executive Order, and to consider restructuring the ethics enforcement process in the executive branch so that ethics rules are interpreted and enforced uniformly across agencies.

1. Blanket Exemption for 501(c)(3) Nonprofit Organizations.

OGE’s proposed gift rule understandably exempts certain scientific organizations and learned societies from the restrictions on exceptions to gifts that apply to lobbyists and lobbying organizations, in that conferences and seminars sponsored by these groups provide educational and professional development for career employees. However, OGE then goes further and proposes to exempt all 501(c)(3) nonprofit organizations from the restrictions on exceptions to the gift rule – an exemption ripe for abuse.

As we are now seeing with the travel rules for Congress – which restrict lobbying organizations from sponsoring travel junkets for members of Congress and their staff – the 501(c)(3) exemption poses a gaping loophole. Under congressional ethics rules, lobbying organizations

may sponsor only one-day or two-day trips for members and staff, just long enough to allow them to speak or participate in an industry or labor union conference and then fly them back to Washington. The intent of the rule is to prevent lobbying organizations from using lavish and extended travel junkets as an extension of their lobbying campaigns, while continuing to allow reasonable levels of interaction between lawmakers and the regulated community.

Both the House and the Senate provide special exemptions for 501(c)(3)s from the travel restrictions.¹² We are now seeing that this exemption is increasingly being abused by lobbying shops as a means to evade the travel restrictions. Lobbying entities have figured out that they can simply create a 501(c)(3) wing of the lobbying organization, even if it is just on paper, and funnel money through the 501(c)(3) to pay for unrestricted travel junkets for members and staff. The American Israel Education Foundation, a 501(c)(3) wing of the prolific lobbying organization AIPAC, complete with the same staff and offices, recently broke all travel records and flew more than 80 members of Congress to Israel on lavish and extended trips in a single month.¹³

The blanket 501(c)(3) exemption in OGE's proposed gift rule poses the same gaping loophole for the executive branch. The rationale that these nonprofit organizations are "limited by law as to the lobbying in which they may engage" does not hold water if the organizations are in fact extensions of lobbying shops. Many lobbying organizations, and even some lobbying firms, already have 501(c)(3) divisions established and are staffed and directed by the same individuals. If the 501(c)(3) loophole to the gift rule is adopted, most lobbying organizations that want to ply agency officials with gifts as part of their lobbying campaigns will simply file papers with the IRS creating such nonprofit wings in their shops.

The 501(c)(3) loophole to the gift rule should not be adopted for career employees and it should be revoked from the current rules guiding political appointees. If an organization is a prohibited source, with business pending before the agency, it should be subject to the same gift restrictions as other prohibited sources. If an organization is a prohibited source who also is a lobbyist or lobbying organization – *or is established, financed or controlled by a lobbyist or lobbying organization* – it should be subject to the same limits on exceptions to the gift rule.

2. Travel Restrictions

Executive Order 13490 excludes privately sponsored travel for political appointees from the gift ban for lobbyists and lobbying organizations. This is particularly odd, given that travel junkets are one of the most common forms of gifts provided by lobbyists and lobbying organizations to government officials in an attempt to curry favor. Indeed, free golf outings to Scotland provided

¹² The House exempts 501(c)(3)s from the travel restrictions if the nonprofit group does not employ lobbyists. House Rule XXV(5)(b)(4)(A-D). The Senate exempts 501(c)(3)s even if the group employs lobbyists. Senate Rule XXXV(2)(e)(1-2).

¹³ Amanda Becker and Rachel Blade, "Members Flock to Israel with Travel Loophole," *Roll Call* (Sep. 12, 2011).

by former lobbyist Jack Abramoff to members of Congress severely tainted the image of Congress and forced that body to place restrictions on congressional travel as part of HLOGA.

Similar scandals involving gifts of travel, some of which are cited above, have damaged the credibility of executive agencies as well. President Obama should take the cue from Congress and impose similar restrictions on privately sponsored travel provided by lobbyists and lobbying organizations – and entities financed, controlled or directed by lobbyists and lobbying organizations – for political appointees under the Executive Order.

OGE should take this rulemaking opportunity to encourage the President to include gifts of travel under the gift rule of the Executive Order for political appointees. The current rulemaking for career employees notably includes travel.

3. Accountability of Ethics Officers

Though the issue of some 6,000 ethics officers in the executive branch interpreting and enforcing the ethics rules, sometimes inaccurately and inconsistently across agencies, raises additional concerns about the structure of OGE that are beyond the scope of this rulemaking, we feel compelled to highlight the problem for future discussion.

Ethics officers are accountable primarily to those who appoint them. This arrangement can place tremendous pressure on ethics officers when they rule on matters that directly concern their bosses. Ethics officers are not compelled to receive ethics training, even though OGE makes quality training readily available. Ethics officers in different agencies sometimes interpret the same rule differently. And ethics officers may enforce certain rules in one agency but not in another.

The Office of Government Ethics clearly has the expertise when it comes to knowledge of ethics laws and how to implement these laws. But the agency is often denied the means to carry through on its expertise. It offers advice and guidance to executive branch agencies and their ethics officers on how to interpret federal ethics laws, but does not usually have the authority to compel consistency between the agencies in implementing ethics laws.

Measures must be taken to ensure that ethics regulations are uniform across executive branch agencies and that they are being interpreted and enforced in a consistent fashion. Just as the Bush Administration recognized the need to standardize the granting of waivers from the conflict of interest regulations, and issued an executive order (still in place today) requiring all such waivers by ethics officers be cleared by the White House counsel's office, there should be reasonably uniform oversight of the gift and ethics rules of the executive branch. This can best be achieved by making all executive branch ethics officers largely accountable to a single authority – preferably, the Office of Government Ethics. This would be a powerful improvement in the executive branch ethics system but would likely require legislative action.

Conclusion

For the reasons stated above, our organizations encourage adoption of OGE's proposed gift rule, with some strengthening amendments, particularly narrowing the proposed blanket exemption for 501(c)(3) nonprofit groups that are established, financed or controlled by lobbying entities.

Respectfully Submitted,

Campaign Legal Center
Common Cause
Democracy 21
Public Citizen
U.S. PIRG