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November 14, 2011

Richard M. Thomas  
Associate General 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;  
Proposed Amendments Limiting Gifts From Registered Lobbyists and  
Lobbying Organizations. RIN 3209-AA04. Proposed Amendments to  
5 CFR Part 2635. 76 FR 56330. September 13, 2011.

Dear Mr. Thomas:

Pillsbury Winthrop Shaw Pittman LLP (“Pillsbury”) appreciates the opportunity to comment on the Office of Government Ethics’ (“OGE”) proposed rule RIN 3209-AA04, which restricts all executive branch employees from using certain exceptions under federal rules to accept gifts from registered federal lobbyists and lobbying organizations, including invitations to widely attended gatherings (“WAGs”).

Pillsbury represents many nonprofit organizations, including professional societies; social welfare organizations; charitable, educational, and/or scientific organizations; and trade or business associations. The undersigned is the head of this practice at Pillsbury; he has written a dozen books on nonprofit organization law including the standard in the field, Association Law Handbook; and he serves as General Counsel to the “association of associations,” the American Society of Association Executives (“ASAE”), which is submitting separate comments on behalf of its other members. Pillsbury also represents the Association General Counsel Forum, a group of General Counsels of more than fifty of the largest national nonprofit membership organizations in the United States. Pillsbury presents these comments on behalf of all of its nonprofit organization clients.

Pillsbury and the nonprofit organizations we represent support OGE's mission to promote high ethical standards for government employees. In light of recent scandals involving lobbyists, such as those mentioned in the proposed rule, it is vital that federal employees avoid potential conflicts of interest, real or perceived, that could undermine public trust in the integrity of government decision-making. At the same time, we appreciate that OGE has consistently acknowledged that the attendance of federal employees at certain WAGs sponsored by nonprofit organizations can serve important government purposes. Such events provide educational and professional development opportunities for government employees and facilitate collaboration between industry, experts, and government employees. This collaboration is vital to establishing well-informed federal regulations and to ensuring enforcement and compliance.

Under the OGE's proposed rule, the general prohibition on attending WAGs sponsored by lobbying organizations would not apply to federal employees who attend educational or professional development activities sponsored by nonprofit professional associations, scientific organizations, and learned societies. This proposed exclusion, however, would not cover trade associations, the primary purpose of which, OGE asserts, "is not the education and development of members of a profession or discipline."

We strongly urge that the OGE take the position that government employees should be able to attend educational and professional development events sponsored by trade and business associations, just as they are able to attend events sponsored by other types of nonprofit organizations. Federal officials attend trade association events to advise and educate industry stakeholders about government oversight and regulation as well as to learn about the industry the association represents. Such attendance is as valuable a benefit to the government as it is to the regulated community. For the following reasons, we request that OGE amend its proposed rule to apply the WAG exclusion to trade associations.

### **Government Employee Attendance at Association Events Fosters Sound Industry Regulation and Compliance**

Trade association conferences frequently provide a unique view for regulators to understand the role businesses play in a specific industry and the role an industry plays in the national economy. Association-sponsored events that combine education, professional development, and discussion of public policy meet the President's oft-stated objective of crafting smart, sound regulation. These events provide a valuable opportunity for federal employees and organization officials to engage in meaningful

communication on industry issues. Given that many events occur in a public forum such dialogue is transparent and allows government employees to have the information they need to craft targeted regulation.

This exchange of dialogue is also consistent with the spirit of the First Amendment, which affords citizens and organizations the right to “redress grievances to government.” Attendance by federal government officials at trade association events facilitates the exercise of that right and cultivates interaction in which federal officials can gain a deeper understanding of an industry and stakeholders can learn how to maintain compliance.

The following are typical “real-life” situations in which federal government officials currently attend trade association events, all of which would be impacted by the restriction in the proposed rule:

- Executive branch employees attend substantive scientific conferences, including seminars, that are co-sponsored by a trade association and an administrative agency;
- Government employees observe demonstrations, test products, and view other interactive displays on exhibition floors of an industry’s trade show;
- Government employees attend trainings sessions offered by an association to obtain industry certification and/or maintain industry knowledge;
- Regulators attend compliance conferences and workshops, where they learn what is current and what is being debated in a given industry and answer questions on their expectations for compliance;
- Government technical experts sit as non-voting “observer” members of technical committees or boards of some organizations whose activities are closely related to government programs;
- Administration officials attend national conferences, which allow them to interact with state and local government officials and leadership, such as mayors, city council members, and public sector employees;
- Federal employees attend events that are also attended by members of international governmental delegations, which provides an opportunity for such employees to discuss important trade, regulatory, and other harmonization issues with their foreign counterparts;
- Administration personnel brief organizations about the status of regulation, and implementation of, and compliance with, policy and directives;
- Government officials attend presentations, forums, and networking events with open dialogue to improve relations and propel the industry forward;

- Agencies exhibit at industry trade shows – and “staff” their exhibits with federal government officials – as efficient and effective means of outreach and message dissemination, and distribute educational materials and guidelines.

The foregoing examples demonstrate that the exclusion of trade and business associations from the “WAG” exception denies government employees and industry members important opportunities for interaction, not only because government employees would no longer be allowed to attend such events for free, but because the proposed rule may chill attendance even where allowed, due to the implication that attendance at such events is somehow improper. Open dialogue is essential not only for industry growth, but for our government to function properly, with knowledge of the issues and concerns of those impacted by regulation.

**Trade Associations, Like Professional and Scientific Societies, Emphasize Education and Professional Development, and OGE’s Differing Treatment of Them is Not Supported By Other Areas of the Law**

Most national trade and business associations emphasize education and professional development as a central component of their overall missions. To that end, these associations sponsor many events that educate members and attendees on technical standards, seek input on the direction of the industry or profession, and promote professional development. This educational emphasis is as clear in trade and business associations as it is in professional societies, and attendance at such trainings, seminars and presentations is an invaluable opportunity for government employees to enhance their knowledge, skills, and professional development.

The OGE’s proposed distinction between nonprofit professional associations, scientific organizations, and learned societies, on the one hand, and trade and business associations on the other, is inconsistent with the treatment of such organizations under federal law. First, no such distinction exists in tax, corporate, or other bodies of law applicable to nonprofit membership organizations. Many nonprofit membership organizations have both entity and individual memberships and would be “neither fish nor fowl” under the OGE proposal. Further, if the differing treatment is predicated upon lobbying activities, no such distinction exists there either; federal law permits both trade associations and professional societies to engage in lobbying activities. Organizations that are tax exempt under Section 501(c)(6) of the Internal Revenue Code may engage in unrestricted lobbying, while the remainder that are exempt under Section 501(c)(3) are still permitted to engage in considerable lobbying [Internal Revenue Code Section 501(h) permits up \$1 million per year in lobbying expenditures for 501(c) organizations without penalty or effect upon exemption].

Data extracted by ASAE from over 60,000 Form 990 informational tax returns filed for tax year 2009 contradict OGE's assertion that "the primary concern of such associations generally is not the education and development of members of a profession or discipline."<sup>1</sup> The Form 990 data indicate that the average trade association spent \$1,204,180 on program activity – which includes publications, trainings, seminars, and other forms of education – and \$60,228 on lobbying activity reported under the Lobbying Disclosure Act. In comparison, the average professional society spent \$1,459,871 on program activity, and \$64,770 on lobbying activity. This comparison yields two important findings: (1) professional societies actually spent, on average, slightly more on lobbying than did trade associations and (2) trade associations and professional societies spend a similar, and, indeed, overwhelming, amount of their dollars on program activity, focused on education and professional development. As reflected in the field's legal and tax contexts, and supported by financial data, there is no meaningful distinction between professional societies and trade and business associations that provides an adequate rationale for different treatment under the OGE's proposed rule. Education and professional development is a "primary concern" of trade associations, just as it is for other types of nonprofit organizations.

### **OGE's Proposed Restriction on Government Employee Attendance at Trade Association Events Discounts and Undermines the Objective of Public-Private Partnerships**

In addition to imposing an ill-considered distinction between trade associations and other nonprofit organizations, the proposed rule would create unnecessary ambiguities related to attendance by federal employees at events sponsored by trade associations that effectively operate as public-private partnerships. In particular, the proposed rule does not appear to contemplate the permissibility of attending events sponsored by the following types of organizations:

- Associations that have been recognized as agents of the federal government;

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<sup>1</sup> Copyright 2011, ASAE Foundation. *Source:* Association 990, an ASAE Foundation database of IRS Form 990 tax returns of nonprofit organizations reporting a minimum of \$200 in membership dues and at least one paid employee. Database updated monthly. For information about the *Association 990 Key Ratios*: [www.asaecenter.org/association990](http://www.asaecenter.org/association990). To our point, the 990 does not have a way of identifying a "professional society" versus a "trade association", and the terms are used quite loosely in the field; therefore ASAE has divided the data roughly according to their designations of "mainly company" (trade association) and "mainly individual" (professional society).

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- Associations identified by the Internal Revenue Service as “instrumentalities” of the United States;
- Associations whose members are all units of state and local government.

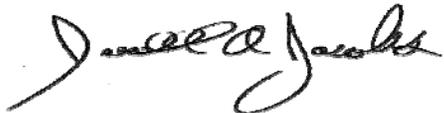
Prohibiting federal employees from attending educational or professional development events sponsored by these types of organizations runs counter to the necessary partnership that federal agencies must maintain with the organizations. The benefits of public-private partnership – recognized frequently by this administration – would be undermined if the proposed rule becomes effective.

### **Conclusion**

Pillsbury urges OGE to revise its proposed exception for gifts to allow federal government employees to attend substantive programs and events held by business and trade associations, for the same reasons that the WAG exception has been extended to the other types of nonprofit organizations listed in the proposed rule.

Thank you in advance for your consideration, and if you have any questions, please contact me at 202-663-8011, or [jerry.jacobs@pillsburylaw.com](mailto:jerry.jacobs@pillsburylaw.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Jerald A. Jacobs". The signature is written in a cursive, flowing style.

Jerald A. Jacobs  
Partner and Head of Pillsbury’s Nonprofit Organizations Team