From: [mailto:

Sent: Sunday, November 13, 2011 2:47 PM

To: USOGE

Subject: Proposed Amendments to Part 2635 Proposed Amendments to Part 2635



Office of Government Ethics Suite 500 1201 New York Ave, NW Washington DC 2005-3197

Subj: RIN 3209-AA04

I am an ethics official at a very large agency. While my views on the proposed rule are informed by that experience, the opinions expressed here are my own and do not necessarily reflect the views my agency.

As an initial matter, OGE should reconsider whether a rule on lobbyists is needed Executive Order 13490 requires OGE in consultation with the Attorney General and Counsel to the President to apply the lobbyist gift ban to all executive personnel that are necessary and appropriate. Nothing in the preamble to the final rule demonstrates that there is any necessity to apply the lobbyist gift ban to all employees. Rather, the preamble cites to the Jack Abramoff scandal as justification. However, there is no evidence that Mr. Abramoff ever approached a career official. Much to the contrary, it was widely reported at the time that career officials cautioned the political leadership against taking actions that favored Abramoff. Finally, and perhaps most importantly, Mr. Abramoff's actions and those of the political leadership were already banned by the Standards of Conduct and criminal law. Adding new restrictions only increases the complexity of the Standards without enhancing in any way protections against undue influence. Adding new complicated and difficult to understand rules risks making the Standards of Conduct more like tax law (where the rules are essentially arbitrary and decided by political fiat rather than by reasoned analysis.) The existing Standards, while not perfect, can be understood and applied by most employees most of the time without the aid of ethics professionals. The proposed rule will make that impossible (if only because the lobbyist database is so difficult to use and interpret.)

The preamble acknowledges that the rule does add complexity, but dismisses this complexity by stating that it is reasonable for an employee to determine if a gift is being offered by a registered lobbyist. I submit that in host of benign situations, it is unreasonable to expect an employee to make these kind of determinations. I think an example is the best way to demonstrate a real world situation where it is unreasonable.

An employee goes to a seminar at agency expense and visits the attached trade show where he takes a pen offered by one of the vendors. Under existing rules we say the pen is acceptable from this prohibited source (after all the vendor is trying to get business from the employee's agency and may already be a contractor) because of the \$20 rule. Under the proposed rule the employee must first determine if that contractor is a registered lobbyist and further whether the division offering the pen is incorporated separately from the division that offers the pen. Indeed, if the employees manning the booth are from different divisions, the proposed rule may make accepting the pen from one employee a violation (because they are from the part of the business that happens to employee the registered lobbyist) while accepting the pen from a different employee perfectly acceptable. How is an employee to make these find distinctions in that type of environment.

I also think it is important for OGE to realize that the average employee simply does not have the direct and day to day access to ethics advice that the political leadership has. Given the thousands of gifts offered every year throughout the federal government, it is almost impossible to believe that they will all be screened by ethics officials to determine that it is not from a registered lobbyist. OGE's solution to this is to limit applicability to those registered lobbyists that already prohibited sources. For a large agency like ours, this is of absolutely no benefit. In the list of contractors is more than 48,000 names long and contains many well-known consumer companies. So virtually every gift will have to be screened against the lobbyist database.

If OGE believes that it must issue a rule, I suggest that they merely add registered lobbyists to definition of prohibited source. Long experience with existing Standards of Conduct has shown that they are very effective at ensuring that undue influence (and the appearance of undue influence) is avoided. To the extent that the gift rules need amending they should be amended for all prohibited sources to retain a workable and understandable rule.

If OGE is determined to purse the proposed rule, I believe the following specific comments and suggestions will improve what I nevertheless believe to be a deeply flawed rule.

2635.203 (h)(3) When is a media organization giving a gift because it is engaged in the gathering of information? Presumably this was intended to permit the White House Correspondent's dinner, but this ethics official does not understand how that dinner is about gathering information for the news. This definition needs examples or more clarity if ethics officials are to be able to apply it. This is especially true because the definition at 2 USC 1602 includes persons who disseminate information using "other medium of mass communication" So if a lobbyist also has a blog, is he exempt from this rule? What if the blog gets 2 million hits a week, what if its only 2 hits a week? How is an ethics official to reasonably interpret this definition?

Eliminating the \$20 rule.—Eliminating the \$20 rule is the principle cause for much of the proposed rule's complexity. If rank and file employees were permitted to continue to use this exception, most employees could continue to apply the Standards without ethics official assistance. Nothing in the preamble

demonstrates that this very small gifts are unique problem when the come from lobbyists. Indeed, there is no real evidence that lobbyists target employees with these gifts. I recommend that if the rule is pursued that rank and file employees be permitted to use the \$20 rule.

Widely Attended Gatherings – The preamble makes much of OGE's concern that the WAG rule is used for social gatherings. If that is OGE's concern it should amend the WAG rule directly by limiting to conference, symposia, and similar events where there is a formal program and a formal exchange of views and prohibit its use for social occasions. Limiting WAG's from lobbyists will not be effective anyway. The organization's we deal with that host social events typically sell tables of 10 to industry, but only give the donor 6 or 8 tickets. The remaining seats are filled by the organization sponsoring the dinner from lists of potential invitees supplied by the industry purchasers of tables. They avoid imputing the gift to industry by the sponsoring organization actually inviting and seating the government attendees, but everyone knows that you will get a government official who interests you seated at your table. Nothing in the proposed rule address this practice, and I submit for OGE's consideration that this practice is far more troubling than knowingly being invited by a lobbyist.

While not in the definitions itself, the preamble makes it clear that only the corporate entity that actually employees a lobbyist is a lobbying organization. All other corporate affiliates are free to offer whatever gifts that are otherwise acceptable under the standards. This is a terrible interpretation for 2 reasons. First it forces employees and ethics officials to become experts on corporate organizational structures. You have to determine if the division offering the gift is separately incorporated from the division that is the lobbyist. How is an employee to know that without extensive research? Secondly, and perhaps more importantly, it makes the lobbyist gift ban ridiculously easy to evade. All they need do is place the lobbyists in a separate subsidiary and any gifts are perfectly ok. Even without changes to existing corporate organizational structure, it is obvious that most large corporations have dozens of separately incorporated subsidiaries. All they need do is have the lobbyists at HQ tell them who the subsidiary should be giving gifts to curry favor and the lobbyist gift ban is effectively evaded. I suggest OGE revise its guidance and provide that a lobbyist is a corporation and its affiliates. This if far simpler to understand and if you agree with the premise behind the lobbyist gift ban, far more in keeping with the purpose of the ban.

Respectfully,

//s