



American Bar Association
Section of Administrative Law and Regulatory Practice
740 15th Street NW
Washington, DC 20005-1022
(202) 662-1690
Fax: (202) 662-1529
www.abanet.org/adminlaw

November 14, 2011

Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3917

Attention: Julia Eirinburg, Associate General Counsel

Re: Proposed Amendments to 5 CFR Part 2635; Standards of Ethical Conduct for Employees of the Executive Branch; RIN 3209-AA04, 76 Fed. Reg. 56330 (Sep. 13, 2011)

Dear Ms. Eirinburg,

On behalf of the Section of Administrative Law and Regulatory Practice of the American Bar Association ("the Section"), I submit these comments regarding the above-referenced Notice of Proposed Rulemaking. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association ("ABA" or "the Association") and, accordingly, should not be construed as representing the position of the Association. Indeed, ABA President Wm. T. (Bill) Robinson III is submitting separate comments representing the position of the Association.

In our view, the rule change proposed by the Office of Government Ethics (OGE) is a solution in search of a problem. It would prevent lobbyists from engaging with government officials in the same manner as any other citizen, without justification and in a manner that disadvantages both private entities and government officials.

Our comments are limited to the proposed elimination of the Widely Attended Gathering ("WAG") exception for lobbyists. In our view, the existing exception strikes an appropriate and carefully constructed balance. OGE's December 2007 memorandum to agency ethics officials sets out a number of conditions that must be satisfied before the WAG exception can be invoked. These include, *inter alia*, a determination that the employee's attendance at the event is in the interest of the agency. In most cases, particularly where the person offering to pay for the official's attendance is not the host of the event itself, various forms of written findings must be made that the agency's interest outweighs any concern that the gift of free attendance may appear improperly to influence an official's performance

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of his or her duties. Moreover, like all of the exceptions to the gift prohibitions, the WAG exception is subject to a general overriding limitation to the effect that the government official may not coerce or solicit an offer for free attendance at a WAG. In addition, a government employee cannot accept it in return for being influenced in the performance of his or her duties.

OGE justifies abandoning this carefully bounded limitation with remarkably little actual evidence of any actual or apparent impropriety. It relies on two observations, both offered without empirical support. First, it notes that it has “perceived some instances over the years in which the WAG exception was used to permit attendance at events, particularly social events, where the nexus to the government’s interest was attenuated.” If indeed OGE has “perceived” an unspecified, though apparently small, number of instances “over the years” where existing standards may not have not been met because the agency interest was “attenuated” (though not nonexistent?), the appropriate response is stricter enforcement of the rules at the agency level. Elimination of the WAG exception is a disproportionate response that is tantamount to a blanket restriction on lobbyists.

The second justification is also flawed. According to OGE, “It is increasingly recognized that the . . . problem is not brazen quid pro quo, but rather the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients.” In support, OGE offers one quote from a law review article: “the public’s concern is not just that . . . officials will engage in blatant [selling of their services] to lobbyists but, more subtly, that they will become partial to the causes of lobbyists’ clients because they spend a lot of time in lobbyists’ company.” We agree with the quoted statement. However, read in context, the statement provides little support for OGE’s proposal. The author was not discussing widely attended gatherings. Rather, she was referring to more intimate gatherings at which officials and lobbyists spend time alone: meetings, train rides, poker games and golf.

More important, if OGE is concerned about the contingent risk that someone would extend an invitation in the hope of cultivating a level of access that could be used in the future to obtain a more sympathetic hearing for clients, merely eliminating the exception for currently registered lobbyists does not address that risk. By way of example, if the rule change is implemented, a registered lobbyist could not invite a government employee to a WAG event. Yet, someone who is not a registered lobbyist at that time could do so. The non-lobbyist could secure clients in the future – perhaps even on the basis of his relationship with officials – and then register as a lobbyist after the fact. What’s more, executive officials would still be free to *attend* a WAG event; they would just have to pay. Forcing them to pay eliminates the “brazen quid pro quo,” but that, all are agreed, is not the concern here. Paid attendance presents essentially the same risk as free attendance of an appearance of impropriety resulting not from a gift but from seeing officials “spending a lot of time in lobbyists’ company.” Again, we consider that risk minute in the WAG context, but if indeed it exists, the proposed rule would not eliminate it.

The proposed rule change thus does not address the two concerns that OGE has identified. First, it would not address the fact that some government employees have not followed the directives contained in the December 2007 memo. Second, it would not prevent someone from trying to cultivate a relationship with an official for some future client purpose.

If it did no harm, perhaps the proposed rule might still make sense, even absent a strong justification, for appearances’ sake. But it could do very real harm. The comments submitted by Wm. T. (Bill) Robinson III on behalf of the ABA explain the costs of isolating executive branch officials. While those

comments focus on the value of exposure and interchange of officials with professional organizations, similar points can be made about other entities. It has long been recognized that isolating agency decisionmakers is not the route to sound governance. As a member of the Civil Aeronautics Board once observed, "I am not sure how, if we are restricted to almost a vacuum-like atmosphere, that we would be able to even determine what the questions are, let alone the solutions."¹ To be sure, the current proposal would not place executive officials in a "vacuum-like atmosphere," but the general principle – that there is a cost to isolating executive officials – is valid and important.

This Section has long supported strong rules for disclosure of and, in appropriate settings, restrictions on lobbying activity.² But we have opposed restrictions that would make it harder for government officials to do their jobs when such restrictions lack countervailing benefits.³ This is such an instance.

We hope these comments are useful. Thank you very much for your consideration of our views.

Sincerely,



Michael Herz
Section Chair

¹ Civil Aeronautics Board Practices and Procedures, Report of the Subcomm. on Admin. Prac. & Proc., Senate Comm. on the Judiciary, 94th Cong, 1st Sess. (1975), at 92.

² See, most recently, *Lobbying Law in the Spotlight: Challenges and Proposed Improvements*, Report of the Task Force on Federal Lobbying Laws Section of Administrative Law and Regulatory Practice American Bar Association (January 2011), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/administrative_law/lobbying_task_force_report_010311.authcheckdam.pdf.

³ See, e.g., Letter from William V. Luneburg, Section Chair, to Norman Eisen, Special Counsel for Ethics and Government Reform (March 9, 2010) (opposing policy barring registered lobbyists from serving on agency advisory committees), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/administrative_law/letter_to_norman_eisen_on_faca_march_9.authcheckdam.pdf.