



November 14, 2011

VIA EMAIL

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 - Proposed Amendments Limiting Gifts from
Registered Lobbyists and Lobbying Organizations

Dear Mr. Fox:

TechAmerica¹ appreciates the opportunity to comment on the Proposed Rule, *Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts from Registered Lobbyists and Lobbying Organizations*, which the Office of Government Ethics published in the Federal Register on September 13, 2011. The Proposed Rule, which was issued in response to President Obama's Executive Order 13490, would limit the use of certain gift exceptions by all Executive Branch employees. Specifically, the Proposed Rule would prohibit any employee from using the following exceptions in connection with gifts from registered lobbyists or lobbying organizations: the \$20 *de minimis* exception; the widely attended gathering exception; and the social invitation exception. The Office of Government Ethics excludes "nonprofit professional associations, scientific organizations, and learned societies" from the definition of registered lobbyist or lobbying organizations, even if these organizations are registered under the Lobby Disclosure Act.

TechAmerica strongly supports the Standard of Ethical Conduct for Executive Branch Employees and the continued use of sensible rules to prevent Government employees from accepting gifts that could unduly influence the performance of their

¹ TechAmerica is the leading voice for the U.S. technology industry – the driving force behind productivity growth and jobs creation in the United States and the foundation of the global innovation economy. Representing approximately 1,000 member companies of all sizes from the public and commercial sectors of the economy, it is the industry's largest advocacy organization and is dedicated to helping members' top and bottom lines. TechAmerica is also the technology industry's only grassroots-to-global advocacy network, with offices in state capitals around the United States, Washington, D.C., Europe (Brussels) and Asia (Beijing). Learn more about TechAmerica at www.techamerica.org.

respective duties. However, we believe that the Proposed Rule runs counter to the general principles in the Standards of Ethical Conduct that recognize the need for certain limited exceptions to the general gift prohibitions. These well-established exceptions serve several important public policies, possibly the most important of which is fostering interaction between government employees and industry and other stakeholders. TechAmerica is concerned that the Proposed Rule will undermine the legitimate purposes of the gift exceptions as discussed below, and for that reason, we respectfully request that the Office of Government Ethics withdraw the Proposed Rule.

While we fully understand and support the need to ensure that no material advantage is gained or favors are conferred through offering and providing gifts to Executive Branch employees, we disagree with the implication inherent in the Proposed Rule that communications with the public, particularly through organized constituencies that are also registered lobbying organizations, is in some way unethical and should be strictly prohibited. The Proposed Rule would hinder or, in some cases, entirely eliminate engagement and communication between the Government and industry; undermine the efficiency and effectiveness of Government; contradict President Obama's Administration's transparency policy; hinder the identification and adoption of new and innovative technologies; reduce information exchange between the Government and the public and knowledge exchange between government customers and possible vendors; and, even inhibit the Government's ability to spur economic recovery and job creation.

Accordingly, as discussed below, we recommend that the Office of Government Ethics withdraw the Proposed Rule, thereby avoiding the unnecessary and harmful implications associated with unduly restricting communications with industry and other stakeholders, or alternatively and at the very least, the Office of Government Ethics should revise the Proposed Rule to extend that proposed "carve out" for nonprofit professional associations, scientific organizations, and learned societies to allow federal employees to attend programs and events held by trade associations so long as those events meet the existing, strenuous standards necessary to qualify under the widely attended gathering exception.

I. The Proposal Would Diminish the Ability of Citizens to Communicate with the Government.

The Proposed Rule would diminish the public's ability to communicate with Government. Organized segments of the public that employ registered lobbyists would be excluded from interaction and engagement with representatives of the Executive Branch. The ability to communicate and engage with the public in a "Citizen Democracy" was one of the Obama Administration's bedrock policy, but this Proposed Rule seeks to severely limit when, where, and even if citizens are able to

communicate with government employees, contradicting one of the Administration's core policies.

Further, the proposal quite possibly violates the First Amendment to the United States Constitution in that it diminishes only the ability of those groups that employ lobbyists to communicate with the government employees – an act that quite clearly represents a restriction on the entity's ability to represent themselves and/or petition the government for redress of grievances

II. The Proposed Amendment is Unnecessary and Confusing.

We believe that the current gift rules in the Standards of Ethical Conduct, which have existed since 1992, are working as originally intended, and the Office of Government Ethics has not provided any explanation in the commentary accompanying the Proposed Rule to suggest otherwise. Indeed, the Office of Government Ethics has not provided any basis for the purported need to limit the application of these exceptions to gifts from lobbyists or lobbying organizations. The Office of Government Ethics, for example, has not cited any cases in which lobbyists or lobbying organizations were able to manipulate the exceptions in any way.

We submit that government employees are fully aware of the ethical concerns involved with communications with industry and other stakeholders, as evidenced by the rigorous approval processes we encounter when inviting government employees to speak to a gathering of our member representatives. We frequently are asked to provide extensive information about the event and the audience as part of that process. From our perspective, therefore, the current exceptions appear to be functioning as intended.

The Proposed Rule could cause confusion among Executive Branch employees about what constitutes a "gift" and thus, make it more difficult for them to understand, for example, whether an invitation to an event falls into one of the exceptions. The result will be that employees will fear reprimand for violating ethics rules, and therefore, they will not attend conferences, meetings, seminars or briefings that are beneficial to them and the government mission they serve. This could be the case even in scenarios in which their attendance would not violate the revised Standards of Conduct.

Moreover, since the Proposed Rule would bar Executive Branch employees from accepting gifts of any value from lobbyists or lobbying organizations, it would eliminate the *de minimis* exception for gifts of \$20 or less. This long-standing exception generally offers a safe-harbor by which Federal officials may interact with the public without being concerned that they may inadvertently violate the general gift prohibition by borrowing a pen, or accepting a handout that accompanies a

briefing. The Standards of Ethical Conduct acknowledge the need for such latitude, and have effectively provided for it with the *de minimis* exception.

If the Office of Government Ethics were to eliminate this reasonable, well-established exception for *de minimis* "gifts," as it has proposed to do for lobbyists and lobbying organizations, Executive Branch officials will be reasonably concerned that they may inadvertently violate, or be accused of violating, the gift rules. (Notably, the \$20 exception adopted in 1992 has a value of \$12.86 when accounting for inflation.) For example, if an employee retains a handout from a briefing sponsored by a trade association which qualifies as a "lobbying organization," should the employee return it or write a check to the trade association for the fair market value? If so, how does the employee ascertain its fair market value? If the employee is using the handout for work, should the employee accept the handout as a gift to the agency and process it accordingly?

Finally, the Proposed Rule will require Executive Branch employees to determine if the gift donor is registered under the Lobbying Disclosure Act ("LDA"). Since many companies are registered under names that are different from the names under which they conduct business, Executive Branch employees may fail to accurately identify lobbying organizations leading some employees to mistakenly accept gifts. Further, subsidiaries, joint-ventures, and other members of the corporate family may not be easily identified, leading to confusion and possibly to unintended violations. As a result, the Proposed Rule would be very difficult for an Executive Branch employee to comply with, and the practical implication is that it likely will have a "chilling effect" on the willingness of Government employees to engage with industry and other stakeholders.

III. The Proposed Amendment Would Negatively Impact the Efficiency and Effectiveness of the Government and Restrict the Identification and Adoption of New and Innovative Technology.

According to the Office of Management & Budget's *25-point Implementation Plan to Reform Federal Information Technology Management*, government efficiency and effectiveness has been directly tied to engagement with industry, particularly when it comes to information technology ("IT") acquisition,². Senior Administration leaders acknowledged that a lack of communication between government IT acquisition professionals and the vendors who offer innovative technologies has meant that "[t]he Federal Government does not consistently leverage the most effective and efficient available technologies" and that "agencies have been hindered by inadequate communication with industry." The leaders further found that "[t]he result has been barriers between industry and government buyers," leading to "a lack of awareness of the most efficient and effective technologies

² <http://www.cio.gov/documents/25-Point-Implementation-Plan-to-Reform-Federal%20IT.pdf>

available in the public sector.” The officials concluded that “[t]hese barriers negatively affect the full breadth of the acquisition process”

The Proposed Rule appears to contradict the solutions outlined in the 25-Point Plan and would make it much harder for industry and Government to communicate and interact. Since many companies employ lobbyists and are registered lobbying organizations, the distinctions government employees will make about communications and engagement will apply to them as well. Thus, the same aversion that is expected from government employees for conferences or meetings with associations is also anticipated for corporate-sponsored sessions. In the end, this proposal will make the conditions identified by OMB worse, not better.

It is reasonable to expect that the Proposed Rule would diminish the type of engagement and communication outlined in the 25-Point Plan. Executive Branch employees will be discouraged if not prohibited from participating in the kinds of engagement sought by the Obama Administration, which will diminish the Government’s access to innovative IT products, services, and solutions.

IV. The Amendment Would Inhibit Open Government and Transparency and Further Isolate Executive Branch Employees from the Governed.

In 2008, the Obama Administration presidential platform insisted that government and businesses use all available technologies and modern communication infrastructure to “reduce the costs of health care, help solve our energy crisis, create new jobs, and fuel our economic growth.”³ To such ends, the Administration adopted a wide array of new requirements prescribing open government and transparency for the operation of the Federal government. A major element of those initiatives has been, and should continue to be, the opportunity for government employees to communicate their plans or solicit feedback from the public. Frequently, the goals of transparency and open government, as outlined above, are met in the context of widely attended gatherings, where the public or specific constituencies convene to communicate with a government employee or employees. This Proposed Rule would dampen or almost eliminate the opportunity for such exchanges and stifle communication between Government and the public.

Moreover, without a regulatory safe-harbor offered by the *de minimis* exception, Executive Branch employees must exercise great care in avoiding the acceptance of improper gifts. This adds a new element of risk in meetings and other interactions with the public, companies and associations, thereby having a chilling effect on the willingness of Executive Branch employees to meet with them. Coupled with the

³ *President Barack Obama: Connecting and Empowering all Americans through Technology and Innovation.*

elimination of the exceptions permitting attendance at widely-attended gatherings and events outside of the United States, the effects of this amendment are further exacerbated. As activities and regulations become more complex and sophisticated, it is even more essential that employees be able to continue to exchange views with, question, and receive data from the public, business community, unions, and lobbyists. However, this Proposed Rule would contradict that need and prohibit that exchange.

V. The Amendment Would Diminish the Ability to Respond to the Current Economic Crisis and Promote Job Creation.

The Obama Administration is focused on creating jobs and spurring economic growth. The Proposed Rule, however, would seem to contradict that effort by restricting communication and exchanges with industry and other stakeholders that would allow the Government to gain a better understanding of the conditions in the economy and job market. The Administration further suggested in its *Connecting and Empowering all Americans through Technology And Innovation* that it would “foster home-grown innovation and ensure that we can retain and grow high-paying jobs in fast-growing sectors in the sciences and technology rather than exporting those jobs to lower cost labor markets abroad.” And in President Obama’s speech last month to Congress on job creation (his “Jobs Speech”), he insisted on strengthening competitiveness by “work[ing] side by side with America’s businesses” and utilizing a Jobs Council to “develop a wide range of new ideas to help companies grow and create jobs.”⁴

Yet it is hard to imagine how it would be possible for the Government to foster innovation, protect American jobs, and work collaboratively with the business sector when the Proposed Rule would impede communication between Government and industry and other stakeholders. We strongly believe that, in order to emulate the relative success of the tech sector and identify ways to replicate that success in the Government market, communications and engagement between Government and industry should be encouraged and not unduly hindered. But the Proposed Rule would have exactly the opposite effect by preventing or at least hindering full and open exchanges with industry. We are concerned that placing unnecessary limits on the means and opportunity for the Government and industry to collaborate will undermine efforts to foster a broader recovery for the American economy.

VI. The exception to allow federal employees to attend programs and events held by nonprofit professional associations, scientific organizations, and learned societies should be extended to trade associations.

⁴ Transcript: President Obama’s Speech to Congress on Jobs (Published: September 8, 2011).

TechAmerica understands the necessity of promoting high ethical standards and limiting the exposure of Executive Branch employees to undue influence. However, we disagree with the reasoning behind eliminating trade associations from the exclusion that has been extended to nonprofit professional associations, scientific organizations, and learned societies to allow federal employees to attend widely attended gathering held by these organizations.

In the very least, we believe that the Office of Government Ethics should allow federal employees to attend programs and events held by trade associations by extending the proposed "carve out" for nonprofit professional associations, scientific organizations, and learned societies. We support and have joined the American Society of Association Executive's comment letter submitted to the Office of Government Ethics that details this point.

However, we further believe that the restriction the amendments place on "purely social events" is ambiguous and overly inclusive and should be removed. We believe that there will be confusion about whether an event is a "purely social" or one that is educational, or provides some training or professional development. Our paramount concern is that this ambiguity would cause a chilling effect, ultimately limiting the dialogue between Government and industry in the manner discussed above.

VII. Conclusion

In President Obama's Jobs Speech, he stated that "there are some rules and regulations that do put an unnecessary burden on businesses at a time when they can least afford it [. . .] we should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test." TechAmerica believes that the Proposed Rule does not meet that common-sense test. It would have a deleterious effect on communications and engagement between Government and industry. Further, contrary to its intended purpose, the Proposed Rule would reduce the transparency and openness of the Federal Government and limit the ability of Executive Branch employees to tap into the resources of industry to identify and emulate successes for economic recovery and job creation.

We, therefore, propose that the Office of Government Ethics withdraw the amendments from consideration, or if the Office is unwilling to do so, we propose that it revise the Proposed Rule to allow federal employees to attend widely attended gathering held by trade associations when the pre-existing requirements are met.

On behalf of the members of TechAmerica, we again express our appreciation for this opportunity to comment on the proposed amendment. Should you have any questions or wish to discuss our comments in greater detail, please contact Trey Hodgkins at thodgkins@techamerica.org or 703-284-5310.

Respectfully submitted,



Daniel Varroney
Acting President & Chief Executive Officer