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VIA EMAIL: usoge@oge.gov

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

Attn: Richard M. Thomas, Associate General Counsel

REF: RIN 3209-AA04 (76 Fed. Reg. 56330)

Proposed Amendments Limiting Gifts From Registered Lobbyists

And Lobbying Organizations

Dear Mr. Thomas:

Thank you for the opportunity to submit these comments to the Office of Government Ethics ("OGE") regarding the proposed amendments to the regulation governing standards of ethical conduct for executive branch employees of the Federal Government, which would impose limits on the use of gift exceptions by all employees to accept gifts from registered lobbyists and lobbying organizations, and to implement the lobbyist gift ban for appointees required to sign the Ethics Pledge prescribed by Executive Order 13490.

Our comments are submitted on our own behalf, and not on behalf of any client. Our firm, Webster, Chamberlain & Bean, LLP, has been at the forefront of representation of non-profit organizations, and since 1970, has provided comprehensive legal services to a broad range of trade associations, professional societies, public charities, private foundations, scientific organizations, churches, clubs, schools and civic groups, lobbying groups, and political committees and candidates. It is this specialization, and over 35 collective years of experience of representing non-profit organizations, which informs these comments.

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The proposed rule bans government employees from accepting a gift from a registered lobbyist or lobbying organization and removes certain exceptions from the gift rules. Under the proposed rule, government employees are no longer permitted to accept invitations from lobbyists or lobbying organizations to a "widely attended gathering." However, the proposed rule exempts from the definition of registered lobbyist or lobbying organization an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code, an institution of higher education, a media organization as defined in 2 U.S.C. 1602(11), and any non-profit professional association, scientific organization or learned society (with respect to a gift made in connection with the entity's educational or professional development activities).

I. The focus of the proposed exemption is not tailored to achieve the stated goal because it excludes legitimate educational and professional development activities of many types of non-profits, is discriminatory, and is not based in fact.

The proposed rule completely exempts § 501(c)(3) organizations. The proposed rule exempts professional associations, scientific organizations and learned societies (however those terms are defined) but only as to their educational or professional development activities. OGE supports its refusal to exempt other non-profit organizations because the "primary concern of such associations generally is not the education and development of members of a profession or discipline, which is the focus of the proposed exclusion." 76 Fed. Reg. 56330, 56,338 (Sept. 13, 2011).

The line drawing between § 501(c) organizations and professional associations, scientific organizations and learned societies is without rational basis. Usually, trade associations, professional associations, scientific organizations and learned societies are classified under § 501(c)(6) of the Internal Revenue Code. If the purpose of the proposed exclusion is to encourage and permit educational and professional development activities, why aren't the educational and professional development activities of all § 501(c)(6) organizations also excluded? Why are the educational and professional development activities of other § 501(c) organizations excluded? Presumably, lobbyists could be present at events sponsored by professional associations, scientific organizations and learned societies, as well as at trade association events.

The proposed rule fails to recognize critical distinctions between lobbyists and lobbyist employers. OGE states that the "widely attended gathering" ("WAG") exception raises concerns when free attendance is provided by a lobbyist because the government employee will be in the company of the lobbyist. 76 Fed. Reg. at 56333. It is "the cultivation of familiarity and access

¹ There are at least 27 different classifications under § 501(c) of the Internal Revenue Code.

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that a lobbyist may use in the future to obtain a more sympathetic hearing for clients." *Id.* This concern is overblown and not borne out by reality.

First of all, the OGE assumes, without any factual basis, that the government employee will be in the company of a lobbyist merely because the sponsor of the event employs one or more lobbyists. In our experience, government employees are usually *not* in the company of the individual lobbyist. Most of the attendees at non-profit WAGs are *not* lobbyists; generally, only the organization, as the lobbyist-employer, is present. Yet, the proposed rule prohibits free attendance at a WAG, which may have hundreds or thousands of attendees, simply because the non-profit employs one or two in-house lobbyists, who may or may not even be present.

Second, the OGE is concerned about "free attendance provided by a lobbyist." The OGE fails to recognize the difference between lobbyists and lobbyist employers. In our experience, most invitations to WAGs do not come from individual lobbyists, but rather, from the lobbyist employer.

The proposed ban on accepting invitations to WAGs applies not only to large inside-the-Beltway gatherings of members, but also to smaller WAGs taking place in cities and rural areas across the country. These smaller educational events rarely involve lobbyists. The result of the proposed ban is not the prevention of interaction with actual lobbyists, but rather the punishment of organizations that employ registered lobbyists. If the goal were to prevent "access," then OGE could adopt an approach similar to that contained in the House and Senate gift rules. Those rules seek to restrict access by limiting lobbyist involvement in the planning of, and travel to, an event. The House and Senate gift rules thus recognize the value of such events and thus, do not ban such events merely because the non-profit employs in-house lobbyists.

II. The proposed exclusion punishes those non-profit organizations which comply with laws designed to promote transparency and in the end, the public as a whole suffers.

The proposed rule is more than restricting access to actual lobbyists; it results in the "punishment" of those organizations that comply with the Honest Leadership and Open Government Act. Those organizations that can keep their lobbying activities under the registration threshold, or that choose not to comply, can continue to invite government officials to their events. The proposed ban will only serve to strengthen the disincentive to register under the Lobbying Disclosure Act, and may cause some organizations to deregister altogether. Such a result will lead to less transparency and does not address the OGE's concerns.

² We do not agree that the prevention of access is an appropriate goal.

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"It is the sense of the Congress that any applicable restrictions on congressional officials and employees in this Act should apply to the executive and judicial branches." Honest Leadership and Open Government Act, 121 Stat. 735, § 701 (2007). The ethics rules are complex enough. If the proposed rules are adopted, non-profit organizations will find it increasingly difficult to educate and interact with government officials, especially if one branch is prohibited from even being present. Consistency is important, and therefore, the OGE should follow an approach similar to that adopted by Congress. Or, § 2635.203(h)(4) should be revised as follows:

"A nonprofit organization exempt from taxation pursuant to 26 U.S.C. 501(c), with respect to any gift made in connection with the entity's educational or professional development activities."

By failing to permit attendance at educational or professional development activities, regardless of the registration status of the organization under the Lobbying Disclosure Act, the public as a whole loses – there is less interaction, less sharing of ideas, and less knowledge gained. By contrast, encouraging the sharing of the latest developments in industry, best practices, and compliance concerns, leads to more informed oversight and policymaking.

Respectfully submitted,

Heidi K. Abegg

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