

## COALITION FOR TAX EQUITY

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Via Email: [usoge@oge.gov](mailto:usoge@oge.gov)

Mr. Walter Schaub  
Director  
Office of Government Ethics  
1201 New York Avenue, NW  
Washington, DC 20005-3917

Re: Office of Government Ethics, RIN 3209-AA04, Comments on Proposed Amendments to Subpart B of 5 C.F.R. § 2635

Dear Mr. Schaub:

The Coalition for Tax Equity appreciates the opportunity to submit comments regarding the Office of Government Ethics' proposed changes to Subpart B, "Gifts from Outside Sources" of the Standards of Conduct for Employees of the Executive Branch, codified at 5 C.F.R. § 2635. The Coalition is particularly pleased that this proposal offered by the Office of Government Ethics ("OGE") is, for the most part, an attempt to incorporate existing OGE guidance and update the rules to reflect practical realities.

The Coalition, which was established in 1992, is a 501(c)(6) organization representing corporations and trade associations. It is dedicated to advocating reasonable and workable standards in the areas of federal election law, lobbying disclosure, and Congressional and executive branch ethics rules.

The Coalition's members interact with executive branch government employees on a daily basis in a variety of contexts. This exchange of information between the government and the private sector is vital to the effective functioning of government. While we appreciate the importance of OGE's mission of ensuring that government employees are not improperly influenced by gifts from outside sources, we urge OGE to recognize the importance of fostering an environment in which stakeholders can effectively provide their knowledge and expertise to the government. Our members have seen firsthand the chilling effect that subjective ethics rules can have on the important sharing of ideas between industry and the government.

As an overarching premise, we applaud OGE's proposal to codify a number of existing principles that currently can be found in OGE's Legal Advisories, Guidance Letters, "DAEO-grams" and other informal guidance. Consolidating these key principles into the regulation assists the private sector in complying with the law as it has developed over time. Examples of this include clarification of the definition of "market value," the valuation of a private sky-box or invitation-only event, and clarification surrounding gifts based on a personal relationship. With

respect to some of the new proposals set forth in the draft rule, the Coalition offers the following comments.

#### Section 2635.201(b)

The draft proposes to create a new subheading entitled "Considerations for declining otherwise permissible gifts." The proposal characterizes the provision as a "flexible, non-binding standard" that is left to the employee's discretion. We believe the inclusion of this section adds unnecessary confusion to the rule.

At present, there is a presumption that gifts from a prohibited source or because of the official's position are impermissible unless they fall within one of the enumerated exceptions. The exceptions are narrowly drawn and include helpful illustrative examples. It is a clear, easy to apply, bright-line determination that reflects OGE's determination that "acceptance of a gift under the relevant exception will not adversely affect public confidence." The exceptions are intended to permit government employees to interact with the regulated community by discussing issues, fact-finding, and hearing the viewpoints of an array of stakeholders in furtherance of their agency's mission.

The overarching notion embedded in the proposed section 201(b), namely, that "it is frequently prudent for an employee to decline a gift offered by a prohibited source or because of the employee's official position" turns the entire purpose of the exceptions on its head. Although it is characterized as "non-binding," it creates a presumption that even gifts that fall within an exception are prohibited if one of the eight factors is present. Adding this subjective gloss to the analysis will serve only to chill government employees from engaging in otherwise lawful activities that are in the best interest of the agency and foster the effective functioning of government.

With respect to the specific factors enumerated in the proposed rule that apply to gifts of free attendance, there are many events that are entirely appropriate and, indeed, vital to carrying out the government's mission that do not include "persons with views or interests that differ from those of the donor" or are not "open to the public or representatives of the news media." Such events may include all-day meetings or trainings where a light meal is provided, refreshments offered at a roundtable or brainstorming discussion on a topic of importance to a government agency, or conferences and other large gatherings. Moreover, government invitees may not have visibility into the backgrounds and positions of other attendees, yet the draft rule places the burden on the invitee to ascertain other attendees' views and interests. Layering the subjective element onto these events will deter many employees from participating in these useful and informative exercises.

Finally, the subjectivity embedded in the proposal encourages unequal application of the rule. The interpretation of what is "reasonable" can only reasonably be expected to vary widely among the more than 2.6 million civilian executive branch employees and the myriad ethics offices charged with enforcing this murky standard.

The Coalition implores OGE to refrain from including proposed section 201(b) in the final rule. The rule as currently drafted is both easily understandable and effective in ensuring that government employees are not improperly influenced by gifts from outside sources. Injecting

subjectivity into this clear and effective rule will only result in confusion and may deter government employees from participating in certain lawful activities of critical importance to their agency's mission.

**Section 2635.203(b)(1)**

OGE has proposed adding an example to the definition of "modest items of food and refreshment," to clarify the agency's longstanding determination that alcoholic beverages may not be accepted under this exception. The language of the example, however, appears to go beyond merely prohibiting government employees from imbibing at an event by prohibiting attendance altogether.

The issue of attendance at a reception where alcoholic beverages are served is one area where the executive branch gift rules diverge widely from the congressional gift rules. Because many reception-type events provide excellent opportunities for government agency employees to mingle and converse with Members and staff of Congress and the private sector, the inclusion of this new example would effectively cut off those channels of communication for executive branch employees. In current practice, executive branch officials often attend these reception-type events but do not partake in the food and beverage offerings. It is not clear why OGE is now proposing to disallow attendance at such events, as there is nothing else of value provided to the attendees. The Coalition urges OGE to redraft the example to clarify that attendance at reception-type events is permitted so long as the attendee refrains from consuming alcoholic beverages or food items that may be offered.

**Section 2635.203(g)**

The Coalition strongly supports inserting the definition of "free attendance" into this section as well as the inclusion of the provision that would permit an employee who is a presenter to attend a separate meal for participating presenters. This change recognizes the importance of the exchange of ideas among presenters, and it is appropriately excluded from the definition of "free attendance" rather than enumerated as an exception.

**Section 2635.204(g)(2)**

The Coalition objects to several of the new provisions that have been woven into the existing exception for Widely Attended Gatherings ("WAGs"). First, the new requirement that WAGs provide "an opportunity to exchange ideas and views among invited persons" suggests that the only forums that will qualify as WAGs under the new rule will be panel or roundtable-type events where there is active participation by all attendees. This narrowing of the rule would appear to exclude speeches, charitable events, awards dinners, and other events that currently often qualify under the WAG rules. It is not clear why OGE would seek to exclude these heretofore permissible events by adding this requirement regarding the exchange of ideas among invited persons.

The Coalition does not necessarily object to the new requirement that every WAG must receive written agency approval. This practice protects both the employee and the private sector sponsors of such events. We would stress, however, that the current WAG approval process is entirely subjective and varies greatly from agency to agency. We encourage OGE to

provide additional training and guidance to Designated Agency Ethics Officials regarding the approval process, and highlight the need for quick turnarounds on these questions. We also urge OGE to highlight the available methods for providing written determinations, such as email or other informal written methods.

### **Gift Rule Uniformity**

Although it falls outside the scope of the proposed rule, the Coalition implores OGE to support a uniform set of rules for all executive branch employees -- political appointees and career employees alike. Under the current Executive Order 13490, Political Appointees are subject to arbitrary and unfounded restrictions on gifts from lobbyists and lobbyist employers. The practical reality is that these rules are so draconian and unworkable that many political appointees received waivers that allowed them to avoid the rules, or events in which political appointees wish to participate are artificially recrafted to permit their attendance (by offering them a speaking role, for example). The Coalition is very pleased to see that OGE has apparently determined not to move forward with the September 2011 proposed rulemaking that sought to apply these same unworkable rules to all career employees within the executive branch. We encourage OGE to work with the next administration to ensure that political appointees are subject to the same common-sense, effective and mission-oriented gift rules that are applicable to career appointees.

### **Conclusion**

As discussed above, we urge OGE to maintain the important balance between ensuring a high level of public confidence in the integrity of the federal executive branch workforce and fostering an environment in which stakeholders can effectively provide their knowledge and expertise to the government. The Coalition posits that this can only be achieved through the adoption of clear and sensible rules that do not chill interactions between agency personnel and the public sector.

Please do not hesitate to contact me at [tjenkins@nossaman.com](mailto:tjenkins@nossaman.com) or 202-887-1400 if you have any questions regarding our comments. Thank you for your consideration.

Sincerely,



Timothy W. Jenkins  
of Nossaman LLP  
on behalf of the Coalition for Tax Equity