VENABLE LLP

Venable Partners Comment on Proposed Executive Branch Gift Rule "Lobbyist Gift Ban"

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FOR MORE INFORMATION, PLEASE CONTACT ANY OF OUR ATTORNEYS IN THE POLITICAL LAW PRACTICE GROUP.

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Venable LLP partners Ronald M. Jacobs and D. E. Wilson, Jr. submitted Comments critical of the U.S. Office of Government Ethics' ("OGE") notice of proposed rulemaking ("NPRM") to expand the executive branch gift rule. The gift rule traditionally has permitted federal employees to accept certain gifts from the private sector, such as attendance and meals at "widely attended gatherings" or *de minimus* gifts worth less than $20. President Obama changed this rule in 2009 by Executive Order, requiring as a contractual term of employment, all political appointees in his Administration to sign an Ethics Pledge that bans gifts from lobbyists. Now, OGE proposes to codify the political appointee lobbyist gift ban in its regulations and expand it to cover all 2.8 million federal employees.

Mr. Jacobs and Mr. Wilson urged OGE to review the constitutionality of its proposal, and suggest that OGE use this opportunity to harmonize the gift rules across the government in an understandable manner. The current rule is dense, long and confusing. Adding a new layer of restriction will make it worse.

OGE recognized that brazen *quid pro quo* gifts from lobbyists are not a problem. Instead, its NPRM seeks to limit lobbyists' access to federal personnel by barring federal personnel from accepting invitations to most events sponsored by a federal lobbyist or an organization that employs one or more federal lobbyists. OGE proposes to exempt media organizations and certain nonprofits—but not 501(c)(6) trade associations or 501(c)(4) social welfare organizations—from this lobbyist gift ban.

Venable's Comments challenged OGE's assumptions. While supportive of exempting media organizations and select nonprofits, Venable urged OGE to exempt other nonprofits and businesses, too. OGE chose to exempt media organizations from the lobbyist gift ban because the First Amendment guarantees a free press. But OGE neglected to read the rest of the First Amendment, which also guarantees the right to petition the government for redress of grievances, or "lobbying." This suspect classification cannot stand. Likewise, the tax law limit on 501(c)(3) lobbying applies to only some 501(c)(3) organizations. Other taxes and rules limiting for-profits' deduction of lobbying expenses from their taxable incomes provide equivalent inhibitions. And the federal ban on using federal funds to lobby for more federal funds applies to all individuals and organizations, not just charities. Venable, and other commenters as well, demonstrate that other nonprofits and businesses also provide value to federal agencies by inviting federal personnel to trade

shows, plant visits and other events, contrary to OGE's conclusions.

Mr. Jacobs and Mr. Wilson demonstrated how easily lobbyists may evade the proposed lobbyist gift ban. Many federal lobbyists will simply de-register. Others will provide gifts through affiliated entities that are not registered or are 501(c)(3) organizations, such as a lobbying firm's tax-exempt foundation. These organizations either fall outside the class of defined "registered lobbyists or lobbying organizations," or are exempt despite being registered. In any event, decreased transparency in lobbying and gift-giving will result if the NPRM is adopted as proposed. The current system is complex and cumbersome, but the new rules will both fail to achieve the government's stated purpose and remove substantial lobbyist-government interaction from the public record.

To avoid these problems, Mr. Jacobs and Mr. Wilson proposed taking this opportunity to conform the executive branch gift rules to those adopted by Congress, including its lobbyist gift ban. Congressional gift rules are clearer and give donors and recipients greater assurance.

OGE has extended its comment period to December 14, 2011. Its NPRM and the comments filed to date are available at: http://www.usoge.gov/Laws-and-Regulations/Federal-Register-Issuances/Proposed-Rules-and-Comments/Proposed-Lobbyist-Gift-Ban-Rule/.

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