

E-ALERT | Election and Political Law

September 22, 2011

OFFICE OF GOVERNMENT ETHICS PROPOSES EXTENDING MAJOR PORTIONS OF THE “LOBBYIST GIFT BAN” TO ALL FEDERAL EXECUTIVE BRANCH EMPLOYEES

Last week, the U.S. Office of Government Ethics proposed [amendments to the federal executive branch gift rules](#) that dramatically reduce the ability of federal lobbyists and their employers to provide gifts, including meals, entertainment, and invitations to events, to federal executive branch employees. The proposed amendments adopt the prohibitions found in [President Obama’s 2009 “lobbyist gift ban” executive order](#)—which only applies to political appointees—and extend many of the restrictions to all federal executive branch employees. These changes, if adopted, will affect a wide range of activities that were previously permissible, requiring a wholesale revamping of gift rule compliance policies by corporations and trade associations that deal regularly with the federal government.

ADDITION BY SUBTRACTION

The proposed amendments are the result of the 2009 executive order’s call for the Office of Government Ethics to adopt rules that extend the executive order’s “lobbyist gift ban” to all executive branch employees. The proposed amendments remove the ability of lobbyists and lobbyist employers to take advantage of certain well-known exceptions to the general executive branch gift prohibition. While everyone currently has available a long list of exceptions that permit certain types of gifts to executive branch officials, under the amended rules, lobbyists and lobbyist employers registered with the House or Senate will have a much shorter list of exceptions to choose from. Below, we summarize the exceptions that would no longer be available to lobbyists and lobbyist employers, the limited number of exceptions that remain, depending on the recipient of the gift, and the types of organizations that are exempted from the restrictions under the proposed rules.

OFF THE LIST ENTIRELY: POPULAR GIFT RULE EXCEPTIONS NO LONGER AVAILABLE TO REGISTERED LOBBYISTS AND THEIR EMPLOYERS

Several of the most commonly used exceptions are taken off the table by the proposed amendments. Registered lobbyists and lobbyist employers would no longer be able to take advantage of the following exceptions, with respect to all executive branch employees:

- Gifts provided subject to the so-called “\$20/\$50” exception, under which an employee could accept gifts with a value of \$20 or less per source per occasion, provided that an employee did not receive \$50 or more per year in value from that source;
- Free attendance at “widely attended gatherings” (unless the employee serves as a “speaker”);
- Food and entertainment when on duty or official travel in a foreign area; and
- Social invitations from persons other than “prohibited sources.”

EXTREMELY LIMITED LIST OF EXCEPTIONS THAT REMAIN FOR GIFTS FROM REGISTERED LOBBYISTS AND THEIR EMPLOYERS TO POLITICAL APPOINTEES

Here, the proposed amendments essentially incorporate into the regulations the Obama executive order on ethics. With regard to gifts from registered lobbyists or lobbyist employers to a “full-time, non-career appointee” (generally, political appointees), the list of gift rule exceptions is pared down to a lonely few:

- The “personal relationships” exception, under which an appointee may accept certain gifts that are motivated by a personal friendship or family relationship;
- The “professional organizations” exception, under which an appointee may accept reduced membership fees in a professional organization if the discount is offered to all government employees with the appropriate professional qualifications;
- The “spouse’s business/employment” exception, under which an appointee may accept benefits resulting from the spouse’s business or employment that are provided to similarly situated spouses;
- The “bona fide employment discussions” exception, under which an appointee may accept benefits that are generally provided by prospective employers pursuant to bona fide employment discussions;
- Gifts to the President or Vice President; and
- The “specific authorization” exception, under which an appointee may accept a gift specifically authorized by statute or supplemental agency regulation.

SOMEWHAT LARGER LIST OF EXCEPTIONS THAT REMAIN FOR GIFTS FROM REGISTERED LOBBYISTS AND THEIR EMPLOYERS TO ALL OTHER EXECUTIVE BRANCH EMPLOYEES

Registered lobbyists and their employers who wish to provide a gift to an executive branch employee who is not an appointee will face tighter constraints under the amendments. However, the list of available exceptions (permissible gifts) is slightly larger than if the official is an appointee:

- All exceptions listed in the appointees section above: “personal relationships” exception, “professional organizations” exception, “spouse’s business/employment” exception, “bona fide employment discussions” exception, President/Vice President exception, and “specific authorization” exception;
- The “award or honorary degree” exception, under which an employee may accept certain bona fide awards in recognition of service or achievements, or honorary degrees;
- The “outside business employment” exception, under which an employee may accept a gift resulting from his or her outside business employment if it is unrelated to the employee’s official status; and
- The “Hatch Act” exception, under which an employee may accept gifts in connection with political activities permitted by the Hatch Act Reform Amendments.

The Office of Government Ethics takes some pains in its explanation of the proposed rules to emphasize that the new restrictions for non-appointees only apply if the lobbyist gift-giver is also a “prohibited source” or gives the gift because of the official’s government position. Generally, a prohibited source is a person or firm who is regulated by, or does business with, the agency that employs the gift recipient. In contrast, the restrictions on gifts to appointees apply to any lobbyist or lobbyist employer. As a practical matter, the circumstances in which this distinction will make a difference will be very rare, and we would not necessarily expect clients’ compliance policies to take account of this distinction.

ITEMS THAT CONTINUE TO BE PERMISSIBLE BECAUSE THEY ARE NOT CONSIDERED “GIFTS”

It is important to note there are several categories of items that may be provided to federal executive branch employees, including appointees, because they are not considered “gifts” under the Office of Government Ethics rules. These categories of items, including the following, are not affected by the proposed amendments:

- Modest items of food and refreshments, such as soft drinks, coffee, and donuts, offered other than as part of a meal;
- Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;
- Any good or service generally made available at the given price to either the general public or all government employees; and
- Anything for which market value is paid by the employee.

ORGANIZATIONS EXEMPTED FROM THE PROPOSED LOBBYIST GIFT RESTRICTIONS

The proposed amendments exempt certain types of organizations from the new restrictions altogether, allowing them the option to take advantage of the full list of gift rule exceptions previously available to them. These organizations include the following:

- 501(c)(3) organizations;
- Public institutions of higher education;
- Media organizations, but only with respect to their information gathering and dissemination activities; and
- Nonprofit professional associations, scientific organizations or learned societies, but only with respect to their educational or professional development activities.

COMMENTS INVITED

These amendments have not yet been adopted. The Office of Government Ethics is inviting written comments on the proposed amendments, which are due by November 14, 2011. Covington would be pleased to provide more detailed advice, or to submit comments on the proposed rules on behalf of our interested clients. We expect that applying the strictures of the Obama executive order on ethics broadly to all executive branch employees could have a significant impact on the ability of federal employees to attend events, and that this could draw objections from the regulated community and the federal employees themselves.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

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