

Office of Government Ethics Proposes New Restrictions on Gifts from Registered Lobbyists and Lobbying Organizations

The Office of Government Ethics (OGE) has proposed amendments to its Standards of Ethical Conduct for Employees of the Executive Branch to provide new restrictions on the acceptance of gifts by executive branch employees.¹ The proposed rules would prohibit career employees, special government employees, and any other employees currently subject to OGE gift restrictions from accepting gifts from any registered lobbyist, lobbying firm, and lobbying organization in reliance upon certain existing exceptions to the OGE gift prohibitions: the *de minimis* exception; the “widely-attended gathering exception” (unless the employee is speaking or presenting); the “social event” exception; and the exception for refreshments and entertainment from private entities in a foreign area.

The proposed amendments also generally would adopt as rules the restrictions on gifts from registered lobbyists and lobbying organizations to Obama administration political appointees contained in Executive Order 13490.² The comment period ends on November 14, 2011, and the proposed changes have already generated controversy among interested trade associations and others.

Background

The proposed amendments would make all executive branch employees subject to most of the special gift limitations imposed on Obama administration political appointees under the Executive Order, which requires all full-time non-career appointees appointed on or after January 20, 2009 to sign an “Ethics Pledge” in which they agree not to accept gifts from lobbyists or lobbying organizations while serving in the administration, with limited exceptions. The Executive Order/Ethics Pledge applicable to political appointees is in addition to OGE rules generally applicable to executive branch employees prohibiting them from accepting: (1) gifts from a prohibited source (generally, an individual or entity with interests that may be affected by the employee’s agency), or (2) gifts given because of the employee’s official position.

¹ See 76 Fed. Reg. 56,330 (Sept. 13, 2011).

² See Exec. Order 13490 (Jan. 21, 2009), <http://www.whitehouse.gov/the-press-office/ethics-commitments-executive-branch-personnel>.

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The Proposed Rule

The proposed rule would limit the acceptance of gifts from registered lobbyists and lobbying organizations for both political appointees and all other executive branch employees that currently are subject to OGE gift restrictions. The proposed rule excludes media organizations and certain nonprofits, educational institutions, and professional associations from the definition of “lobbying organizations,” but otherwise includes all other persons and organizations that are Lobbying Disclosure Act (LDA) registrants.

For political appointees (full-time, non-career appointees), the proposed rule provides that such appointees shall not accept a gift from a registered lobbyist or lobbying organization, except pursuant to specified exceptions. Like the Executive Order, the proposed rule applies to gifts from registered lobbyists and lobbying organizations, *whether or not* they also are prohibited sources or are providing a gift because of the employee’s official position.

For career and other nonappointed employees, the proposed rule specifies that, notwithstanding the exceptions otherwise provided under OGE rules, employees may not accept a gift from a registered lobbyist or lobbying organization, except pursuant to limited specified exceptions. These nonpolitical employees are subject to the special limitations on gifts from lobbyists *only* where the lobbyist/lobbyist organization *also* is a prohibited source or is conferring a gift because of the employee’s official status.

The following summarizes how the proposed rule, if adopted, would affect a political appointee’s or career employee’s acceptance of gifts in reliance upon various exclusions and exceptions.

Exceptions currently unavailable to political appointees subject to the Executive Order that would continue to be unavailable to such appointees and that would also become unavailable to career employees:

- The *de minimis* exception for gifts having a market value of US\$20 or less from a single source on a single occasion and gifts in an aggregate value of up to US\$50 per source in any calendar year;

- The exception for free attendance at widely attended gatherings (but free attendance at a conference or other event for an employee who is speaking or presenting would remain as an available exception);
- The exception for free attendance at social events that are not sponsored by a prohibited source; and
- The exception for meals, refreshments, and entertainment from private entities in a foreign area.

Other existing exceptions and exclusions from the definition of “gift” would continue to be available to executive branch career employees and, with limitations noted below, also would be available to political appointees and would permit acceptance of gifts from lobbyists and lobbying organizations as follows:

Exclusions from the definition of “gift,” all of which would continue to be available under existing OGE regulations:

- Modest items of food and refreshments, offered other than as part of a meal;
- Greeting cards and items with little intrinsic value, such as plaques intended solely for presentation;
- Loans on standard terms;
- Discounts available to the public or to all government employees;
- Rewards for competitors in contests and random drawings open to the public;
- Pensions and benefits maintained by a former employer;
- Anything paid for by the government;
- A gift accepted by the government under specific statutory authority—which may include private-paid travel, subsistence, and related expenses in accordance with specific GSA regulations; and
- Anything for which the employee pays market value.

Exceptions from the gift prohibition that would continue to be available (with certain limitations for political appointees, as indicated):

- Gifts based on a personal relationship, including family relationship or personal friendship;
- Generally available discounts and similar benefits;

- Awards and honorary degrees—but **not** for political appointees;
- Gifts based on outside business or employment relationships—but political appointees may rely upon this exception only for such gifts related to their spouse's employment and gifts from prospective employers, consistent with OGE requirements, and they may **not** rely upon this exception to accept gifts based upon their own outside business or employment;
- Gifts in connection with permissible political activities—but **not** for political appointees;
- Gift to the president or vice president, consistent with statutory requirements; and
- Gifts accepted under specific statutory authority (certain training provided by tax-exempt organizations, consistent with OGE rules, and gifts provided by foreign governments or multinational organizations, consistent with statutory authority).

Note that many of the above exclusions and exceptions are fact-specific, and the OGE regulations and accompanying examples described in the OGE regulations are very detailed. No one should rely upon any exclusion or exception in conferring a benefit on an executive branch employee—either a political appointee or career employee—without a thorough examination of the particular facts and application of the particular exception.

If you have any questions about any of the topics discussed in this Advisory, please contact your Arnold & Porter attorney or:

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