

The “Take Them Out to the Ball” Game: Inaugural Events and Events for New and Departing Members under the Gift Rules and the Lobbying Disclosure Act

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The election is over. Let the Inaugural events begin. With the upcoming second Inaugural of President Obama, and the pending swearing in of the Members of the 113th Congress and departure of some Members of the 112th Congress, come questions under the executive branch and congressional gift rules about providing tickets to Members, other government officials or staff to Inaugural events and about sponsoring parties in honor of Members or staff coming to or leaving the Congress. Here are some key points to keep in mind.

Members-Elect and the Congressional Gift Rules

Do congressional gift rules apply to new Members and staff before they take office? For new Members and staff who are coming to the House or Senate from non-congressional lives and careers, the “letter of the law” answer is, “No,” the gift rules do not apply to Members until they are sworn in and do not apply to staff until they become congressional employees.

But there is also a requirement in the Code of Ethics for Government Service—applicable to both houses of Congress—that Members and staff must not only uphold the specific ethics rules but also “never be a party to their evasion.” Keeping this requirement in mind, considerable caution should be taken where any Member-elect or prospective staffer may be viewed as accepting—and any donor as providing—a gift given at a time and in a manner suggesting that it was motivated by the intent to avoid the restrictions of the rules. And

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if the circumstances of such a “pre-congressional service” gift are egregious enough, the House Ethics Committee or the Senate Ethics Committee (as relevant) could even take action against the receiving Member or staffer once they entered congressional service on the grounds that acceptance of the gift amounted to improper conduct reflecting on the institution.

One last point: a gift (or anything of value) given to a Member-elect (or a person selected to be an employee of Congress) to influence, or for or because of, an official act to be performed once in office, may be prosecuted as an illegal bribe or gratuity.

Presidential Inaugural Events

Congressional invitees. Attendance at a Presidential Inaugural event may be accepted by a Member or staffer of Congress from a private entity under either the widely-attended event exception or reception exception to the congressional gift rules if the criteria for the exception are met. As a general matter, the widely-attended event exception, in both the House and the Senate, requires that attendance at the event is expected to include at least 25 persons from outside of Congress, that attendance is open to Members throughout a given industry or profession or to a range of people interested in an issue, that the invitation comes only from the sponsor of the event and that the Member or staffer determines that his or her attendance is appropriately connected with his or her official duties or position. Free attendance at a widely-attended event may include a sit-down meal. At a “reception” under the rules, however, the food must consist only of food and beverages offered other than as part of a meal—but invitations to a reception may come from individuals or entities other than the event sponsor.

Many Presidential Inaugural events are galas or balls that include music and dancing. Could such an event meet the widely-attended event criteria under congressional gift rules? The Senate Ethics Committee's answer to this question appears to be, “Yes.” Without including any qualification as to entertainment occurring in connection with an event, the Committee's Senate Ethics Manual states: “a Member or staffer could accept an offer of free attendance from the Presidential Inaugural Committee for an event sponsored by the committee, or from a private group for an event sponsored by the group, if the event is widely attended and the Member or staffer determines that attendance is connected with his or her official duties or position.” Review of specific proposed events for conformity with this general Senate guidance would appear to be prudent, nonetheless. And, because the House Ethics Manual does not include any similar blanket statement regarding Presidential Inaugural events, review of specific proposed events for conformity with House standards is advisable.

Depending on the nature of the Inaugural event, other exceptions to the congressional gift rules may apply through which a Member or staffer could accept free attendance from a private entity. For example, assuming all the criteria for a particular gift rule exception are met (including the requirement as to permissible source), a Member or staffer could accept a ticket to an Inaugural event under the charity event exception, or under the exceptions for a political fundraising or other campaign organization event, or if the ticket is received in connection with the outside business or employment activities of their spouse.

Executive branch invitees. Whether, and under which gift exceptions, an executive branch official may accept free attendance to an Inaugural event from a private source depends on whether the official is a "political appointee." For example, as a general matter, non-political appointee executive branch officials may be able to accept free attendance to an Inaugural event from the private sponsor of that event if the event meets the criteria of the widely-attended gathering (WAG) exception to the executive branch gift regulations. In addition to imposing certain requirements as to the number and nature of attendees at an event, the WAG exception requires the invited official's agency ethics designee to determine that the official's attendance at the event is in the agency's interest. However, pursuant to President Obama's Executive Order, the WAG exception is not available to executive branch political appointees (although a political appointee—when assigned by his or her agency to speak at an event—may accept free attendance at the event for the day on which he or she will be speaking).

Likewise, where the criteria are met, a non-political appointee executive branch official may accept a ticket to an Inaugural event under the gift exception permitting attendance at events sponsored by political organizations, but this exception does not cover executive branch political appointees. However, all executive branch officials—including political appointees—may accept an invitation to an Inaugural event from a private source if the invitation results from the employment or business activities of the official's spouse.

Honorific and Swearing-in Events

As a general matter, consistent with both House and Senate gift rules, individuals and entities outside Congress may hold events in honor of a Member or employee leaving Congress without the cost of such an event counting as a gift to the Member or employee. Certain conditions must be satisfied, however: any invitations must clearly indicate the Member or staffer is the honoree at the event; the Member or staffer should not be identified as a host of the event; the actual hosts of the event should be clearly identified. Also, as stated in the House Ethics Manual, "The event must genuinely be the event of the outside sponsor, and it is the sponsor who must determine the nature of the event and the guest list." As long as it is done consistent with this requirement of actual control by the outside sponsor, however, the Member or staffer being honored may be able to suggest names for inclusion on a guest list.

If such an honorific event meets these requirements as well as the requirements under the gift rules for a widely-attended event or for a reception, the Member or staffer being honored could attend the event without raising gift rule concerns. Therefore, under such circumstances it appears that lobbyists, foreign agents and the private entities that employ or retain them could sponsor such events without providing an impermissible gift. However, if these requirements are not met, costs of the event could be deemed to be a gift to the Member or staffer, a gift ranging in value from the entire cost of the event to the cost of the refreshments consumed by the Member or staffer, depending on the circumstances.

As a general matter, the same gift rule conditions and cautions discussed above in connection with honorific events for Members leaving Congress may be applied to events held in honor of a Member upon his or her being sworn in to the House or Senate. It is important to emphasize here, however, the requirement that such

an honorific event—whether it occurs at the beginning, during, or at the end of a Member's congressional career—must genuinely be an event of the outside sponsor or sponsor(s). In this regard, consultation with counsel and with the relevant congressional ethics committee is always prudent. (Members and Members-elect should keep in mind that, as a general matter, they may pay for their swearing-in receptions with principal campaign committee funds.)

LDA Requirements

Individuals or entities subject to Lobbying Disclosure Act (LDA) reporting requirements should remember that they must report on their LDA Form LD-203 the following information: the date, the name of the honoree, the payee(s) and the amount of funds equal to or exceeding \$200 paid to a Presidential Inaugural committee.

Finally, for any event held "in honor of," or otherwise honoring or recognizing a Member or staffer of Congress (or of a covered executive branch official), keep the LDA reporting requirements in mind. A reporting individual or entity that sponsors such an event, or otherwise meets the conditions for "paying the cost of an event," as discussed in the joint House/Senate LDA guidance, must report the date, the name of any honoree (s), the payee(s) and the amount of funds paid for the event on their Form LD-203.

This discussion covers the highlights of the rules and regulations relevant to Inaugural and swearing-in events. But navigating these rules can be tricky. The attorneys of Wiley Rein's Election Law and Government Ethics Practice Group are available to review and discuss your organization's plans and proposals for any specific event or invitation.