

ALERT

OGE Proposal to Tighten Executive Branch Gift Regulations

September 29, 2011

On September 13, 2011, the Executive Branch Office of Government Ethics (OGE) proposed tightened regulations on gifts to career Executive Branch employees from federally-registered lobbyists and entities that employ in-house lobbyists. For any company, association or other entity employing lobbyists, interactions with Executive Branch employees would be impacted by these proposed regulations in a number of significant ways, including—as summarized in an article in the September 2011 issue of Wiley Rein’s *Election Law News* and as discussed in more detail below—through elimination of exceptions for:

- Widely-attended gatherings
- Meals, refreshment and entertainment to U.S. officials in foreign areas
- Gifts of *de minimis* value (\$20 or less)

Scope of the proposed rules. The proposed OGE regulations would apply to all career officers and employees—and all other non-“political appointee” officers and employees—of all federal Executive Branch offices and agencies, including special government employees and including officers of the uniformed services. (As discussed below, the restrictions imposed by a 2009 Executive Order on acceptance of lobbyist gifts by political appointees—which the new regulations largely track—will remain in effect and will be incorporated in the standing Executive Branch ethics regulations.) As to enlisted military personnel, through the Joint Ethics Regulation (JER), DoD 5500.07 (November 29, 2007), the Department of Defense (DoD) directed that the Executive Branch gift regulations (among other provisions of Executive Branch ethics regulations) are applicable to National Guard Members and enlisted members of the

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military as if they were employees as defined by the regulations. Therefore, barring revision of this JER provision, the tighter restrictions of the proposed new regulations would apply to enlisted military personnel.

The proposed regulations would not treat all lobbyist employers equally. First, the restrictions would not apply to charities or public educational institutions, among others, even if they are lobbyist employers. Further, the restrictions would not extend to entities that retain outside lobbyists as opposed to those entities employing in-house lobbyists.

Elimination of the “widely attended gathering” exception. Under the proposed regulations, entities employing lobbyists could no longer offer free attendance to an Executive Branch employee to a reception, dinner, conference, facility opening, trade show or any other “widely attended gathering of mutual interest to a number of parties.” The only exception would be for “speaking and similar engagements” where the employee is assigned by his or her agency to present information at a conference or other event; in such cases the entity sponsoring the event could provide free attendance to the employee—including meals with the other event attendees—on the day of the employee’s presentation *only*.

Elimination of the “foreign areas” exception. Under current gift regulations, companies and entities that employ lobbyists may provide food, refreshment or entertainment under certain circumstances to Executive Branch employees assigned to duty in, or on travel to, foreign areas. The new regulations would eliminate this exception in connection with lobbyists and lobbyist employers and, as a general matter, would prohibit such gifts in foreign areas from these sources. The “speaking and similar engagements” provision discussed above, however, would apply to Executive Branch employees assigned to present information at a conference or other event abroad.

Elimination of the \$20 *de minimis* value exception. Under the proposed regulations, companies and entities that employ lobbyists would no longer, as a general matter, be permitted to provide gifts of \$20 or less (for example, an inexpensive lunch) to Executive Branch employees.

Exceptions still available for lobbyist gifts. Under the proposed regulations, the gift exceptions available under the “Ethics Pledge” to Executive Branch political appointees would also apply to gifts from lobbyists/lobbyist employers to Executive Branch employees generally. Therefore, the following categories of gifts from lobbyists/lobbyist employers would remain permissible under the proposed regulations:

- Modest items of food and refreshment, 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.
- Free attendance—including meals taken with the other attendees—at a conference or similar event where the employee is assigned by his or her agency to present information, but on the day of presentation only.
- Gifts based on a personal relationship.

- Discounts and similar benefits.
- Gifts resulting from a spouse's business or employment.
- Gifts customarily provided by prospective employers.
- Gifts authorized by an agency's authorized supplemental regulations and gifts accepted under specific statutory authority.

Under the proposed regulations, these additional categories of gifts from lobbyists/lobbyist employers would be acceptable by career and other Executive Branch employees (but *not* by political appointees):

- Awards and honorary degrees.
- Gifts resulting from the employee's outside business or employment.
- Certain benefits in connection with permissible political activities.

The lobbyist gift ban for political appointees is incorporated in the regulations. With respect to Executive Branch political appointees, OGE's proposed new regulations would incorporate within the standing Executive Branch gift regulations the terms of the ban on gifts from lobbyists and lobbyist employers currently imposed on political appointees by Executive Order and agreed to by these political appointees through signing of the "Ethics Pledge."

Comment period. The comment period on the proposed regulations ends November 14, 2011.