



## Government Affairs Advisory

January 31, 2007

### Gifts, Entertainment, Earmarks, Travel: Navigating the New Congressional Ethics Rules

As the first order of business during the new 110th Congress, both the House of Representatives and the Senate have passed a major updating of Congressional ethics rules. House Resolution 6 (H. Res. 6) included an immediate tightening of the House gift rules contained in House Rule XXV and also adopted new restrictions effective March 1, 2007 on travel by Members and staff of the House of Representatives. In Senate Bill 1 (S. 1), the Senate adopted very similar changes in regard to gifts and travel, and then went much further by approving the first significant changes in the Lobbying Disclosure Act (LDA) in more than a decade. Both the House and Senate included provisions to address earmarks.

As a Resolution imposing rules on the House itself, H. Res. 6 needs no further action to become effective. As a change in the federal statutes, however, S. 1 must now be considered by the House of Representatives and any changes to the LDA must pass both the House and Senate and be signed by President Bush before becoming effective. It is our understanding that the House may not consider its version of S. 1 for several weeks. In the meantime, several Senate offices tell us that they are abiding by the changes in gift and travel rules incorporated in S. 1, even though those provisions have not been approved as a separate Senate Resolution.

#### New Gift Rules

- House Rule XXV and Senate Rule XXXV generally allow a Member of the House or Senate or their staff to accept any single gift (other than cash or cash equivalent), including a meal, valued at less than \$50. Gifts from a single source may not exceed \$100 in any calendar year, and gifts of less than \$10 do not count toward this annual limit.
- These general gift rules were not changed by the recent House and Senate action. Rather, the recent changes simply added language making clear that the \$50 provision DOES NOT apply to a registered lobbyist or a private entity that employs or retains a lobbyist. Gifts from such individuals or entities are prohibited. Thus, a Member of Congress or staff may no longer receive a gift from a registered lobbyist or private entity that is registered under the LDA.
- **But Wait:** There are 23 exceptions to the Gift Rules and these exceptions **were not changed** by H. Res. 6 or S. 1, even if the exception applies to a registered lobbyist or an entity that employs or retains a lobbyist.

#### Exceptions to the General Gift Rules

- **Gifts based on personal friendship or preexisting friendship** are exempt from the gift rules

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(even if received from a registered lobbyist) unless the recipient has a reason to believe that, under the circumstances, the gift was provided because of his or her position and not because of the friendship. A member or staff should consider all of the circumstances surrounding the gift, the history or the relationship, and whether it is believed the friend may be seeking reimbursement from an employer who retains a lobbyist etc.

- **Attendance at widely attended events**, including a meal, as a part of official duties. A widely attended event, such as a Congressional dinner, reception or briefing, where the expectation is that at least 25 persons other than Member's and staff will be in attendance, constitutes an exception to the Gift Rules.
- **Attendance at events sponsored by bona fide constituent groups**, including a meal, as part of official duties, even if the event is not a widely attended event. The Senate guideline sets forth that at least 5 constituents must be present. Visits by civic groups, Chamber of Commerce groups from a Member's home state, for example, would fall under this exception.
- **Food or refreshment of Nominal Value, other than as part of a meal**, continue to be an exception, whether provided by a lobbyist or other individual or entity. Coffee, juice or pastry provided at a morning meeting for example, or an afternoon snack, ice cream, cookie are acceptable. Nominal has normally been defined as less than \$10 under the gift rules. Thus, while this exception would NOT allow a lobbyist to buy a cheap meal (even a hot dog or hamburger lunch) for a Congressional staffer under this exception, a staffer could accept a cup of coffee, bagel, drink or appetizer, as long as it is NOT part of a regular meal, and of Nominal value.
- **Gifts of Nominal Value** such as a greeting card, notepad, baseball cap or t-shirt are still covered by an exception. Such gifts are acceptable, even from lobbyists, but must be less than \$10 in value except for those specifically included under this exception by past interpretations (baseball caps and t-shirts).
- **Gifts paid directly by a federal, state or local government**, including public universities are still covered by an exception.
- **Home state products intended for promotional purposes**, such as food products, fruits, nuts, a Christmas tree grown in the Member's home state, but not tickets to events, are exempt from the gift rule.
- **Books, periodicals, or other informational materials** are still covered by an exception.

For a full explanation of the existing Gift rules and exceptions, see the House Gift Rule manual at [http://www.house.gov/ethics/Gifts\\_and\\_Travel\\_Chapter.htm](http://www.house.gov/ethics/Gifts_and_Travel_Chapter.htm). The interim House guidance on the recent changes can be found at [http://www.house.gov/ethics/m\\_interim\\_gift\\_rule.htm](http://www.house.gov/ethics/m_interim_gift_rule.htm). The exceptions to the Senate gift rules can be found at <http://rules.senate.gov/senaterules/rule35.php>.

### **Valuation of Tickets**

The House and Senate rules did make a change in the valuation of event tickets. For purposes of the gift rules, tickets will now be valued at face value. If a ticket to a concert or sporting event does not have a face value (say an invitation to a corporate box), then such ticket must be valued at the highest face value ticket sold for the event. The face value printed on the ticket can only be used as the value of the ticket for gift rule purposes if such tickets are sold to the general public for that face value amount.

### **New Travel Rules**

Like the new gift rules, both the new House Rules adopted by H. Res. 6 and S. 1 prohibit travel for Members of Congress and their staffs if paid for by lobbyists or registered entities that employ or retain lobbyists. However, there are important exceptions to this prohibition.

- Both the new House Rules and S. 1 allow an exception for travel to one-day events (including one and possibly two night(s) lodging and meals depending upon the circumstances).
- The new House Rules exclude higher educational institutions and S. 1 excludes Section 501(c)(3) organizations from this new prohibition even if they are registered or employ or retain lobbyists.

Both the new House Rules and S. 1 impose additional requirements on Congressional travel whether or not the travel is being sponsored by a lobbyist or a registered entity that employs or retains lobbyists.

The most critical change is that the funding source must now provide a written certification that the trip complies with these new rules and the implementing regulations that will be issued by the House and Senate ethics committees. This certification presumably carries penalties for making false statements on the House side, and there is a specific provision in S. 1 for criminal penalties.

Under both the new House Rules and S. 1, this certification requirement will require the funding source to state:

- That the trip will not be financed in any part by a lobbyist
- That the funding source (i) does not employ or retain lobbyists; (ii) is an institution of higher learning (under the House rules) or a Section 501(c)(3) organization (under S. 1); or (iii) that any involvement by registered lobbyists in a one-day event are de minimis if the entity itself is registered or employs or retains lobbyists
- That the funding source will not accept from an impermissible source funds earmarked directly or indirectly to finance any part of the travel
- That the Congressional traveler will not be accompanied on any segment of the trip by a lobbyist
- That the trip will not in any part be planned, organized, requested, or arranged by a lobbyist except for de minimis involvement

Both the new House Rules and S. 1 require their respective ethics committees to issue implementing regulations. H. Res. 6 states that such regulations are supposed to be issued within 45 days (after January 5, 2007).

For the first time, Members of Congress as well as their staffs will be required to submit these certifications and obtain advance approval for travel from their respective ethics committee. Also, all certifications, authorizations and reports that must be filed after each trip is completed will be made public. As always, the Congressional traveler must be speaking or otherwise attending an event in an official capacity, and recreational activities are not allowed.

Several important interpretative questions remain to be resolved by the House and Senate ethics committees in their implementing regulations. For example, does the ban on having a lobbyist accompany the Congressional traveler on any "segment" of the trip relate solely to the travel portion? Presumably this exclusion will not apply to attendance at the event itself if it will be widely attended and there will be no opportunity for interactions between the Congressional traveler and a lobbyist that is different than for other attendees.

Another important question that needs to be clarified is whether an entity such as an association that is not itself registered may sponsor an out-of-town event even if it receives dues and general sponsorships from business members who may be registered. Assuming that no funding is directly or indirectly earmarked for Congressional travel, and no lobbyists are involved in planning, organizing, requesting or arranging the trip, such general support should be allowed or these associations will be severely hampered in raising funds for their general activities.

Both the new House Rules and S. 1 provide further limitations on noncommercial air travel. The House Rules simply ban Members and staff from using their personal funds, official funds, or campaign funds to pay for trips on certain private airplanes. S. 1 would continue to allow travel on private airplanes, but would require reimbursement based on full charter fares (in contrast to lower first-class fares as currently allowed).

## **Earmarks**

H. Res. 6 added new language to House Rule XXI that requires committees of jurisdiction and conference committees to publish lists of earmarks, limited tax benefits, and limited tariff benefits contained in all bills, manager's amendments, and conference reports that go to the House floor. An earmark is defined as any Member-requested project that is targeted to a specific place and falls outside a formula funded or competitive award program. A limited tax or tariff bill is defined as one that would benefit 10 or fewer persons. Each earmark must identify the sponsor of the earmark, and the list of earmarks must be available to the public in an electronic format. The Senate has adopted similar earmark changes. Both versions require Members to certify that they and their spouses would not benefit or have no financial interest in the earmark being requested. The Senate provision also requires that a list of earmarks be made available at least 48 hours before floor consideration of the bill containing the earmark.

### **Changes to the Lobbying Disclosure Act Included in S. 1**

S. 1 includes significant changes in the LDA and other provisions that will be important to consider as the bill goes to the House for further action.

- A number of changes to the Lobbying Disclosure Act are proposed, including an increase from semi-annual to quarterly reports; mandatory electronic filings; lower reporting thresholds; the reporting of fund raising (including bundling) activities by lobbyists; increased civil penalties of \$200,000 for knowing non-compliance with the LDA; and new criminal penalties if such noncompliance is willful and corrupt. Importantly, these increased civil penalties and new criminal penalties are applicable if a lobbyist or entity that registers under the LDA (or a listed employee) makes any gift or provides any travel “with knowledge that the gift or travel may not be accepted under the rules of the House of Representatives or the Senate.”
- A measure that would have required greater reporting of grassroots coalitions was not included in the final version of S. 1. Also defeated was a provision to create a new Office of Public Integrity. Both measures are expected to be pursued by political reform groups when S. 1 is considered in the House.
- S. 1 also includes a provision that prohibits lobbyists or the entities that employ them from paying for events to honor Members of Congress at a national party convention.
- The so-called “revolving door rules” would be changed by S. 1 to increase the period of time that a Member of Congress is prohibited from all lobbying activities (not just direct contacts) from one to two years. The prohibition for certain senior staff would continue to be one year, but would be expanded to cover the entire body of Congress where the individual was employed.

### **Important Planning Considerations**

Reviewing the regulations issued by the House and Senate ethics committees will be critical, not just to see how they implement the new rules, but also to determine what impact, if any, there will be on the exceptions to the old gift rules. Perhaps even more so than before, great care must be exercised if making use of the exceptions to the gift rules (for example, by making sure that a tax deduction or business reimbursement is not obtained for a meal or gift that is intended to meet the “personal friendship” exception).

Given the severe limitations that are imposed on lobbyists or entities that employ or retain lobbyists, a big question for many organizations will be whether they are actually required to be registered (keeping in mind that the monetary thresholds for registration will be reduced under S. 1). Many organizations registered under the LDA years ago and may not have reviewed recently whether their activities still require registration. Also, organizations that do not engage in substantial lobbying activities may wish to consider whether they should reduce their lobbying activities so that they will not be required to register under the LDA in the future. However, any such changes should be carefully considered given the substantial penalties for failing to register when registration is required.

Depending upon how the new regulations are written, it may be possible for some associations to make greater use of their affiliated Section 501(c)(3) organizations (either because they are not registered under the LDA and are therefore exempt under the House Rule **or** because they qualify for the additional exemption under S. 1 whether or not they are registered). It will be important, however, to make sure that any out-of-town events or fact finding trips are truly educational in nature and are carefully designed to further their charitable and educational missions. Also, those activities must not violate the prohibition against political activities by Section 501(c)(3) organizations under the Internal Revenue Code. Another planning possibility may be to establish a new Section 501(c)(4) or 501(c)(6) affiliate to transfer all of the lobbying activities and assume responsibility for registering and reporting under the LDA. However, care must be exercised that the new organization will have an independent existence and is not merely a superficial attempt to avoid the new rules.

Finally, since campaign finance contributions are exempt under both the House Rules and S. 1, some activities prohibited under the new House Rules and S. 1 may be conducted by Political Action Committees; provided, however, that they are properly structured and reported, and the PAC is not used to violate the letter and spirit of the new rules. It will be important to see how the implementing regulations will integrate the new gift and travel rules with the campaign finance laws.

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