

House Passes Sweeping Ethics and Lobbying Rule Changes

Last week, the U.S. House of Representatives¹ overwhelmingly passed sweeping ethics and lobbying rule changes, including a gift ban and significant new travel restrictions.² The gift ban takes effect immediately; the travel restrictions take effect March 1, 2007. This advisory briefly describes these changes and the practical implications for lobbyists and companies or organizations that employ or retain lobbyists.

For a full briefing on the recent House rule changes and on other significant ethics laws, including an analysis of reform measures currently being considered by the U.S. Senate, please attend our complimentary Government Ethics and Lobbying Seminar on Thursday, February 1, 2007, at Kelley Drye Collier Shannon's Washington, D.C. office. If you have questions regarding this advisory, or about the upcoming seminar, please call or email Corey Rubin at 202.342.8470 or crubin@kelleydrye.com.

INTRODUCTION

Gifts. The new ethics rules prohibit House Members and staff from accepting gifts – such as meals, tickets to sporting events, or anything else of value – from lobbyists, or from a company or organization that employs or retains a lobbyist, unless the gift can be accepted

under one of the exceptions to the gift rule, such as the “widely attended event” exception or the “personal friendship” exception. Under the old rules, Members and staff could accept a gift from virtually any source, including a lobbyist, as long as the value of the gift was less than \$50.00.

Travel. Beginning March 1, 2007, all privately funded travel must be pre-approved by the House Committee on Standards of Official Conduct (“House ethics committee”). Members and staff will no longer be permitted to accept privately funded travel that lasts in excess of one day from private companies or organizations that employ or retain a lobbyist (with the exception of colleges and universities). Also, prior to accepting reimbursed travel, Members and staff will be required to obtain a certification from the organization paying for the trip that a lobbyist did not plan, organize, request, arrange, or finance the travel.

The scope and impact of these rules, however, may not be fully understood until the ethics committee publishes additional guidance, as specifically required under the new rules.

¹ Senate Majority Leader Harry Reid (D-NV) introduced an ethics and lobbying reform bill (S. 1) on January 4, 2007, and the Senate is expected to take up to two weeks to consider the measure. The House is slated to consider changes to the lobbying laws later this month (the new rules passed by the House changed only internal House rules). We are closely monitoring these legislative efforts and will publish future advisories as the situation develops.

² The ethics and lobbying provisions, contained in Title II of H. Res. 6, were approved by a vote of 430 – 1, with Rep. Dan Burton (R-IN) having the single “nay” vote.

What follows is an analysis of the gift ban and travel restrictions, as well as some other notable rule changes made as part of the House rule reform package.

A quick note on the application of House rules and false statements. As a general matter, House rules only apply to House Members and staff. This means that a lobbyist or private entity technically cannot violate the new ethics and lobbying rules outlined in this advisory. This does not mean, however, that private entities are without legal exposure under the House rules. For instance, the new travel certification, which requires Members to obtain a certification from the entity paying for the trip that a lobbyist did not plan, organize, request, arrange, or finance the travel, would presumably be treated as a statement by the entity to the U.S. government, and, thus, subject to federal false statement laws. Thus, these certifications should be carefully scrutinized for accuracy prior to submission.

DISCUSSION AND ANALYSIS

THE GIFT BAN

Prior rule. House rules previously permitted House Members and staff to accept a gift from virtually any source, including a lobbyist, provided the gift was valued at \$49.99 or less. Members and staff could accept gifts from a single source having a cumulative value of up to \$99.99 during a calendar year.

New rule. Under the new rules, Members and staff are prohibited from accepting a gift from a lobbyist, an agent of a foreign principal (“agent”), or a private company or organization that employs or retains a lobbyist or agent, even if the gift is valued

at less than \$50, unless the gift falls within one of the existing exceptions to the gift rules. Exceptions include, among others:

- Gifts from personal friends;
- The widely attended event exception;
- Items of nominal value, such as a baseball cap or t-shirt; and
- Food or refreshments of a nominal value, offered other than as part of a meal.

The gift ban takes effect immediately.

It should be noted that the gift ban does not apply to free attendance for Members at fundraising events sponsored by a candidate committee, PAC, or other political committee.

Practical implication. House Members and staff may no longer accept lunches, dinners, tickets to sporting events, or anything else of value from lobbyists, or companies or organizations that retain or employ lobbyists, unless the gift falls within one of the gift rule exceptions.

Example 1: A lobbyist goes to lunch with a House committee staff person. When the check comes, the lobbyist may not pay for the staff person’s lunch, unless the lobbyist is a personal friend of the staff person (or the meal falls under one of the other existing exceptions to the gift rule).

Example 2: Company X employs an in-house lobbyist. While Company X may no longer provide tickets to a sporting event to a House Member, Company X may still host a conference and invite the Member to speak if the standards of the widely attended event exception are met. Under this exception, the Member may accept local travel provided by Company X (such as a sedan or limousine) and food

or drink offered as part of the conference without violating the new gift ban.

It should also be noted that the gift ban does not appear to apply to non-lobbyists employed by a company or organization that employs or retains a lobbyist, so long as the non-lobbyist employee uses his or her personal funds to make a gift to a House Member or staff and does not seek reimbursement from his or her employer. That said, it is possible that the House ethics committee will publish guidance that expands the prohibition to all employees of these entities. We will continue to monitor this issue and will publish additional advisories as needed.

PRIVATELY FUNDED TRAVEL

Prior rules. Under the prior rules, a House Member or staff person could accept travel expenses or reimbursement from virtually any source (except lobbyists and agents), including lodging, meals, transportation, and any other reasonable non-recreational expenses associated with the travel, as long as the trip was in connection with the Member's or staff's "official" duties. This included fact-finding trips, attendance at trade association conventions, corporate meetings, speaking engagements, and any other event the Member determined was in connection

with his or her official duties. Members and staff could accept travel expenses for up to four days for domestic trips, and for up to seven days for international trips, excluding travel time.

New rules.

Limitations on Payments or Reimbursements for Privately Funded Travel. The new rules prohibit House Members or staff from accepting travel payments or reimbursements from companies or organizations that employ or retain lobbyists or agents³ except for one-day events (excluding travel time), which can include an overnight stay of one night.⁴ The ethics committee may, however, approve, on a case-by-case basis, trips that include a two-night stay. In addition, these new restrictions do not apply to "institutions of higher education"⁵ (generally, colleges and universities), even if the institution employs or retains a lobbyist.

Ban on Lobbyist or Agent of Foreign Principal Planning, Arranging, or Requesting Travel.

The new rules prohibit a Member from accepting reimbursed travel if a lobbyist or agent planned, organized, requested, arranged, or financed the travel. For one day trips or travel paid for by a university or college, a lobbyist's or agent's participation

³ The old rule had already prohibited lobbyists and agents of foreign principals from paying or reimbursing Members or staff for travel, and this rule, of course, remains in effect.

⁴ The House ethics committee is expected to prescribe rules outlining the specific requirements that must be satisfied with regard to the one-day trips.

⁵ The term "institution of higher education" is defined at 20 U.S.C. § 1001, and means an educational institution in any state that —

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

in the trip may be *de minimis*; the ethics committee is expected to issue rules clarifying the *de minimis* exception.

Ban on Lobbyist or Agent of a Foreign Principal “Attendance” on Trips. The new rules prohibit Members or staff from accepting travel for which the Member or staff will be “accompanied on any segment of the trip” by a lobbyist or agent. More specifically, and as is discussed in detail below, the sponsor of the trip will be required to certify to the Member prior to the trip that the Member or staff will not be accompanied on any segment of the trip by a lobbyist or agent.

House Member/Staff Travel Certification. Before accepting payments or reimbursement for privately funded travel, House Members and staff must obtain a detailed certification from the entity paying for the trip that:

- The trip will not be financed in any part by a lobbyist or agent;
- That the source of the payments:
 - Does not retain or employ lobbyists or agents;
 - Is an institution of higher education as defined by 20 U.S.C. § 1001;
 - Certifies that the trip meets the one day trip requirements (as outlined in rules the ethics committee is expected to prescribe) and specifically describes any *de minimus* involvement by a lobbyist or agent.
- That the source of the travel will not accept from another source any funds earmarked directly or indirectly for the purpose of financing any aspect of the trip;

- That the traveler will not be accompanied on any segment of the trip by a lobbyist or agent; and
- That the trip will not be planned, organized, requested, or arranged by a lobbyist or agent.

Travel Authorization. All privately funded trips must now be approved by the ethics committee prior to the trip, and Members will be required to justify that the trip is in connection with their official duties.

All of the rules related to privately funded travel described above will effect March 1, 2007.

Practical implications. Companies and organizations that employ or retain lobbyists (with the exception of colleges and universities) will no longer be permitted to fund trips for Members or staff that last in excess of one day (with an overnight stay). The longest such trips could last would be two days, and these trips would require specific approval under guidelines yet to be outlined by the ethics committee. One of the consequences of these new rules is that the number of trips taken by Members and staff will likely substantially decrease relative to prior years.

In addition, private entities wishing to pay for trips will be required to submit a certification to the Member or staff which requires the entity to attest to a number of specific facts, including that the trip was not planned, organized, requested, or arranged by a lobbyist or agent, or financed by a third party. This may require organizations to create a system to prevent in-house lobbyists (and outside lobbyists) from participating in any aspect of a trip in which the entity is paying for a House Member or staff to attend.

The House ethics committee is expected to provide additional guidance on this requirement, particularly since, as mentioned, this new requirement might be construed to expose the entity or person submitting the certification to criminal prosecution for submitting a false statement to the U.S. government.

As with the certifications provided by sponsors of privately funded travel, the submissions by Members to the House ethics committee seeking approval for a privately funded trip may also expose Members to prosecution under Federal false statement laws.

It should be noted that these rules do not appear to restrict Members or staff from attending out-of-town events that are in connection with their official duties – the new rules merely restrict which private sources can defray travel expenses. For example, if a Member used personal funds, or if the travel was paid for by the government, the new rules would not appear to restrict the Member’s ability to attend such an event.

Ambiguities. As with some of the other new rules, there are significant ambiguities with respect to the new travel restrictions. For instance, the scope of the prohibition on lobbyist or agent attendance at events for which Members or staff have received private funding is not clear. As noted, the rules require the sponsor of the trip to certify that the Member or staff will not be “accompanied” by a lobbyist or agent on “any segment of the trip,” but it is unclear whether this means that the lobbyist or agent cannot travel to the event with the Member or staff or whether the lobbyist or agent cannot attend the event at all. In

addition, it is unclear from the rules how “mixed purpose” trips should be treated. For example, it is unclear whether it is permissible for a Member to accept travel reimbursement in connection with a campaign fundraiser and attend an “official” event sponsored by a private entity during the same trip or at the same location.

The ethics committee is expected to issue guidelines clarifying many of these issues.

EARMARKS⁶

The new rules require that the sponsors of earmarks and limited tax or tariff benefits be publicly identified, and that a list of all earmarks and limited tax or tariff benefits be published in the Congressional Record and be made electronically available to the public. The rules define “earmark” as any Member-requested project that is targeted to a specific place and falls outside a formula-driven or competitive award process. Limited tax or tariff benefits are defined as revenue provisions that benefit 10 or fewer persons.

The rules also prohibit the practice of trading earmarks for votes and require Members to certify that they or their spouses have no personal financial interest in the request.

One of the practical effects of the new earmark rules is likely to be a decrease in earmarks, particularly in those earmarks that have a limited benefit to a requesting-Member’s district or are of obvious limited public benefit.

⁶ The new rules relating to earmarks and the “Pay-As-You-Go” provisions discussed below, both contained in Title IV of H. Res. 6, passed by a vote of 280 – 152, with 48 Republicans joining 232 Democrats in approving the these rules.

MISCELLANEOUS NEW RULES

Corporate Jet Ban. This new rule prohibits Members from using official, personal, or campaign funds (whether the Member’s campaign or any other political committee) to pay for the use of a privately owned aircraft, such as corporate aircraft not licensed by the FAA to operate for compensation or hire (although Members will still be permitted to charter commercially available aircraft).

Valuation of Sporting and Entertainment Event Tickets. This rule clarifies the way in which sporting and entertainment event tickets are valued for gift rule purposes. The rule provides that a gift of a ticket to a sporting or entertainment event shall be valued at the face value of the ticket, unless the face value of the ticket does not accurately reflect its actual economic value. In that case, the value of the ticket is measured by the value of the ticket to the general public. If the ticket does not have a face value, the ticket should be valued at the cost of the ticket to the general public.

Ethics Training. The new rules require the House ethics committee to offer annual ethics training to Members and staff, and requires “appropriate” House staff (as determined by the ethics committee) to undergo annual ethics training.

Pay-As-You-Go. The new rules require that legislation proposing direct spending or revenue changes that would increase the budget deficit within a five-year or ten-year period be paid for by raising taxes or cutting spending in other areas. The requirement, as currently drafted, may be subject to waiver.

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