

NOTE: All substantive legal interpretations in this Legal Advisory are applicable to Executive Order 13989, sec. 1, par. 1. Additionally, the substantive legal interpretations pertaining to 5 C.F.R. § 2635.204(g)(1) are applicable to § 2635.203(b)(8). Similarly, employees are permitted to dispose of gifts as provided in 5 C.F.R. § 2635.206. See LA-21-03 and LA-21-05.



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## MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick  
Director

SUBJECT: Lobbyist Gift Ban Guidance

Section 1 of Executive Order 13490 requires all full-time, non-career appointees, appointed on or after January 20, 2009, to sign an Ethics Pledge. 74 Federal Register 4673 (January 21, 2009). Paragraph 1 of the Pledge, titled "Lobbyist Gift Ban," sets out an appointee's agreement not to "accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee." The purpose of this Memorandum is to provide ethics officials with initial guidance concerning the implementation and interpretation of this gift ban.

Currently the ban applies only to those who meet the definition of "appointee" in the Executive Order.<sup>1</sup> The Order directs the Office of Government Ethics (OGE) to adopt rules or procedures to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban. Executive Order 13490, sec. 4(c)(3)(iii). The guidance provided in this Memorandum is intended solely to help ethics officials understand the scope of the ban as it applies immediately to full-time, non-career appointees. While the Executive Order directs OGE to adopt rules and procedures to apply the lobbyist gift ban to all executive branch employees, any such rules or procedures will be developed in due course, with ample consideration of the situation of career employees. See *id.*, sec. 4(c)(3)(ii).

### What is a "Registered Lobbyist" and a "Registered Lobbying Organization"

The Pledge prohibits gifts from lobbyists and lobbying organizations that are "registered" under the Lobbying Disclosure Act (LDA), 2 U.S.C. § 1601, *et seq.* However, neither ethics officials nor appointees must determine independently whether a particular donor meets the registration requirements of the LDA. Rather, in order to provide notice to appointees, the Executive Order purposely covers only those gifts received from a lobbyist or organization that actually has filed a registration with the Secretary of the Senate and the Clerk of the House of

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<sup>1</sup> See DAEOgram 09-003 (explaining the scope of covered "appointee"), <https://www.oge.gov/Web/OGEnsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge>.

Representatives pursuant to 2 U.S.C. § 1603(a). Executive Order 13490, sec. 2(e). The Secretary and the Clerk maintain searchable registrant databases.<sup>2</sup> These are the only databases upon which appointees and ethics officials may rely to determine whether a given donor is registered, for purposes of compliance with the gift ban. Search results must be reviewed carefully. The databases contain the names of clients as well as lobbyists and lobbying organizations. Also, the databases contain historical information. This may indicate that an individual was a registered lobbyist at some time in the past but is not a lobbyist currently. OGE can assist ethics officials who have questions about the use of the databases.

The ban is not limited to donors that provide lobbying services to others. The phrase “registered lobbyist or lobbying organization” includes any “organization filing a registration,” not just lobbying firms. Executive Order 13490, sec. 2(e). In particular, the ban includes any organization that registers because it employs at least one in-house lobbyist on its own behalf. *See* 2 U.S.C. § 1603(a)(2), (3)(A)(ii). For example, an appointee may not accept a bottle of wine from a telecommunications company that is registered under the LDA, even though the company is not a lobbying firm and registers only because it employs a single Governmental affairs officer to represent that company’s own interests. Of course, the ban also covers registered lobbying firms, such as a law firm or Governmental relations firm that files registrations for activities on behalf of its clients.

The ban also applies without regard to whether the particular lobbyist or organization has any dealings with the appointee’s own agency. As long as the donor is registered under the LDA, it does not matter that the donor’s lobbying contacts and activities may be directed solely to another agency--or even solely to the Legislative Branch. As indicated below, the lobbyist gift ban is in addition to the OGE prohibitions on gifts from “prohibited sources” and gifts “given because of the employee’s official position.”

Furthermore, the ban is intended to prohibit gifts from any employee of a registered lobbyist or lobbying organization. In this regard, the ban applies in the same way as the OGE gift prohibitions, which treat a gift from an employee of an organization as a gift from the organization. *See* 5 C.F.R. § 2635.204(a)(Example 3). Otherwise, a lobbyist or lobbying organization could evade the ban simply by relying on non-lobbyist employees to make gifts. Thus, for example, an appointee could not accept a free dinner at a restaurant from an employee of an oil company that is registered under the LDA, even though that employee is not included among the lobbyists listed in the company’s registration. Of course, if the appointee had a personal relationship with the company employee, the gift might be permitted under 5 C.F.R. § 2635.204(b). *Id.*

The lobbyist gift ban does not prohibit gifts from an organization that retains "outside" lobbyists or lobbying firms, as long as the organization itself is not registered under the LDA.

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<sup>2</sup> *See* <http://lobbyingdisclosure.house.gov/>;  
[http://www.senate.gov/pagelayout/legislative/g\\_three\\_sections\\_with\\_teasers/lobbyingdisc.htm](http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm).

Organizations that are merely "clients" but not actually employers of lobbyists do not have to file registrations under the LDA, even though they may be listed as clients in the registrations filed by the lobbyists and lobbying firms they retain. 2 U.S.C. §§ 1602(2); 1603(a)(2). The LDA definition of employee excludes both "independent contractors" and "volunteers who receive no financial or other compensation from the person or entity for their services," so a person who uses only such non-employees for all lobbying services would not be required to register. 2 U.S.C. §§ 1602(5); 1603(a)(2). These exclusions are important to keep in mind because the House and Senate databases (set out in footnote 2 of this DAEOgram) contain the names of many persons and entities that, for example, are clients of lobbying firms but are not themselves registered lobbyists or lobbying organizations.

### The Lobbyist Gift Ban is in Addition to Existing OGE Gift Rules

The Appointee Pledge refers to certain provisions in the existing OGE gift regulations found in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) at 5 C.F.R. part 2635, subpart B, including the OGE definition of "gift." Executive Order 13490, sec. 2(c)(1); 5 C.F.R. § 2635.203(b). That definition excludes several items, such as certain modest refreshments, presentation items of little intrinsic value, benefits available to all Government employees, etc. 5 C.F.R. § 2635.203(b)(1)-(9). However, the prohibitions in the Pledge are more comprehensive and provide far fewer exceptions than the existing OGE rules. For example, an appointee may not accept a gift from a lobbyist or lobbying organization even if the donor is not a "prohibited source" and the gift is not given "because of the employee's official position." 5 C.F.R. § 2635.202(a).

The only exceptions to the lobbyist gift ban are ones that do not undermine the purpose of the lobbyist gift ban and are set out below:

- gifts based on a personal relationship, 5 C.F.R. § 2635.204(b);
- discounts and similar benefits, 5 C.F.R. § 2635.204(c);
- gifts resulting from a spouse's business or employment, 5 C.F.R. § 2635.204(e)(1);
- customary gifts/gratuities provided by a prospective employer, 5 CFR § 2635.204(e)(3);
- gifts to the President or Vice President, 5 C.F.R. § 2635.204(j);
- gifts authorized by an OGE-approved agency supplemental regulation, 5 C.F.R. § 2635.204(k); and
- gifts accepted under specific statutory authority, 5 C.F.R. § 2635.204(l).

Because the lobbyist gift ban is very broad, these common sense exceptions are necessary to avoid potentially absurd results. Thus, an appointee may accept a birthday present from his or her spouse who is a registered lobbyist or sign up for a training course sponsored by a registered lobbying organization that provides a discount for Federal Government employees. However, the following exceptions in the OGE gift regulations are not exceptions to the lobbyist gift ban:

- \$20 de minimis value, 5 C.F.R. § 2635.204(a);
- awards and honorary degrees, 5 CFR § 2635.204(d);

- gifts resulting from the employee's own outside business or employment, 5 C.F.R. § 2635.204(e)(2);
- gifts from political organizations in connection with political participation, 5 C.F.R. § 2635.204(f);
- widely attended gatherings (WAG), 5 C.F.R. § 2635.204(g)(2);<sup>3</sup>
- social invitations from non-prohibited sources, 5 C.F.R. § 2635.204(h); and
- food, refreshments and entertainment from persons other than a foreign government in a foreign area.<sup>4</sup>

This means, for example, an appointee may not accept a \$15 lunch from a registered lobbyist or go to a widely attended reception sponsored by a registered lobbying organization.

The Executive Order also expressly provides that the lobbyist gift ban covers gifts that are solicited or accepted "indirectly" within the meaning of section 2635.203(f). Executive Order 13490, sec. 2(c)(2). The OGE gift regulations define an indirect gift as including any gift to an employee's parent, sibling, spouse, child or dependent relative because of that person's relationship to the employee, provided that the employee knows of and acquiesces in the gift. § 2635.203(f)(1). In other words, the lobbyist gift ban cannot be circumvented by extending an invitation or benefit to an appointee's family. An indirect gift also includes any gift given to any other person, including a charitable organization, based on the employee's designation, recommendation or other specification. 5 C.F.R. § 2635.203(f)(2). Thus, for example, if a lobbying organization offered an appointee free tickets to a Broadway show, the appointee could not simply suggest that the tickets be given instead to his favorite charity or even to one of several charities whose names are provided by the appointee. *See* § 2635.203(f)(Example 1).

Finally, appointees will not be deemed to have accepted a gift in violation of the Pledge if the gift is disposed of as provided in 5 C.F.R. § 2635.205. Executive Order 13490, sec. 4(c)(3)(iv). As provided in the OGE gift regulation, proper disposition includes paying the donor the market value or returning a tangible item. In the case of perishable items that cannot

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<sup>3</sup> Appointees still may accept offers of free attendance on the day of an event when they are speaking or presenting information in an official capacity, as described in 5 C.F.R. § 2635.204(g)(1), notwithstanding the lobbyist gift ban. This is not a gift exception, but simply an application of the definition of "gift" in section 2635.203(b): "The employee's participation in the event on that day is viewed as a customary and necessary part of his performance of the assignment and does not involve a gift to him or to the agency." 5 C F R § 2635.204(g)(1).

<sup>4</sup> Note that the Pledge does not prohibit an appointee from accepting "[g]ifts from a foreign government or international or multinational organization, or its representative, when accepted by the employee under the authority of the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342." 5 C.F.R. § 2635.204(1)(2); *see* Executive Order 13490, sec. 2(c)(3). Whether, or under what circumstances, any of these entities referenced in the Foreign Gifts and Decorations Act could be a registered lobbyist or lobbying organization is beyond the scope of this Memorandum.

be returned, the appointee's supervisor or agency ethics official can determine that the gift will be given to an appropriate charity, shared within the appointee's office, or destroyed. Under section 2635.205(c), an appointee who promptly consults an agency ethics official to determine whether an unsolicited gift may be accepted, and promptly complies with that official's instructions, will not be deemed to have accepted a prohibited gift.<sup>5</sup> For example, if an appointee receives an unsolicited item, but is unsure whether the donor is registered under the Lobbying Disclosure Act (see discussion below), the appointee will not be in violation of the ban if he or she promptly contacts an agency ethics official to determine whether the gift may be accepted and follows the instructions of that official.

### Other Permissible Gifts

Although the lobbyist gift ban is broad, it was not intended to prohibit certain gifts that do not implicate the purposes of the ban. Pending the issuance of final rules or procedures, appointees may rely on the following interim guidance, which OGE developed in consultation with the White House Counsel's Office, to accept certain gifts from 501(c)(3) organizations and media organizations.

Charitable and other not-for-profit organizations that are exempt from taxation under 26 U.S.C. § 501(c)(3) are already restricted as to the amount of lobbying in which they may engage. *See* 26 U.S.C. § 501(c)(3), (h). Consequently, the practices that the Executive Order and Pledge were intended to curb are already less implicated by 501(c)(3) organizations than by other entities that may employ lobbyists. Furthermore, any 501(c)(3) organizations that receive Federal funds are subject to limitations on the use of those funds to lobby for Federal contracts, grants, loans or cooperative agreements. *See* 31 U.S.C. § 1352. Given the kinds of purposes for which 501(c)(3) organizations are granted tax-exempt status (e.g., educational, charitable, scientific), there is little reason to prohibit employees from relying on the usual gift exceptions in the Standards of Conduct, many of which have particular relevance to the activities of such organizations. *See, e.g.,* 5 C.F.R. § 2635.204(g)(2)(permitting attendance at conferences and other widely attended events in the interest of the agency); § 2635.204(d)(permitting certain honorary degrees and awards). This judgment is analogous to policies reflected in the Federal Employees Training Act. *See* 5 U.S.C. § 4111 (permitting employees to accept certain items from 501(c)(3) organizations). Therefore, the gift ban will not apply to a gift from a 501(c)(3) organization, as long as the gift otherwise may be accepted under the Standards of Conduct. However, in keeping with the purposes of the ban, appointees still may not accept a gift if the organization employee who extends the offer is a registered lobbyist him- or herself.

Similar considerations are relevant to gifts from media organizations. The LDA itself reflects solicitude for the unique constitutional role of the press in gathering and disseminating

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<sup>5</sup> *See* OGE Informal Advisory Letter 06 x 4 (employee must take initiative to consult with ethics official and cannot wait until contacted, if ever, by an ethics official before disposing of gift properly).

information. *See* 2 U.S.C. § 1602(8)(B)(ii). Likewise, the lobbyist gift ban is not intended to erect unnecessary barriers to interaction between appointees and journalists. This is consistent with concerns about the application of the OGE gift prohibitions to certain press dinners shortly after the Standards of Conduct became effective. *See* Memorandum from the Counsel to the President to All Agency Heads, December 21, 1993 (suspending enforcement of gift rule with respect to press dinners, pending revision of rule). Therefore, an appointee may accept a gift from an employee of a media organization, as long as the gift is permissible under the OGE gift rules, including any applicable exceptions. The only proviso, as discussed above, is that appointees may not accept a gift if the organization employee who extends the offer is actually a registered lobbyist.

### Conclusion

OGE will continue to provide guidance on the lobbyist gift ban and other aspects of the Executive Order in the future. Ethics officials should consult with OGE if they have any questions concerning these matters.