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Office of Government Ethics Proposed Changes to the Gift Rules

Attending widely attended gatherings would be eliminated for executive branch employees under proposed rules

There are currently two different standards for giving gifts to executive branch employees: one for career employees and another for political employees. This is because President Obama requires his appointees to sign an Ethics Pledge upon taking office in which they agree to more stringent gift rules than those that apply by regulation to career employees. Specifically, the ethics pledge prohibits political appointees from accepting gifts from lobbyists or organizations that are registered under the Lobbying Disclosure Act ("LDA").

The Office of Government Ethics ("OGE") has now proposed to amend the rules that apply to career employees to include the restrictions on gifts from lobbyists. The legislative branch gift rules maintain a number of exemptions for certain types of gifts from lobbyists, including attendance at widely attended events. The executive branch gift rules are structured differently, so there is not an exemption for widely attended gatherings that are paid for by lobbyists or registrants.

Overview of the Executive Branch Gift Rules

The executive branch gift rules prohibit gifts from "prohibited sources," which includes anyone who: (1) is seeking official action by the employee's agency; (2) does business or seeks to do business with the employee's agency; (3) conducts activities regulated by the employee's agency; (4) has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or (5) is an organization, a majority of whose members are described in this list. The rules also preclude gifts given because of the employee's official position. If the giver is not a prohibited source, then the gift is acceptable. If it is a prohibited source, then one has to look at whether the item is even a gift. There is a lengthy list of things that would appear to be gifts but are not (e.g., food or drink of nominal value, plaques, etc.). Currently, if an item is a gift, then there are still a number of exemptions that may apply, such as widely attended gatherings, gifts based on outside business, etc. (see Figure 1).

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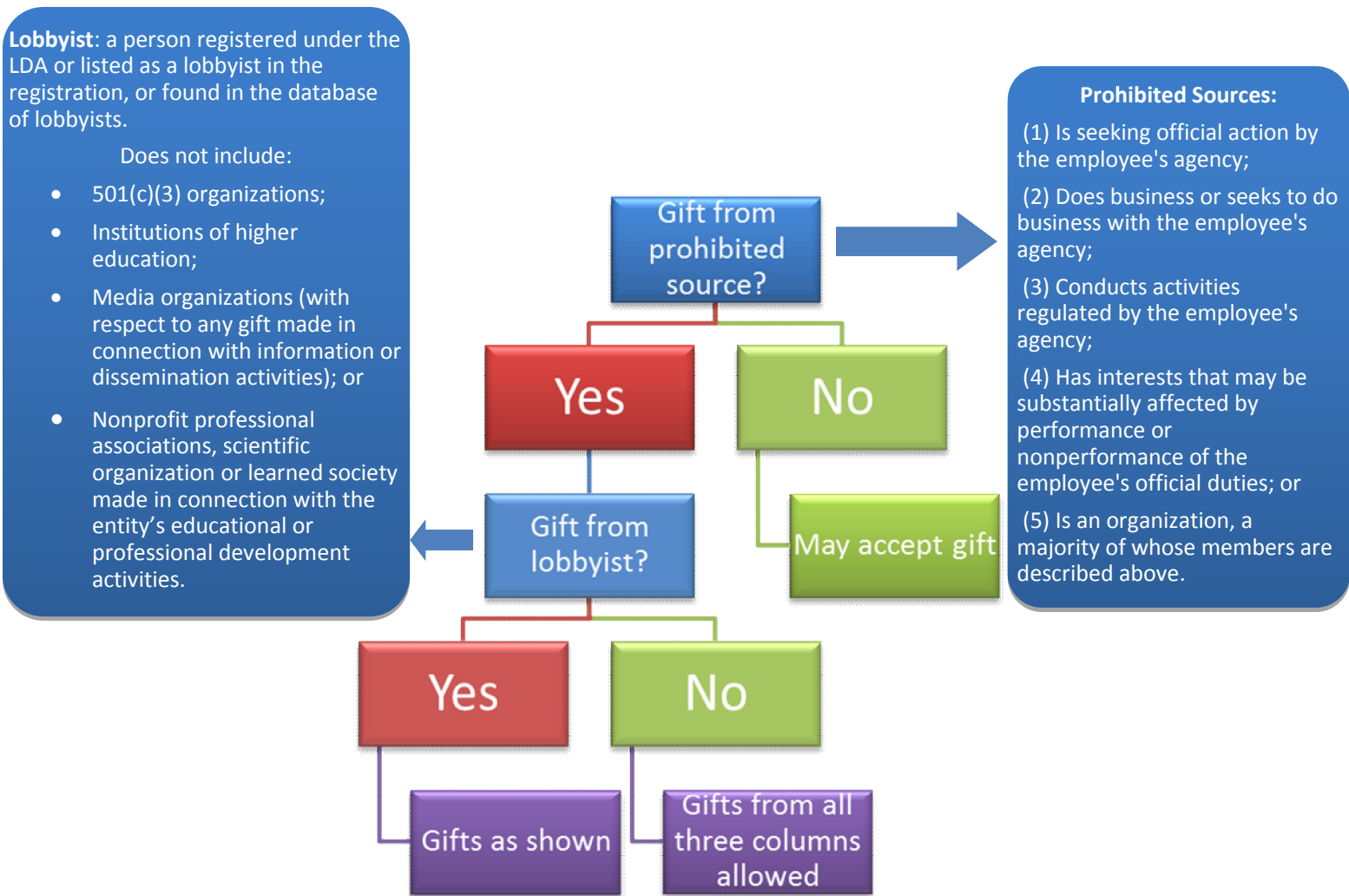
Figure 1

Not Gifts	Exemptions
Modest food and refreshments	Gifts of \$20 or less
Greeting cards, and items with little intrinsic value (e.g., plaques)	Social invitations
Loans from banks made on market terms	Meals, refreshments, and entertainment in foreign areas
Discounts or rates for all government employees	Personal relationship
Contest prizes	Discounts and similar benefits
Pensions from former employers	Awards and honorary degrees
Anything paid for by the government	Gifts based on outside business
Gifts accepted by the government under authority	In connection with permissible political activity
Anything for which market value is paid	Gifts to the President and VP
	Authorized by agency regulation
	Gifts accepted under specific statutory authority

Proposed Changes

OGE has proposed to add a new step to the process. If the prohibited source is a lobbyist, then certain exemptions are taken away (see Figures 2 and 3). This includes gifts of less than \$20, widely attended gatherings, social invitations, and meals and refreshments in foreign areas.

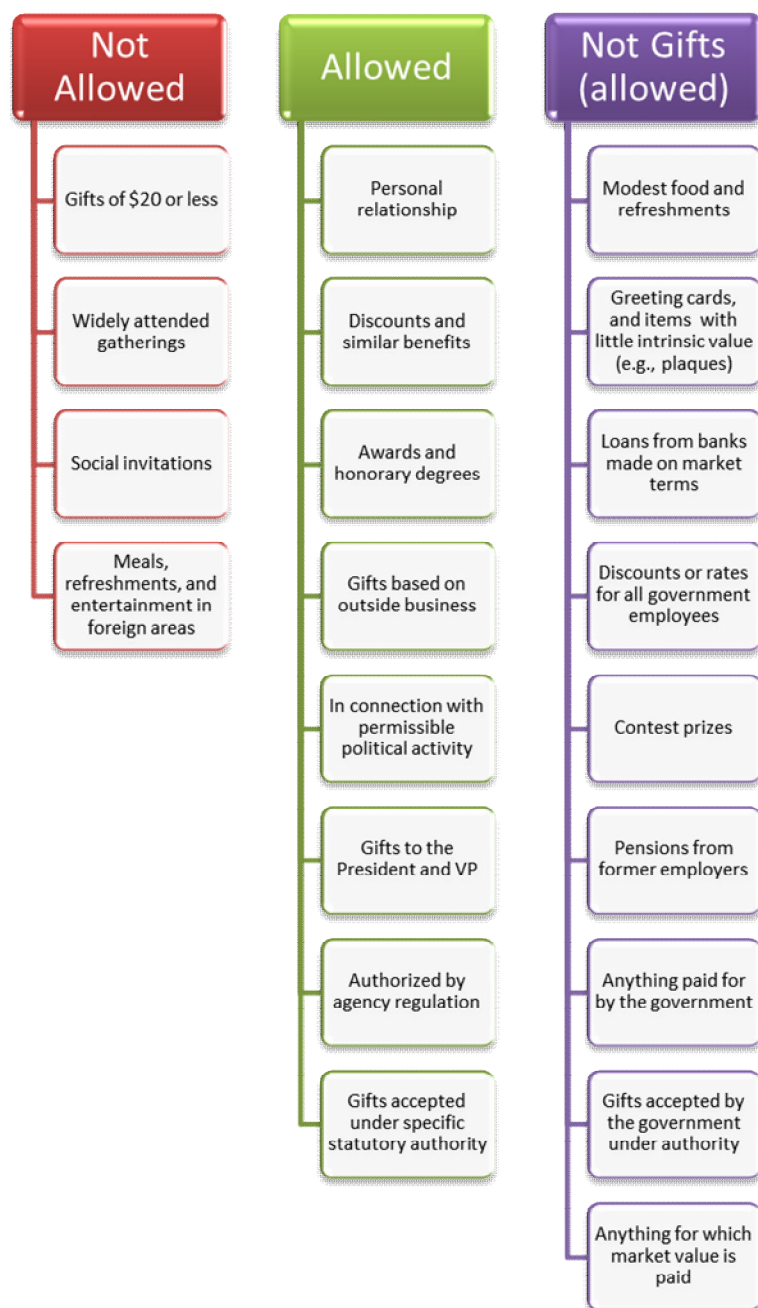
Figure 2



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Figure 3



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OGE proposes to create exemptions from the definition of “lobbyist” for several categories of gift givers:

- 501(c)(3) organizations;
- Institutions of higher education (which are likely to be 501(c)(3) organizations);
- Media organizations; and
- Professional societies (not trade associations).

501(c)(3) Organizations: OGE theorizes that because 501(c)(3) organizations are limited in the amount of lobbying they may do, there is not a need for a ban. This is an interesting theory, given that many 501(c)(3) organizations do engage in lobbying, and often have a particular viewpoint on issues, even if the amount of lobbying they do is limited. In addition, there is nothing to suggest that lobbyists for other organizations may not be present at an event hosted by a 501(c)(3) organization.

Media Organizations: OGE justifies the proposed media exemption as necessary to avoid “erect[ing] unnecessary barriers to interaction between appointees and journalists.” OGE has included a provision in the rule that allows the gift to be given only “in connection with the organization’s information gathering or dissemination activities.” Therefore, it would not apply to a lunch meeting with a business executive of a media company. OGE explains that the exemption is designed to allow executive branch employees to attend press dinners because “journalists and government officials interact with each other” and that “such interactions foster relationships that further the news gathering functions of the organizations.”

Professional Societies: In addition, OGE proposes to create an exemption for “nonprofit professional associations, scientific organizations, and learned societies engaging in educational or professional development activities.” OGE explains that this will allow government employees “to accept free attendance at a training or professional development event.” OGE goes on to explain that this would not allow free attendance at “purely social events (gala balls, fundraisers, parties, etc.).” The somewhat confusing guidance goes on to explain that a government employee “could attend a reception that is integral to an education or professional development event.” OGE also made clear that this exception does not apply to “trade associations, such as associations of manufacturers of particular products.”

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OGE's Rationale and Potential Impact

OGE's rationale for the change is rather stunning. Citing a number of articles by government reform advocates, OGE suggests that widely attended gatherings allow "cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients." OGE goes on to suggest that widely attended gatherings "at least when used in connection with social events, can provide the opportunity for a lobbyist not only to discuss any pending issues with the employee but also to foster a social bond that may be of greater use in the long run."

OGE explains that the widely attended gatherings exemption has been "used to permit attendance at events, particularly social events, where the nexus to the government's interest was attenuated." Rather than encourage agency ethics officials to make certain that the event is appropriate for the employee, OGE has simply decided to ban the gift if it comes from a lobbyist.

Ironically, the change to the rules does not mean that an employee may not attend the events that have caused OGE such concern. Rather, they must *pay* for attendance at the event. Many political appointees attend widely attended gatherings by paying the fair market value of the event. For example, they might pay \$10 for a cocktail reception being held by an association that is registered under the LDA or \$50 to attend a dinner. Thus, the opportunity to meet with lobbyists is not eliminated, just the free invitation. OGE admits that "if one views the problem of lobbyist gifts as the mere potential for quid pro quo, then probably an invitation to a gala ball will not directly influence an official to take action benefiting the giver." Thus, on its face, OGE's rationale falls short.

Next Steps

Comments on the proposed regulations are due November 14, 2011. Venable plans to comment on the proposal and welcomes suggestions about what should be included. Please contact **Ron Jacobs** at 202-344-8215 for more information.