

MEMORANDUM

TO: Interested Parties

FROM: Citizens for Responsibility and Ethics in Washington

DATE: January 9, 2009

RE: Congressional Ethics Rules on Gifts, Travel and Conflicts of Interest

As you know, in October 2007 President Bush signed into law the Honest Leadership and Open Government Act of 2007 (“HLOGA”).¹ HLOGA amended Rule XXXV of the Standing Rules of the Senate to prohibit Members, officers or employees of the Senate from accepting gifts, including gifts of travel, from registered lobbyists, foreign agents or any private entity that retains or employs a registered lobbyist or foreign agent.² This change in the Standing Rules of the Senate went into effect on September 14, 2007 when President Bush signed the bill into law.³ The House of Representatives adopted a nearly identical ban on gifts and travel from lobbyists and the entities that retain or employ them when it adopted its rules for the 110th Congress on January 4, 2007.⁴

Historically, the internal rules of the House and Senate have only applied to Members, officers and employees of Congress. HLOGA, however, amended the Lobbying Disclosure Act of 1995 (“LDA”)⁵ to prohibit registered lobbyists and the entities that employ or retain them from making gifts to a “covered legislative branch official,” including Members, officers or employees of the House and Senate, if the lobbyist knows that the recipient of the gift may not accept the gift under the rules of the House or Senate.⁶

This application of internal congressional rules to lobbyists and the companies that retain or employ them is important for two reasons. First, HLOGA amended the LDA to require those signing the new semi-annual LDA reports on contributions by lobbyists to certify that they (1) have read and are familiar with the House and Senate rules related to gifts and travel and (2) have not “provided, requested or directed” a gift, including travel, to Members, officers and employees

¹ Pub. L. No. 110-81, 121 Stat. 735 (2007).

² Pub. L. No. 110-81, § 541, 121 Stat. 735, 766-67 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 1(a)(2)(B)).

³ Pub. L. No. 110-81, § 556, 121 Stat. 735, 774 (2007).

⁴ H. Res. 6, § 203, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(a)(1)(A)(ii)).

⁵ 2 U.S.C. §§ 1602 to 1610 (2006).

⁶ Pub. L. No. 110-81, § 206(a), 121 Stat. 735, 747 (2007)(to be codified at 2 U.S.C. § 1613).

of the House or Senate if they know that the receipt of that gift would violate the House or Senate gift rules.⁷ Accordingly, a failure to comply with the House and Senate gift rules is now a violation of the LDA subject to both civil and criminal penalties. HLOGA quadrupled the maximum civil penalty for a LDA violation to \$200,000 and established a criminal penalty of up to five years in prison, plus fines, for knowingly and corruptly failing to comply with the LDA.⁸

Second, HLOGA requires the Comptroller General of the Government Accountability Office (“GAO”) to annually audit compliance with the LDA “by lobbyists, lobbying firms, and registrants through a random sampling of publicly available lobbying registrations and reports filed under [the] Act during each calendar year.”⁹ In carrying out these random audits, the GAO is authorized to request access “to any relevant documents from any person registered under [the LDA] and each employee who is listed as a lobbyist under [the LDA] if the material requested” is related to assessing compliance with the LDA.¹⁰ The GAO may notify the Congress, in writing, if a person refuses to comply with a GAO request for documents within 45 days after the request is made.¹¹ The GAO has already released its first annual report on audits of entities registered under the LDA.¹²

Gifts

Senate Rule XXXV, as amended by HLOGA, states:

A Member, officer, or employee may not knowingly accept a gift from a registered lobbyist, an agent of a foreign principal, or a private entity that retains or employs a registered lobbyist or an agent of a foreign principal¹³

House Rule XXV, as amended by H. Res. 6, is virtually identical:

A Member, Delegate, Resident Commissioner, officer, or employee of the House may not knowingly accept a gift from a registered lobbyist or agent of a foreign principal or from a private entity that retains or employs registered lobbyists or agents of a foreign principal¹⁴

Note that both rules prohibit gifts “from” a private entity that retains or employs lobbyists. The House Committee on Standards of Official Conduct (the “House Ethics Committee”) has interpreted House Rule XXV to mean that “a gift paid for with the private

⁷ Pub. L. No. 110-81, § 203(a), 121 Stat. 735, 743-44 (2007)(to be codified at 2 U.S.C. § 1604(d)(1)(G)).

⁸ Pub. L. No. 110-81, § 211, 121 Stat. 735, 749 (2007)(to be codified at 2 U.S.C. § 1606).

⁹ Pub. L. No. 110-81, § 213, 121 Stat. 735, 750 (2007)(to be codified at 2 U.S.C. § 1614).

¹⁰ Id.

¹¹ Id.

¹² United States Government Accountability Office, *Lobbying Disclosure: Observations on Lobbyists' Compliance with New Disclosure Requirements* (Sept. 2008).

¹³ Pub. L. No. 110-81, § 541, 121 Stat. 735, 766-67 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 1(a)(2)(B)).

¹⁴ H. Res. 6, § 203, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(a)(1)(A)(ii)).

entity's funds (such as by use of a corporate credit card) would be considered a gift 'from' the private entity"¹⁵ It is highly likely that both the House and Senate Ethics Committees would also find a gift paid for with personal funds was a gift "from" the private entity if the person who initially paid for the gift was subsequently reimbursed with funds from the private entity.

Note also that neither House Rule XXV nor Senate Rule XXXV is dependent on the gift being delivered by the private entity's registered lobbyist or foreign agent. The House Ethics Committee has said specifically that the gift ban may also apply, depending on the circumstances, to gifts from non-lobbyist employees of a private entity as long as the entity employs registered lobbyists or foreign agents.¹⁶ At a minimum, this interpretation of the gift ban means congressional staff should consider House Rule XXV and Senate Rule XXXV as applying to any government affairs employee of a private entity, even if that employee does not meet the LDA's definition of a lobbyist.

Finally, it should be noted that House Rule XXV and Senate Rule XXXV apply to all Members, officers and employees of the House of Representatives and the Senate – not just those in Washington, D.C. Congressional staff in Washington, D.C. should ensure their colleagues working in the district offices of a U.S. Congressman or Senator are aware these gift rules apply to them also.

Exceptions to the Gift Ban

While the gift ban in House Rule XXV and Senate Rule XXXV is very broad, neither rule is truly a "ban" on gifts from lobbyists or the entities that retain or employ them because both rules contain more than twenty exceptions.

Both House Rule XXV and Senate XXXV define the term "gift" to include:

[A] gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.¹⁷

Both House Rule XXV and Senate Rule XXXV then go on to say, however, that despite this broad definition, the gift ban does not apply to any of the following:¹⁸

- Anything for which the Member, officer or employee pays the market value or does not use and promptly returns to the donor.

¹⁵ Memorandum for All Members, Officers, Employees from the Committee on Standards of Official Conduct Regarding Gift Rule Amendments at the Beginning of the 110th Congress at 2 (June 14, 2007)(hereinafter "House Ethics Committee Gift Memo").

¹⁶ Id.

¹⁷ House Rule XXV, cl. 5(a)(2)(A); Senate Rule XXXV, cl. 1(b)(1).

¹⁸ House Rule XXV, cl. 5(a)(3)(A)-(W); Senate Rule XXXV, cl. 1(c)(1)-(23).

- Campaign contributions or attendance at a party committee, campaign committee or PAC fundraising event.
- A gift from a relative.
- Anything provided on the basis of a personal friendship.
- A contribution to a legal defense fund, unless the contribution is from a registered lobbyist or agent of a foreign principal.
- Gifts from another Member, officer or employee of the House of Representatives or the Senate.
- Food, refreshments, lodging, and other benefits resulting from outside business or employment activities, including, specifically, such benefits provided by a party committee, campaign committee or PAC in connection with a fundraising or campaign event.
- Pension and other benefits provided by a former employer.
- Informational materials sent to the office of a Member, officer or employee in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.
- Awards or prizes given to competitors in contests open to the general public.
- Honorary degrees and other bona fide awards (and associated travel, food, refreshments and entertainment) presented in recognition of public service.
- Donations of products from the State that the Member represents if they are intended primarily for promotional purposes, such as for display or free distribution.
- Training if such training is in the interest of the House/Senate.
- Bequests and inheritances.
- Any item the receipt of which is authorized by the Foreign Gifts and Decorations Act or the Mutual Educational and Cultural Exchange Act, i.e., gifts from foreign governments.
- Anything paid for by the Federal government or a State or local government.

- A gift of personal hospitality from an individual (i.e., food, lodging or entertainment in an individual's home) other than a registered lobbyist or agent of a foreign principal.
- Free attendance at a widely attended event.
- Opportunities or benefits which are available to the general public or members of a group or class in which membership is unrelated to congressional employment.
- Plaques, trophies, or other items that are substantially commemorative in nature and which are intended solely for presentation.
- Food or refreshments of a nominal value offered other than as part of a meal.
- An item of little intrinsic value such as a greeting card, baseball cap, or a T-shirt.
- Any item for which a waiver is granted by the House or Senate Ethics Committees.

In addition, HLOGA created a new exception to the Senate gift ban for free attendance at a constituent event.¹⁹ Members, officers and employees of the Senate may accept free attendance at a constituent event, even if it is paid for by an entity that retains or employs lobbyists, if it meets all of these requirements:

- The event takes place in the Member's home state and is a conference, symposium, forum, panel discussion, dinner event, site visit, viewing, reception, or similar event.
- The cost of the meal provided to the Member is less than \$50.
- The event is sponsored by constituents of the Member or a group that consists primarily of constituents of the Member.
- The event will be attended primarily by a group of at least five constituents of the Member, and no registered lobbyist will also attend the event.
- The Member participates in the event as a speaker or panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to his/her office or

¹⁹ Pub. L. No. 110-81, § 545, 121 Stat. 735, 771-72 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 1(c)(24)).

attendance at the event is appropriate to the performance of the official duties or representative function of the Member.

Accordingly, private entities may still provide a variety of things of value to Members, officers or employees of the House and Senate, but only if they fall into one of the exceptions to the gift ban. Note, however, that many of the exceptions that appear to be quite broad have been narrowly interpreted by the House and Senate Ethics Committees.

Exceptions to the Gift Ban are Narrowly Interpreted

Both the House and Senate Ethics Committees have issued guidance since the passage of HLOGA clarifying the scope of the gift ban and its exceptions. Both committees have emphasized that the most commonly invoked exceptions to the gift ban are narrowly construed.

Personal friendship – The House Ethics Committee specifically warned House Members and employees they should exercise caution when accepting a gift under the personal friendship exception when the donor is a lobbyist.²⁰ When considering whether or not to accept a gift under the personal friendship exception, House Members and employees are required to consider the circumstances under which the gift is offered, including:

- The history of the relationship between the donor and the House Member or employee, including any previous exchanges of gifts.
- Whether, to the House Member or employee's knowledge, the donor personally paid for the gift or, instead, either sought reimbursement or a tax deduction for the cost of the gift.
- Whether, to the House Member or employee's knowledge, the donor gave the same or similar gifts to other Members or staff at the same time.²¹

Widely attended events – The House Ethics Committee also warned House Members and employees they could accept free attendance at events such as conventions, conferences, trade shows, dinners or other similar events only if the event meets all of the following criteria:

- The event is open to individuals from throughout a given industry or profession, or those in attendance represent a range of persons interested in a given subject or matter.
- There is a reasonable expectation that at least 25 persons other than Members, officers or employees of Congress will attend the event.
- The invitation to the event is provided by the sponsor of the event (i.e., not by a lobbyist, foreign agent, or the entity that retains or employs them).

²⁰ House Ethics Committee Gift Memo at 4.

²¹ Id.; see also House Rule XXV, cl. 5(a)(3)(D)(ii).

- The House Member or employee reasonably determines that attendance at the event is related to his or her official duties.²²

In other recent guidance, the House Ethics Committee has stressed that the widely attended event exception “generally does not allow free attendance at entertainment or recreational events such as shows or sporting events.”²³

Food of nominal value offered other than as part of a meal – Both the House and Senate Ethics Committees have provided very specific guidance as to what type of refreshments may be offered to Members and staff at receptions sponsored by entities that retain or employ lobbyists without running afoul of the gift ban.

The House Ethics Committee has said that House Rule XXV, cl. 5(a)(3)(U) allows House Members and employees to accept “the kinds of food and refreshments usually offered at receptions (such as hors d’oeuvres, appetizers, and beverages), and morning meetings (coffee, juice, pastry, or bagels),” but does not allow Members or staff to accept a meal or food that would be considered part of a meal.²⁴ The House Ethics Committee considers a slice of pizza to be “part of a meal” and therefore it is not acceptable as food or refreshments of a nominal value.²⁵

The Senate Ethics Committee has issued similar guidance, interpreting Senate Rule XXXV, cl. 1(c)(22) to allow “a Member or employee to accept food and refreshments of nominal value, such as hors d’oeuvres and drinks at a reception (as opposed to a sit-down meal) or a ‘continental style’ breakfast at a briefing.”²⁶

The House and Senate Ethics Committees focus on *how* food of nominal value is consumed, i.e., not as part of a “sit-down” meal, has led this exception to be commonly referred to as the “toothpick rule.”²⁷ This sobriquet, while no doubt derisive in nature, does provide a useful metric for evaluating what types of food and refreshments will be considered acceptable under this exception. Food that can be eaten with a toothpick while standing up will, in most cases, be permissible. Note, however, the food must still be of “nominal” value. Accordingly, \$45-an-ounce caviar would be unacceptable under this exception.

Travel

The Standing Rules of the Senate and the Rules of the House of Representatives have long prohibited Members and employees of Congress from accepting gifts of travel or travel expenses from registered lobbyists. HLOGA amended Senate Rule XXXV to greatly expand this

²² House Ethics Committee Gift Memo at 3.

²³ Memorandum for All Members, Officers, and Employees from the Committee on Standards of Official Conduct Regarding Gift Rule Provisions Applicable to National Political Conventions at 2 (May 20, 2008).

²⁴ House Ethics Committee Gift Memo at 3-4.

²⁵ *Id.* at 2, n. 6.

²⁶ Memorandum from the Select Committee on Ethics Regarding New Guidance Under the Gifts Rule (Feb. 4, 2008).

²⁷ Mullins, *No Free Lunch: New Ethics Rules Vex Capitol Hill*, Wall. St. J., Jan. 29, 2007, at 1, col. 1.

prohibition to include the acceptance of travel or travel expenses from foreign agents and private entities that retain or employ lobbyists or foreign agents.²⁸ The House of Representatives adopted a very similar ban on travel from lobbyists, foreign agents and the entities that retain or employ them when it adopted its rules for the 110th Congress on January 4, 2007.²⁹

As was the case with the gift ban, however, the “ban” on travel financed by entities that retain or employ lobbyists is subject to several major exceptions. Even when an exception applies, however, the ability of individual lobbyists to participate in such privately-financed trips has been seriously circumscribed.

Exceptions to the Travel Ban

The Senate and the House both created two major exceptions to the ban on travel financed by entities that retain or employ lobbyists: (1) one-day events and (2) trips financed by certain types of non-profit organizations.

One-Day Events - Members of Congress and congressional staff may accept from an entity that retains or employs lobbyists necessary transportation, lodging and related expenses for travel to a meeting, speaking engagement, fact-finding trip or similar event provided the event is a one-day event.³⁰ The House Ethics Committee has cautioned that this exception to the travel ban is a narrow one and that “Members and staff must limit their involvement in connection with the event to *a single calendar day*.”³¹ The House and Senate Ethics Committees may allow Members of Congress or congressional staff to accept a second night’s stay on a case-by case basis if the additional expenses are “practically required” for the individual to participate in the one-day event. The House and Senate Ethics Committees have said that they may allow a second night’s stay for certain long-distance trips (i.e., outside the continental United States or across the country) or when the individual is “participating in a full day’s worth of officially-connected activities such that a second night’s stay is necessary to accomplish the purpose of the trip.”³² The second night’s stay must have been offered by the trip sponsor – not solicited by the Member or staffer – and the traveler must request and receive the Ethics Committee’s approval for the second night’s stay.³³

²⁸ Pub. L. No. 110-81, § 544, 121 Stat. 735, 767 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 2(a)(2)(A)).

²⁹ H. Res. 6, § 205, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(b)(1)(A)).

³⁰ Pub. L. No. 110-81, § 544, 121 Stat. 735, 768 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 2(a)(2)(A)(i)); H. Res. 6, § 205, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(b)(1)(C)(ii)).

³¹ The Committee excludes travel time and one overnight stay when calculating whether the event takes place in a single calendar day. Memorandum to All Members, Officers, and Employees from the Committee on Standards of Official Conduct regarding New Travel Rules for Officially-Connected Travel Paid for by a Private Source at 2 (March 14, 2007)(emphasis in original)(hereinafter “House Ethics Committee Travel Memo”).

³² House Ethics Committee Travel Memo at 3; see also Memorandum from the Senate Select Committee on Ethics regarding Senate Select Committee on Ethics’ Regulations and Guidelines for Privately-Sponsored Travel at 4 (hereinafter “Senate Ethics Committee Travel Regulations”)

³³ House Ethics Committee Travel Memo at 3, n.6.

Both the House and Senate travel bans severely circumscribe the ability of lobbyists to be involved in these one-day events. A registered lobbyist may not accompany Members of Congress or congressional staff on any segment of a one-day trip.³⁴ The House and Senate Ethics Committees have interpreted “any segment” of the trip to mean “any parts of the travel to or from the one-day event, rather than at the event itself or the location being visited.”³⁵

More importantly, both the House and Senate travel bans require that a lobbyist have no more than *de minimis* involvement in the planning or organization of a one-day event.³⁶ Both the House and Senate Ethics Committees have said that in order to meet this standard, the involvement of a lobbyist in connection with a one-day event must be “negligible or inconsequential” to the overall planning and purpose of the trip.³⁷ Under this rule, a lobbyist can do no more than respond to a trip sponsor’s request that the lobbyist identify Members of Congress or congressional staff with a possible interest in a particular issue relevant to a planned one-day event.³⁸ The House Ethics Committee has stated specifically that a lobbyist may not initiate contact with trip sponsors or planners for purposes of suggesting possible House invitees, nor may a lobbyist be involved in selecting the destination of the trip or drafting the trip agenda.³⁹ The Senate Ethics Committee has gone even further, interpreting the *de minimis* exception narrowly to preclude a lobbyist from being allowed to solicit or initiate communications with a trip sponsor, having control over which Senate employees are invited on a trip, extending or forwarding an invitation to a participant in a trip, determining the trip itinerary or even being mentioned in the trip invitation.⁴⁰

Accordingly, private entities may still pay for Members of Congress or congressional staff to travel for a one-day event such as a plant visit, but the role of any registered lobbyist for the entity in such an event must be extremely limited. A private entity’s lobbyist could attend a plant visit that was also attended by Members of Congress or congressional staff, but the private entity’s lobbyist could not travel to or from the plant visit with those same Members of Congress or congressional staff and could play no more than a *de minimis* role in organizing the event.

Trips financed by certain nonprofit organizations – Both the House and Senate created significantly broader exemptions from the ban on travel paid for by entities that retain or employ lobbyists for certain types of nonprofit organizations. Under Senate rules, Members, officers or employees of the Senate may accept gifts of travel from charitable organizations organized under Section 501(c)(3) of the Internal Revenue Code, even if the charity employs or retains lobbyists.⁴¹

³⁴ Pub. L. No. 110-81, § 544, 121 Stat. 735, 769 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 2(d)(1)(B)(i)); H. Res. 6, § 205, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(c)(1)(A)).

³⁵ Memorandum from the Senate Select Committee on Ethics regarding Senate Select Committee on Ethics’ Regulations and Guidelines for Privately-Sponsored Travel – Glossary of Terms at 3.

³⁶ Pub. L. No. 110-81, § 544, 121 Stat. 735, 768-69 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 2(d)(1)(A)&(2)); H. Res. 6, § 205, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(c)(2)).

³⁷ House Ethics Committee Travel Memo at 3; Senate Ethics Committee Travel Regulations at 3.

³⁸ House Ethics Committee Travel Memo at 3; Senate Ethics Committee Travel Regulations at 3.

³⁹ House Ethics Committee Travel Memo at 3.

⁴⁰ Senate Ethics Committee Travel Regulations at 3-4.

⁴¹ Pub. L. No. 110-81, § 544, 121 Stat. 735, 768 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 2(a)(2)(A)(ii)).

Similarly, House rules allow House Members and employees to accept a gift of travel from any institution of higher education as defined by the Higher Education Act of 1965.⁴²

Pre-Travel Certification, Committee Approval and Post-Travel Disclosure

Finally, both the House and Senate amended their rules to establish a formal approval process for privately-financed travel by Members of Congress and congressional staff. Under these amendments to Senate Rule XXXV and House Rule XXV, the burden is placed on the private sponsor to provide written certification to the Member of Congress or congressional staffer traveling at the sponsor's expense that the trip complies with the travel rules.

Senate - Under Senate Rule XXXV, a private sponsor must complete a three-page form created by the Senate Ethics Committee and provide it to each invited Senate traveler.⁴³ The private sponsor must certify:

- The trip will not be financed in any part by a registered lobbyist or foreign agent.
- The private sponsor does not retain or employ registered lobbyists or foreign agents and is not itself a registered lobbyist or foreign agent, OR
- The trip meets the requirements for a one-day event or a trip sponsored by a Section 501(c)(3) charitable organization.
- The private sponsor will not accept funds from a registered lobbyist, foreign agent or private entity that retains or employs a registered lobbyist or foreign agent that are earmarked, directly or indirectly, for the purpose of financing that specific trip.
- The trip will not in any part be planned, organized, requested or arranged by a registered lobbyist or foreign agent (other than in a *de minimis* way) and the Senate traveler will not be accompanied on the trip by a registered lobbyist or foreign agent (unless the trip is sponsored by a Section 501(c)(3) charitable organization).⁴⁴

Once the invited Senate traveler has received a copy of the signed certification form, he or she must submit a complete travel package to the Senate Ethics Committee at least thirty days before the departure date of a privately-sponsored trip.⁴⁵ A complete travel package includes:

⁴² H. Res. 6, § 205, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(b)(1)(C)(i).

⁴³ The three-page Private Sponsor Travel Certification Form and its four pages of instructions are available on the Senate Select Committee on Ethics website (<http://ethics.senate.gov>).

⁴⁴ Pub. L. No. 110-81, § 544, 121 Stat. 735, 769 (2007)(codified at Standing Rules of the Senate, Rule XXXV, cl. 2(e)(1)(A)-(D)).

⁴⁵ Senate Ethics Committee Travel Regulations at 1.

- A copy of the sponsor's invitation.
- A copy of the signed certification form.
- If the invited Senate traveler is an employee, a copy of the Employee Advance Travel Authorization and Disclosure form signed by both the employee and the Senator authorizing the travel.⁴⁶

Once the completed travel package is received by the Senate Ethics Committee, the Committee begins its review of the proposed trip. The Senate Ethics Committee has cautioned Senators and Senate employees that they must demonstrate that any proposed privately-sponsored travel is related to their official duties and will not create the appearance of using public office for private gain.⁴⁷ The Senate Ethics Committee considers the following factors when deciding whether to approve a particular privately-financed trip:

- The official responsibilities of the invited Senate traveler and whether there is an adequate connection between a trip and the official duties of the invited Senate traveler.
- Whether the trip relates to matters within the legislative or policy interests of the Senate.
- Whether the trip's length and itinerary is consistent with its official purpose.
- The stated mission of the organization sponsoring the trip and whether there is a direct and immediate relationship between a source of funding and an event.
- The organization's prior history of sponsoring congressional trips, if any.
- Other educational activities performed by the organization besides sponsoring trips, if any.
- Whether any trips previously sponsored by the organization led to an investigation by the Ethics Committee.
- Any other factors the Ethics Committee deems relevant.⁴⁸

If the Senate Ethics Committee concludes the proposed privately-sponsored travel complies with the travel rules, it will issue a letter to the invited Senate traveler formally approving his or her participation in the trip.

⁴⁶ Id.

⁴⁷ Id. at 3.

⁴⁸ Pub. L. No. 110-81, § 544, 121 Stat. 735, 769-70 (2007)(codified 2 U.S.C. § 31-3(1)(A)(i)-(ix)).

Within thirty days after returning from a privately-sponsored trip, Members of the Senate and Senate employees must file travel expense disclosure forms with the Secretary of the Senate.⁴⁹ These forms require Senate travelers to disclose the identity of the sponsor of the trip, the actual amount of the travel expenses paid by the sponsor, including specific amounts for travel, lodging, meal and other expenses. Senate travelers must also provide a description of all meetings and events attended.⁵⁰ Finally, Senate travelers must sign the disclosure form certifying they determined the travel was in connection with their duties as an officeholder or Senate employee and did not create the appearance of using public office for private gain. These forms are made available for public inspection in the Senate Office of Public Records.

If a private entity provides travel to Members or employees of the Senate, it should be prepared to provide Senate travelers with all information they need to complete and file these travel disclosure forms with the Secretary of the Senate within the thirty day deadline.

House of Representatives – The pre-travel certification, committee approval, and post-travel disclosure requirements of House Rule XXV largely mirror those of Senate Rule XXXV, with two significant differences: (1) the certification the sponsor must provide to an invited House traveler, and (2) the deadline for an invited House traveler to file his or her post-travel disclosure forms with the Clerk of the House.

Under House Rule XXV, a private sponsor must complete a three-page form created by the House Ethics Committee and provide it to each invited House traveler.⁵¹ The private sponsor must certify:

- The trip will not be financed, in whole or in part, by a registered lobbyist or a foreign agent.
- The sponsor of the trip does not retain or employ a registered lobbyist or a foreign agent OR
- The sponsor is an institution of higher education as defined by Section 101 of the Higher Education Act of 1965 OR
- The trip is for attendance at a one-day event and a registered lobbyist's involvement in the planning, organizing, requesting, or arranging the trip was *de minimis*.
- The sponsor has not accepted funds from any other source that were earmarked, directly or indirectly, to finance any aspect of the trip.

⁴⁹ Senate Rule XXXV, cl. 2(a)&(c). Senators and Officers of the Senate file the Senators and Officers: Disclosure of Travel Expenses form and Senate employees file the Employee Advanced Travel Authorization and Disclosure Form, both of which are available on the Senate Select Committee on Ethics website (<http://ethics.senate.gov>).

⁵⁰ Senate Rule XXXV, cl. 2(c)(1)-(6).

⁵¹ The three-page Private Sponsor Travel Certification Form and its three pages of instructions are available on the House Committee on Standards of Official Conduct website (<http://ethics.house.gov>).

- A registered lobbyist or foreign agent will not accompany House Members or employees on any segment of the trip (unless the sponsor is an institution of higher education as defined by Section 101 of the Higher Education Act of 1965).⁵²

Once the invited House traveler has received a copy of the signed certification form, he or she must submit it to the House Ethics Committee at least thirty days before the departure date of a privately-sponsored trip.⁵³ House Members and employees must receive written approval from the House Ethics Committee before accepting travel from a private source.

House Rule XXV requires Members and employees to file their post-travel disclosure forms with the Clerk of the House within fifteen days after travel is completed.⁵⁴ This filing deadline is significantly shorter than it was in the past. In the 109th Congress, travel disclosure forms were required to be filed within thirty days after the House traveler returned from a privately-sponsored trip.⁵⁵ The House Ethics Committee has stressed to House Members and employees that it is a violation of House rules not to file the necessary disclosure forms within the new fifteen day deadline.⁵⁶

The travel disclosure forms require House travelers to disclose the identity of the sponsor of the trip, the actual amount of the travel expenses paid by the sponsor, including specific amounts for travel, lodging, meal and other expenses. House travelers must also provide a description of all meetings and events attended. Finally, House travelers must sign the disclosure form certifying they have determined that the travel was in connection with their duties as an officeholder or House employee and did not create the appearance of using public office for private gain.⁵⁷ These forms are made available for public inspection in the House Legislative Resources Center.

If a private entity provides travel to Members or employees of the House, it should be prepared to provide House travelers with all information they need to complete and file these travel disclosure forms with the Clerk of the House within the new fifteen day deadline.

⁵² H. Res. 6, § 206, 110th Cong, 1st Sess. (2007)(codified at House Rule XXV, cl. 5(d)(1)(A)-(E)).

⁵³ Members and staff frequently failed to comply with this 30-day deadline. The House Ethics Committee has now issued guidance stating that it will not process pre-trip approval requests that are submitted less than 14 days before the start of a trip, even if the Committee has approved the participation of another Member or staff member for the same trip. Memorandum to All Members, Officers, and Employees from the Committee on Standards of Official Conduct regarding Changes to the Pre-Approval Process for Officially-Connected Travel Paid for by a Private Source at 1 (Sept. 23, 2008).

⁵⁴ House Ethics Committee Travel Memo at 4.

⁵⁵ Id. at n.10.

⁵⁶ Id.

⁵⁷ Representatives and Officers of the House file the Member/Officer Post-Travel Disclosure Form and House employees file the Employee Post-Travel Disclosure Form, both of which are available on the House Committee on Standards of Official Conduct website (<http://ethics.house.gov>).

Conflicts of Interest

The House and Senate conflict of interest rules are implicated in a number of different situations, including a Member's decision to recuse himself or herself from voting on a particular matter, submitting requests for congressionally directed spending, and completing the financial disclosure statements required under the Ethics in Government Act.

Senate Rule XXXVII states:

A Member, officer, or employee of the Senate shall not receive any compensation, nor shall he permit any compensation to accrue to his beneficial interest from any source, the receipt or accrual of which would occur by virtue of influence improperly exerted from his position as a Member, officer or employee.⁵⁸

House Rule XXIII is virtually identical:

A Member, Delegate, Resident Commissioner, officer, or employee of the House may not receive compensation and may not permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress.⁵⁹

The purpose of the conflict of interest rules is to ensure Members, officers and employees of Congress are not using their official positions for personal gain. The rules most frequently come into play when a Member, officer or employee has to make a choice in the course of his or her official duties that conflicts with his or her own private economic interests.⁶⁰

Recusal from Voting on Legislation

Because of the breadth of economic activity subject to legislation by Congress, Members may frequently find themselves in the position of voting on legislation that affects their private economic interests. Congressional rules and precedents, however, make it clear a Member is only rarely required to recuse himself or herself from voting on such legislation.

Members of the House of Representatives are required to vote on bills brought to the House floor unless they have "a direct personal or pecuniary interest" in the legislation.⁶¹ Members of the Senate have more discretion under the Standing Rules of the Senate. They may decline to vote, in committee or on the Senate floor, on any matter if they believe that voting on the matter would be a conflict of interest.⁶²

⁵⁸ Standing Rules of the Senate, Rule XXXVII, cl. 1.

⁵⁹ Rules of the House of Representatives, Rule XXIII, cl. 3.

⁶⁰ U.S. House of Representatives, Committee on Standards of Official Conduct, 110th Congress, 2d Session, *House Ethics Manual* at 186-87 (2008 ed.)(hereinafter *House Ethics Manual*).

⁶¹ Rules of the House of Representatives, Rule III, cl. 1.

⁶² Standing Rules of the Senate, Rule XII, cl. 3.

For more than one hundred years, the House has held that a Member does not have a “direct personal or pecuniary interest” in legislation that would require recusal from voting if the legislation affects an entire class of businesses rather than just one specific business.⁶³ Recusal would only be required under House Rule III if the legislation “applied to one and only one corporation.”⁶⁴ Even in cases where legislation does primarily affect one company, the House Ethics Committee has declined to sanction Members if their financial interest in the company was *de minimis*.⁶⁵

Requests for Congressionally Directed Spending

HLOGA amended the Standing Rules of the Senate to add a new Rule XLIV, which among other things, requires a Member of the Senate requesting congressionally directed spending (i.e., an earmark) to certify in writing that neither the Senator nor the Senator’s immediate family has a pecuniary interest in the earmark.⁶⁶ The House of Representatives adopted a similar earmark disclosure provision when it adopted its rules for the 110th Congress that requires Members, Delegates or Resident Commissioners to certify in writing that neither the House Member nor the Member’s spouse has a financial interest in the earmark.⁶⁷

The House Ethics Committee has provided general guidance to assist Members in determining when a Member must disclose a financial interest in a requested earmark. A Member has a financial interest in an earmark “when it would be reasonable to conclude that the provision would have a direct and foreseeable effect on the pecuniary interests of the Member or the Member’s spouse.”⁶⁸ A Member’s pecuniary interests may include “financial assets, liabilities, or other interests of the Member and spouse, such as investments in stocks, bonds, mutual funds, or real estate. A financial interest may also derive from a salary, indebtedness, job offer, or other similar interest.”⁶⁹

The House Ethics Committee concluded, however, that a Member’s financial interest in an earmark would not include “remote, inconsequential, or speculative interests.”⁷⁰ For example, the House Ethics Committee stated that if a Member requested an earmark for a specific company, the Member would not be considered to have a financial interest in the earmark if the Member merely owned shares in a diversified mutual fund, employee benefit plan or pension

⁶³ 5 *Hinds’ Precedents of the House of Representatives* § 5952, at 504 (1907).

⁶⁴ 8 *Cannon’s Precedents of the House of Representatives* § 3072, at 623.

⁶⁵ *In the Matter of a Complaint Against Rep. Robert L.F. Sikes*, H. Rept. 94-1364, 94th Cong., 2 Sess. at 14-16 (1976)(declining to sanction a Member who voted on legislation to appropriate funds to a defense contractor in which the Member held 1,000 shares of common stock out of 4,550,000 shares outstanding).

⁶⁶ Pub. L. No. 110-81, § 521, 121 Stat. 735, 760-64 (2007)(codified at Standing Rules of the Senate, Rule XLIV, cl. 6(a)(5)). The Senate Ethics Committee has defined the term “immediate family” in this provision to include a Senator’s father, mother, son, daughter, brother, sister, husband, wife, father-in-law and mother-in-law. Memorandum from the Select Committee on Ethics Regarding Definition of “Immediate Family” for Requested Appropriations (Sept. 12, 2007).

⁶⁷ H. Res. 6, § 404, 110th Cong., 1st Sess. (2007)(codified at House Rule XXIII, cl. 17(a)(5)).

⁶⁸ *House Ethics Manual* at 239.

⁶⁹ *Id.*

⁷⁰ *Id.*

plan that, in turn, owned shares in the company.⁷¹ A Member's direct ownership of stock in the company, however, even if it were only a small number of shares in a widely-held company, would constitute a financial interest that would have to be disclosed under House Rule XXIII.⁷²

The House Ethics Committee has since gone on to provide additional guidance as to when a Member will be considered to have a financial interest in an earmark that would affect the value of real estate owned by a Member. In response to a request for guidance, the House Ethics Committee found that Rep. Ken Calvert (R-CA) did not have a financial interest in an earmark providing \$5.6 million to the Corona Transit Center despite the fact that Rep. Calvert had an ownership interest in seven different commercial properties near the transit center. The committee stated that determining whether a Member has a disclosable interest in real estate requires the consideration of a number of factors, including, but not limited to:

- The value of the real estate;
- The proximity of the real estate to the area that would benefit from the earmark; and
- Whether the real estate would be affected uniquely or as part of a class belonging to landowners in the area generally.⁷³

Because the committee found the Corona Transit Center project would not provide any direct or unique benefits to the properties owned by Rep. Calvert that it would not also provide to other landowners in the general vicinity, the committee concluded Rep. Calvert did not have a disclosable financial interest in the Corona Transit Center earmark.⁷⁴

Completing Financial Disclosure Statements

Both the Rules of the House of Representatives and the Standing Rules of the Senate incorporate by reference Title I of the Ethics in Government Act.⁷⁵ Title I requires Members of Congress and senior congressional staff to file annual Financial Disclosure Statements with the Clerk of the House or the Secretary of the Senate.⁷⁶ Generally, filers must disclose the source, type and amount of any income (other than their congressional salary) from any one source that totals \$200 or more in a calendar year.⁷⁷ Filers must disclose the exact amount of earned income they receive from any one source in a calendar year if it aggregates \$200 or more.⁷⁸ Filers must also disclose all sources and types of unearned income (dividends, rents, interest and capitol

⁷¹ Id.

⁷² Id. Compare to text accompanying footnote 65.

⁷³ Letter from the House Committee on Standards of Official Conduct to The Honorable Ken Calvert at 2-3 (May 3, 2007).

⁷⁴ Id. at 3.

⁷⁵ Rules of House of Representatives, Rule XXVI, cl. 2; Standing Rules of the Senate, Rule XXXIV, cl. 1.

⁷⁶ 5 U.S.C. app. 4 §§ 101(f)(9)&(10).

⁷⁷ 5 U.S.C. app. 4 §§ 102(a)(1)(A)&(B).

⁷⁸ 5 U.S.C. app. 4 § 102(a)(1)(A).

gains) that exceeds \$200 in a calendar year, but are allowed to disclose the amount of unearned income according to pre-determined ranges of value.⁷⁹

Unlike tax returns, Financial Disclosure Statements are designed primarily to identify the *sources* of outside income rather than the precise *amount* of outside income. The financial disclosure provisions of the Ethics In Government Act “were enacted to monitor and to deter possible conflicts of interest due to outside financial holdings.”⁸⁰ While various official sanctions are possible for violations of the Ethics in Government Act and related House and Senate rules, the public disclosure rules were specifically designed to allow for political sanctions. “Public disclosure is intended to provide the information necessary to allow Members’ constituencies to judge their official conduct in light of possible financial conflicts with private holdings. Review of a Member’s financial conduct occurs in the context of the political process.”⁸¹

Conclusion

The preceding memorandum provides an extensive, but by no means comprehensive, explanation of the House and Senate ethics rules governing gifts, travel and conflicts of interest. If you have any specific questions about any of these rules, please contact the staff of the Senate Select Committee on Ethics (202-224-2981) or the House Committee on Standards of Official Conduct (202-225-7103).

⁷⁹ 5 U.S.C. app. 4 § 102(a)(1)(B).

⁸⁰ *House Ethics Manual* at 249.

⁸¹ *Id.* at 251 (emphasis added).