

The Complete Compliance and Ethics Manual 2023

Compliance Overview: Corporate Involvement in the Federal Public Policy Arena

By Timothy W. Jenkins and Kate A. Belinsk^[1]

An increasingly regulated area of corporate activity is involvement in the federal public policy arena. ^[2] Lawmakers' and regulators' decisions have a direct and substantial impact on corporate operations and the general business climate, compelling many companies to seek ways to influence the political process. At the same time, high profile enforcement actions and public pressure for increased transparency has led to more stringent regulation of the interactions between lawmakers and corporate executives. This regulatory environment has prompted some corporations to adopt overly cautious internal policies. Ultimately, the challenge for entities that engage in the public policy arena is to balance effective advocacy with robust compliance.

Establishing an effective compliance program for federal public policy activities serves to mitigate both legal and reputational risks. Potential legal exposure includes a wide range of civil and criminal penalties. The reputational risks related to political activities are reported in the news on a daily basis and include widely-publicized incidents, such as the Abramoff lobbying scheme or Target Corp's political contributions to an allegedly discriminatory group in Minnesota. In addition, there has been a marked rise in shareholder activism surrounding transparency in corporate political spending. Having an effective compliance program in place will not necessarily insulate a corporation's public policy activities from scrutiny, but will serve to mitigate risk and provide an affirmative response in the face of public outcry.

This overview addresses three specific areas of greatest risk on which corporations should focus their public policy compliance program:

- Gift and ethics rules governing interactions with congressional and executive branch officials and employees;
- Lobbyist registration and reporting; and
- Political contributions.

It also provides tools for implementation using the four key elements of a comprehensive public policy compliance program: written policies, implementation, education, and monitoring. Any compliance program is only as effective as the people who oversee its implementation, so it is imperative that companies have effective and well-managed government affairs organizations, as well as in-house or external counsel who are knowledgeable about the issues that arise in the context of engaging in public policy activities.

Ethics Rules Governing Interactions with Congressional and Executive Branch Officials and Employees

Interactions with congressional and executive branch officials and employees are subject to fairly stringent requirements, particularly with respect to gifts and travel. The overarching purpose of the gift rules is to ensure that there are no conflicts of interest or other improprieties, or the appearance thereof, between government employees/officials and outside sources. Although the rules related to both the executive and legislative branches

are similar, there are some subtle yet important differences that are outlined below. In general, however, a corporate compliance program should be tailored to be broad enough to capture the rules applicable to both branches.

Congressional Ethics Rules Overview

The House Committee on Ethics issues and administers the rules regarding gifts to members of the House of Representatives, and the Senate Select Committee on Ethics issues and administers the rules for U.S. Senators. Another congressional body, the Office of Congressional Ethics, is an independent office within the House of Representatives that is charged with reviewing allegations of misconduct and referring them to the House Committee on Ethics, where appropriate.

The jurisdiction of all three congressional ethics entities extends only to the members, officers, and staff of the U.S. Congress. Accordingly, corporations cannot be held directly liable for violating the ethics rules. The risk to corporations in connection with the congressional ethics rules is in causing a member, officer, or staff to violate a rule, becoming embroiled in an investigation into the alleged violation, and/or violating a criminal statute related to bribery, fraud, false statements, or similar charges. Additionally, registered lobbyists may be held criminally liable under the Lobbying Disclosure Act (LDA) for willful violations of the gift and travel provisions.

The House and Senate gift rules generally provide that a member, officer, or employee may not knowingly accept anything of value (includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, service, training, transportation, lodging, meals, or other item having monetary value) from a registered lobbyist or any entity that retains or employs a federal lobbyist. If the source of a gift is not a registered lobbyist or entity that retains or employs a federal lobbyist, the member, officer, or employee may accept a gift having a value of less than \$50 (\$100 cumulative from a single source within a calendar year), and gifts valued at under \$10 do not count toward the limit. There are 23 exceptions to the House and Senate gift rules that apply regardless of the source, including: gifts based upon a personal friendship; informational materials; donations of home state products; free attendance at widely-attended events and charity events; commemorative items; food or refreshments offered other than as part of a meal; and items of little intrinsic value. In addition to gifts, the ethics rules impose severe restrictions and burdensome reporting obligations for privately sponsored travel.

The House ethics rules are available here:

http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

The Senate ethics rules are available here: <http://ethics.senate.gov/downloads/pdf/manual.pdf>.

Executive Branch Gift Rules Overview

The ethics rules that apply to officials and employees of the executive branch are issued and administered by the Office of Government Ethics (OGE), an independent federal agency. Similar to the congressional ethics rules, OGE's jurisdiction extends only to officials and employees of the executive branch; corporations and individuals other than those within the executive branch do not face liability for violating the executive branch gift rules. Executive branch employees and officials who are accused of violating the ethics rules are referred to the Department of Justice's (DOJ) Public Integrity Section for criminal prosecution or may face penalties imposed by the DOJ's Federal Programs Division. The risk to corporations is that in the course of these investigations, they may face legal liability for violating a criminal statute related to bribery, fraud, false statements, or a similar charge, or face reputational damage stemming from publicity related to the investigation.

The prohibitions on gifts that are acceptable for executive branch employees depend to a degree on whether the employee is a political appointee and whether the giver is a federally-registered lobbyist or an entity that

employs a lobbyist. In general, a political appointee may not accept anything of value from a lobbyist or lobbyist employer, subject to very limited exceptions.¹³¹

For employees who are not political appointees, there is a prohibition against accepting gifts given because of their official position or that come from certain “prohibited sources” that have interests or business before the employee’s agency, or that may be affected by the employee’s duties. There are a limited number of exceptions to the prohibition, including: gifts valued at \$20 or less (\$50 aggregate in a calendar year from a single source); gifts motivated solely by a family relationship or personal friendship; gifts based upon outside business or employment; gifts provided in connection with certain political activities; free attendance at widely attended gatherings; modest refreshments (such as coffee and donuts), greeting cards, plaques and other items of little intrinsic value; discounts available to the public or to all government employees; and rewards or prizes connected to competitions open to the general public.

The ethics rules for executive branch employees are available here:

<https://www.oge.gov/web/oge.nsf/Gifts%20and%20Payments>.

Ethics and Compliance Program

1. Establish clear written policies (may stand alone or be part of a broader business gifts and entertainment policy)
 - Clearly state that no employee may give or receive any gift that violates the law or applicable regulations, and require prior approval from the corporate government affairs or legal department before providing anything of value to an official.
 - Specify that the House, Senate, and executive branch ethics rules are applicable to all interactions between company employees and government employees and officials.
 - Require that any events involving legislative or executive branch officials or employees be vetted and closely monitored by the corporate government affairs department or legal department.
 - Identify individuals who have necessary business contacts with government employees and officials and consider prohibiting all other company employees from engaging in incidental or occasional contacts without receiving prior approval from the government affairs or legal department.
 - If the company does business in foreign countries or with foreign companies, include a cross-reference to a Foreign Corrupt Practices Act policy and other countries’ laws regarding anti-bribery/anti-corruption as applicable.
2. Processes for implementing policies
 - Establish a central contact for vetting potential gifts to, or sponsoring travel for, government employees and officials.
3. Educate employees on their role and responsibilities under the policies
 - Distribute a copy of the gifts and ethics policy to every employee and/or post on a corporate intranet website. Some companies post their gift policies on external corporate websites.
 - Conduct annual training for employees who frequently or regularly have contact with federal executive or legislative branch officials and employees.

4. Continually monitor to ensure compliance.

- The government affairs or legal department should, on an annual basis, review the policy documents to ensure they are up-to-date and that the processes are being implemented as designated.
- Regularly review the expense reimbursements of employees who frequently or regularly have contact with federal executive or legislative branch officials and employees to verify that no expenses on behalf of government employees have been reimbursed by the company.

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