

## Interactions with Administration Officials

This brief summarizes certain legal restrictions that apply when Children's Hospital Association<sup>1</sup> member hospitals interact with employees of the Department of Health and Human Services and its various divisions ("HHS"). It addresses certain rules that apply to lobbying on agency rulemakings, as well as certain rules governing gifts to agency officials.

Note that this brief is intended as a reference guide and does not constitute legal advice or represent or otherwise address all applicable authority and guidance on interacting with administration officials. You should consult the relevant laws, rules, and standards of conduct, or engage legal counsel and/or compliance personnel, should you have any questions about interacting with administration officials in connection with a specific situation.

### I. Lobbying Rules

Member hospitals should be aware that their activities may have implications under federal tax and lobbying law. The Internal Revenue Code (the "IRC") imposes limits on a 501(c)(3) organization's ability to lobby. However, the IRC generally defines "lobbying" as efforts attempting to "influence legislation." "Legislation," in turn, generally includes actions by Congress, any state legislature, local council, or other similar governing body with respect to acts, bills, resolutions, or similar items; it also extends to referendums, ballot initiatives, constitutional amendments, and other similar procedures. However, it generally does not include actions by executive, judicial, or administrative bodies. Therefore, depending on the circumstances, a member hospital that is a tax-exempt 501(c)(3) may be able to interact with HHS officials regarding a rulemaking, for example, without it counting as lobbying under the IRC.

Communicating with HHS officials regarding the rulemaking may or may not impact a member hospital's obligation to register or report under the Lobbying Disclosure Act (the "LDA"). Under the LDA, a communication to an executive branch official to influence an administrative action is very likely considered a lobbying contact.<sup>2</sup> However, the LDA permits a 501(c)(3) that opts to monitor its lobbying activity under the Internal Revenue Service's (the "IRS") "Expenditure Test" to follow the IRS definitions for purposes of determining the registration and reporting obligations in connection with executive branch lobbying.

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<sup>1</sup> The Children's Hospital Association's legal name is the National Association of Children's Hospitals.

<sup>2</sup> There are exceptions for certain types of communications that might apply under the LDA. Additionally, in order for a communication with an executive branch official to be considered a lobbying contact under the LDA, the communication generally must be with an official who meets the LDA definition of a covered executive branch official. Covered executive branch officials are the President, the Vice President, officers and employees of the Executive Office of the President, any official serving in an Executive Level I through V position, any member of the uniformed services serving at grade 0-7 or above, or a Schedule C employee.

Thus, if a member hospital is tax exempt under section 501(c)(3) and opts to monitor its lobbying activity under the IRS's Expenditure Test for LDA purposes, its communications with HHS officials on administrative rulemakings, generally speaking, would not trigger LDA registration and would not need to be reported as lobbying activity.<sup>3</sup>

However, if a member hospital is not tax exempt under section 501(c)(3), or if it is tax exempt but does not elect to follow the Expenditure Test for LDA purposes, its contacts with HHS officials likely would be lobbying contacts that could trigger LDA registration. Two or more lobbying contacts by a single employee whose lobbying activities (which is defined more broadly than lobbying contacts) constitute 20 percent or more of his or her time during any three-month period would trigger the registration requirement under the LDA.

## **II. Other Restrictions on Communications with HHS Officials**

Note that federal departments and agencies, including HHS, may impose agency-wide rules and disclosure requirements on lobbying activities and contacts related to administrative rules. Federal departments and agencies, including HHS, also may have non-public internal policies that limit the information that it will share on a pending rulemaking. In addition, the Administrative Procedure Act generally prohibits "ex parte" communications – communications that are not disclosed on the public record – with agency officials during certain agency proceedings.

## **III. Gift Restrictions**

Employees of the Executive Branch, including HHS employees, are subject to two sets of rules for gifts and travel.<sup>4</sup> The first, which is enforced by the Office of Government Ethics ("OGE"), applies broadly to gifts given by member hospitals to all Executive Branch employees. The second, enacted by President Obama's Executive Order 13490 (January 21, 2009) and extended by President Trump, applies more narrowly to gifts from federally registered lobbyists and lobbyist employers to presidential "appointees."

### **A. General Executive Branch Gift Rules**

Executive Branch rules limit gifts solicited or accepted by federal employees from "prohibited sources" or those given "because of the employee's official position." A gift is considered given "because of the employee's official position" if it would not have been solicited, offered, or given had the federal employee not held the status, authority, or duties associated with his or her federal position. A member hospital (or any of its employees or agents) generally will be a "prohibited source" with respect to a particular agency employee if it:

- is seeking official action by the employee's agency;
- does business or seeks to do business with the employee's agency;

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<sup>3</sup> Remember that, under the IRS rules, lobbying also includes grass-roots and state lobbying, while the LDA excludes those types of lobbying from its definition of lobbying activities. The LDA would not allow a member hospital filing under the Expenditure Test to exclude grass-roots and state expenditures when reporting lobbying expenses under the LDA.

<sup>4</sup> The Medicare Payment Advisory Commission ("MedPAC") and the Medicaid and CHIP Payment and Access Commission ("MACPAC") are independent legislative branch agencies established by Congress to advise Congress on issues related to Medicare and Medicaid. As such, MedPAC and MACPAC members and employees are not subject to the executive branch gift rules. Each entity may have its own rules that govern gifts to its members and employees.

- conducts activities regulated by the employee's agency; or
- has interests that may be substantially affected by performance or nonperformance of the employee's official duties.

Because member hospitals are subject to regulation by HHS, they should abide by the OGE's gift rules when dealing with HHS employees and officials.

Under these rules, unless the gift qualifies for an exception, a member hospital may not provide any HHS employee with a gift valued at more than \$20. "Gift" is broadly defined for purposes of this restriction, and includes almost any item of monetary value, including transportation, local travel, lodging, and meals, unless an exception applies. The restrictions apply not only to a gift given to an HHS employee, but also to gifts given to the employee's family with the employee's knowledge or acquiescence, and gifts given to any other person, including a charity, on the basis of a recommendation by the employee. A gift from an employee or agent of a member hospital will be presumed to be from both the individual and the hospital.

In November 2016, the OGE published amended rules related to gifts from outside sources, which became effective in 2017. Among other things, the new rules from the OGE provide that employees should consider a number of factors in determining whether acceptance of a gift would be permissible, including whether:

- the gift has a high market value;
- the timing of the gift creates an appearance that the donor is seeking to influence an official action;
- the gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties; and
- acceptance of the gift would provide the donor with significantly disproportionate access.

A gift's value is based on its "market value," which is defined as the retail cost the employee would incur to purchase the gift. OGE includes tax and gratuities in the calculation of the value of a gift. An agency employee generally can accept a gift valued at \$20 or less, provided that the total value of gifts received from the same person is not more than \$50 in a calendar year.

Gifts given based on a personal relationship (from family or friends) are generally exempt from the gift restrictions. Relevant factors include the history of the relationship and whether the family member or friend personally pays for the gift. A gift reimbursed by a member hospital would not qualify under this exception.

Other exceptions would allow member hospitals to offer certain items of value to employees under other circumstances:

- An employee may accept modest items of food and refreshments, such as soft drinks, coffee and donuts (but excluding, among other things, alcohol), when not offered as part of a meal;
- An employee may accept greeting cards and items of little intrinsic value, such as trophies, plaques, and certificates, which are intended solely for presentation;

- An employee may accept food, refreshments, entertainment, instruction, and materials (but not travel, lodging, collateral entertainment, or meals in a separate setting) furnished to all attendees by the sponsor of an event at which he or she is speaking or serving on a panel, or at a widely-attended gathering.
  - Note that, under the OGE's amended rules, an employee must obtain written authorization to accept a gift of free attendance at a widely attended gathering and the employee may be authorized to accept a gift of free attendance at all or appropriate parts of a widely attended gathering only if an agency designee determines, in writing, that:
    - the event is a widely attended gathering,
    - the employee's attendance at the widely attended gathering is in the agency's interest,
    - the agency's interest outweighs the concern that the employee may be, or may appear to be, improperly influenced, and
    - in the case of an event where a person other than the sponsor of the event invites or designates the employee as the recipient of the gift, the event is expected to be attended by more than 100 people and the total value of the gift does not exceed \$390.
  - A gathering generally is "widely-attended" if it is expected that a large number of persons will attend and that persons with a diversity of views or interests will be present (e.g., if it is open to members from throughout the interested industry or profession or if those in attendance represent a range of persons interested in a given matter).

There are no special exemptions governing site visits. A member hospital may host a site visit for an administration official. But, if the hospital offers the official anything of value (such as food or beverages, mementos, travel costs, etc.), it must fit within the gift limit or one of the enumerated exceptions.

Certain senior Executive Branch employees and officials must file publicly available reports annually on which they disclose gifts, including travel reimbursements, they have received.

## **B. Gifts from Registered Lobbyists and Entities that Employ Lobbyists**

If a member hospital employs in-house federally registered lobbyists, it would also be subject to the Executive Order gift ban. With few exceptions, the Executive Order prohibits presidential appointees from accepting gifts from registered lobbyists and from entities that employ in-house lobbyists. The prohibition applies even if the lobbyist does not have any contact or business with the appointee's agency.

For purposes of the Executive Order, "appointees" are defined to include all full time, non-career presidential and vice-presidential appointees, non-career appointees in the senior executive service, and any appointee to a Schedule C or similar position.

### **C. Certain Payments for Travel**

Notwithstanding the gift limits, General Services Administration ("GSA") rules permit sources other than the federal government to pay for the travel, subsistence, and related expenses of an Executive Branch employee under certain circumstances, such as to attend a meeting or similar function in his or her official capacity.

A member hospital wishing to pay for an Executive Branch employee's travel expenses to a meeting or similar function must ensure that the recipient employee's agency has authorized his or her receipt of these expenses in advance. Each agency may have its own standards of subsistence allowance.