



THE WAG EXCEPTION AND THE ETHICS

PLEDGE:

**Analyzing Invitations Using Relevant
Authorities**

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AGENDA

- Part I: What is the WAG exception?
 - The differences between (g)(1) and (g)(2).
 - The problem with locally-held events.
- Part II: The Ethics Pledge and the WAG
- Part III: Other Issues
 - The WAG, Emoluments Clause, and the Foreign Gifts and Decorations Act.
 - How to determine fair market value?
- Questions?





PART 1: WHAT IS THE WAG?

WHAT IS A WAG?

- Exception to the gift rule which allows the acceptance of free attendance. There are two types:
 - 2635.204(g)(1): use when an employee is assigned to participate as a speaker or panel participant or “otherwise to present information on behalf of the agency”
 - 2635.204(g)(2): use when there has been a determination that the employee’s attendance is in the interest of agency



A DEFINITION

- Free attendance includes:
 - Waiver of all or part of the registration fee
 - Provision of food, refreshments, entertainment and instructional materials “furnished to all attendees as an integral part of the event”
 - Hint: for integral to the event, check agenda
 - All attendees invited?
 - Is the event at the same location as the main conference?
 - Does the registration fee cover the cost of the other event?
- Free attendance does not include:
 - Travel expenses
 - Solicited gifts



(G)(1) WAG

- Attendance is in employee's official capacity
- Gives free attendance on the day the employee is presenting information
- Offer of free attendance may only be from the sponsor
- Not viewed as a gift to either the agency or the employee, so no need to include on financial disclosure reports



(G)(1) WAG (CONTINUED)

- “Otherwise to present information on behalf of the agency” allows for acceptance of a gift when the employee is assigned by his or her agency “to take an active but less formal role than that of a speaker or panel participant”
 - Presentation of information does not have to be delivered from the stage or dais
 - However, the presentation must be pre-arranged with the event sponsor, so there is more than a mere possibility of speaking
- Use (g)(1) to accept free attendance when, for example, employee is assigned as a federal liaison to an outside organization



(G)(2) WAG

- Attendance is in employee's personal capacity
- Since no participation is required, may be used to accept free attendance on all days of the event
- Offer of free attendance from the sponsor or a non-sponsor
 - If offer is from the sponsor, no limit on value
 - If offer is from a non-sponsor, need 100 persons in attendance and value of gift (employee's and guest's, if applicable) is limited to \$375
- Viewed as a gift to the employee and may have to be reported on financial disclosure reports



(G)(2) WAG (CONTINUED)

- “Widely attended” defined:
 - A large number of persons will attend; and
 - Persons with a diversity of views or interests will be present
- No absolute number of attendees required if from sponsor
- Determining “diversity of views or interests” often requires getting a copy of the guest lists and the attendees’ affiliations



BEWARE OF . . .

- Concerts and sporting events
 - Not sufficient opportunity for exchange of ideas
 - May fit under a Social Invitations from Persons Other than Prohibited Sources, 2635.204(h)
- Board of Directors' meetings
 - (g)(1) likely, if presenting; “diversity of views” not required
 - (g)(2) probably not because “diversity of views” not present, unless several other non-board members are attending



SOME OTHER ISSUES

○ Blanket WAGs

- Used when several employees are invited to the same event
- Prevents duplication of effort and multiple calls to the organization for the needed info (number of attendees; cost; attendees' affiliations)

○ After-the-Fact Concurrence

- Sometimes, invitations are received at the event, e.g., a flyer is at the registration table
- Cannot give retroactive approval but can do a conflicts analysis and determine that if timely submitted, no conflict would have been found and approval would have been given



SCENARIO

- Dr. Smith is invited to speak about his research at the week-long 17th annual Society of Microbiologists meeting.
- He spoke at this event for the last five years when the meeting was held in New York, Los Angeles, Boston, Chicago and Denver. This year's meeting is in DC.
- Like all of the other 50 speakers this year and similar to the last five years, Dr. Smith is offered economy airfare, five nights hotel and waiver of the meeting's registration fee which includes food, registration and instructional materials.
- What gifts can Dr. Smith accept?



SCENARIO (CONTINUED)

- In previous years, NIH has accepted the offer of the waived registration fee, travel expenses and lodging under 31 USC 1353, payment of travel and related expenses from a non-Federal source. Can we use that authority this year?
 - No, because the event is local and the employee is not in travel status
- Since he is assigned to participate as a speaker to present information on behalf of the agency, he can accept the waived registration and meals that are integral to the meeting (but not separate meals, e.g., speakers' dinner or awards galas not covered by the registration fee) *on the day of his talk* pursuant to (g)(1).



SCENARIO (CONTINUED)

- Is there any authority available to accept the offer of free attendance for the other, non-speaking days?
 - (g)(2)? Could use but . . . employee must be on his/her own time. Often not appropriate.
 - GETA? Also possible, but needs to be training, and for high level officials, that may not be appropriate either.
 - Agency gift acceptance authority? We are waiting to hear.



RESOURCES

- Widely Attended Gatherings, DO-07-047 (Dec. 5, 2007).
- Speaking and Similar Engagements Involving Presentation of Information on behalf of the Agency, LA-12-05 (Sept. 7, 2012).
- Gifts of Travel and Other Benefits (Oct. 2010)
http://www.oge.gov/uploadedFiles/Education/Education_Resources_for_Ethics_Officials/Resources/gifts_travel_other_benefits_2010.pdf



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PART 2: THE WAG AND ETHICS PLEDGE

EXECUTIVE ORDER 13490

JANUARY 21, 2009

“*Every* appointee in *every* executive agency appointed on or after January 20, 2009, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee.....” (emphasis added)



EXECUTIVE ORDER 13490

- Key Provisions of the Pledge
 - Lobbyist Gift Ban
 - Revolving Door Ban – All Appointees Entering Government
 - Revolving Door Ban – Lobbyist Entering Government
 - Revolving Door Ban – Appointees Leaving Government
 - Revolving Door Ban – Appointees Leaving Government to Lobby
 - Employment Qualification Commitment
 - Assent to Enforcement
- OGE Guidance on Lobbyist Gift Ban issued February 11, 2009 (DO-09-007)



WHO HAS TO SIGN THE PLEDGE?

Every Appointee

- Every full-time, non-career Presidential or Vice-Presidential appointee
- Every non-career appointee in the Senior Executive Service (or other SES-type system)
- Every appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency.
- DOES NOT include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.
- Also does not include special government employees (SGEs) or individuals pending Senate confirmation.



LOBBYIST GIFT BAN

“I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee”

- What’s a “gift”?
- Who’s a “registered lobbyist or lobbying organization”?



A “GIFT” IS A “GIFT”

Sec. 2(c) of EO 13490:

“Gift”

- (1) shall have the definition set forth in section 2635.203(b) of title 5, Code of Federal Regulations;
- (2) shall include gifts that are solicited or accepted indirectly as defined at section 2635.203(f) of title 5, Code of Federal Regulations; and
- (3) shall exclude those items excluded by sections 2635.204(b), (c), (e)(1) & (3) and (j)(I) of title 5, Code of Federal Regulations.



IN PLAIN ENGLISH.....

The prohibitions in the Pledge are more comprehensive and provide far fewer exceptions than the existing OGE rules. 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).

○ WAGs are a “common sense exception”



“REGISTERED LOBBYIST OR LOBBYING ORGANIZATION”

Section 2(e) of EO 13490

"Registered lobbyist or lobbying organization" shall mean a lobbyist or an organization filing a registration pursuant to section 1603(a) of title 2, United States Code, and in the case of an organization filing such a registration, "registered lobbyist" shall include each of the lobbyists identified therein.

2 USC § 1603(a) = Registration of Lobbyists under the Lobbying Disclosure Act



SO, HOW DO I KNOW IF SOMEONE IS REGISTERED UNDER THE LOBBYING DISCLOSURE ACT?

○ U.S. House of Representatives

- <http://disclosures.house.gov/ld/ldsearch.aspx>.
 - Next to *Filing Type to search*, select *All* (not *Electronic*).
 - In *Search Field*, first select *Lobbyist Name*. Then, enter the name of:
 - The individual who sent the invitation (search for name variations; e.g., “William” and “Bill”),
 - the event sponsor, and
 - the name of any organization (third party), if applicable, that may be paying for the invitee to attend.
 - Check the matching documents (if any) to see if any of the three entities listed above are listed somewhere as a registered lobbyist.
 - Repeat (ii) and (iii), instead selecting *Registrant Name* in *Search Field*. This allows you to see if the inviting organization (not the individual) is registered as a lobbying entity.



SO, HOW DO I KNOW IF SOMEONE IS REGISTERED UNDER THE LOBBYING DISCLOSURE ACT?

○ U.S. Senate

- <http://soprweb.senate.gov/index.cfm?event=selectfields>
 - One at a time, search *Registrant Name* and *Lobbyist Name*. Click submit. Again, check for name variations; e.g. “William” and “Bill.”
 - Type in name/organization. Click submit.
 - Check the matching documents (if any) to see if the individual or organization in question is listed somewhere as a registered lobbyist.
- **If the event sponsor (or third party/inviting organization, as applicable) is a registered lobbying organization, but indicates (e.g., on its own websites) that it is a 501(c)(3), you will need to verify 501(c)(3) status (One way is to check on Guidestar, available at <http://www2.guidestar.org/>).**



ADDITIONAL PROVISIONS OF EO 13490

○ Section 3 - Waiver

- Authority designated from Director of the Office of Management and Budget to DAEOs
- DAEOs, in consultation with the White House Counsel, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge if he or she certifies in writing
 - (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or
 - (ii) that it is in the public interest to grant the waiver.
- The public interest shall include, but is not limited to, exigent circumstances relating to national security or to the economy.
- **It is the President's intention that waivers will be granted sparingly and that their scope will be as limited as possible. All waivers must be in writing. (See, DAEOgram, February 23, 2009, DO-09-008)**



ADDITIONAL PROVISIONS OF EO 13490

○ Section 4 – Administration

- Requires every executive agency to establish rules and procedures as necessary or appropriate to ensure that every appointee signs the pledge upon assuming office
- Charges the Director of the Office of Government Ethics to, among other things, help agencies fulfill their duties, to apply the lobbyist gift ban, and to authorize limited exceptions to the lobbyist gift ban for circumstances that do not implicate the purposes of the ban
- Provide an annual public report on the administration of the pledge and EO 13490

○ Section 5 – Enforcement

- Give the Attorney General the authority to enforce, including civil actions



THINGS THAT MAKE ME THINK.....

- What's the difference between fund-raising and lobbying? Does it matter for purposes of approving a pledge-signer to attend a WAG?
- What about a 501(c)(4) that is a subsidiary or sister organization of a 501(c)(3)?
- What if the donor isn't a lobbying firm, but just employs a couple of lobbyists?
- What will future Administrations do?





PART 3: OTHER ISSUES

OTHER ISSUES

- What is the interplay between the Emoluments Clause, the Foreign Gifts and Decorations Act, and the WAG
- Fair Market Value Determinations and Why They are Important
 - Why is the value of the gift important?
 - How do you determine the value?
 - What if the price is not readily available or known?
 - Does the gift need to be reported on a financial disclosure form?



THE EMOLUMENTS CLAUSE, THE FOREIGN GIFTS AND DECORATIONS ACT, AND THE WAG

- What is the Emoluments Clause?
 - U.S. Constitution, Art. I, §9, cl. 8
 - “... no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”



THE EMOLUMENTS CLAUSE, THE FOREIGN GIFTS AND DECORATIONS ACT, AND THE WAG

- What is The Foreign Gifts and Decorations Act?
 - General Rule
 - 5 U.S.C. §7342(b)(2)
 - An employee may not (1) request or otherwise encourage the tender of a gift or decoration; or (2) accept a gift or decoration, other than in accordance with the provisions of subsections (c) and (d)
 - Definition of a Gift
 - 5 U.S.C. §7342(a)(2)
 - “gift” means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government.



THE EMOLUMENTS CLAUSE, THE FOREIGN GIFTS AND DECORATIONS ACT, AND THE WAG

○ Exceptions

- 5 U.S.C. §7342 (c)(1)
 - (1)The Congress consents to—(A)the accepting and retaining by an employee of a gift of minimal value tendered and received as a souvenir or mark of courtesy; and
 - (B)the accepting by an employee of a gift of more than minimal value when such gift is in the nature of an educational scholarship or medical treatment or when it appears that to refuse the gift would likely cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States, except that—
 - (i)a tangible gift of more than minimal value is deemed to have been accepted on behalf of the United States and, upon acceptance, shall become the property of the United States; and
 - (ii)an employee may accept gifts of travel or expenses for travel taking place entirely outside the United States (such as transportation, food, and lodging) of more than minimal value if such acceptance is appropriate, consistent with the interests of the United States, and permitted by the employing agency and any regulations which may be prescribed by the employing agency.



THE EMOLUMENTS CLAUSE, THE FOREIGN GIFTS AND DECORATIONS ACT, AND THE WAG

- The WAG Exception does not trump the Emoluments Clause or the FGDA.
 - First Question: Who is the offeror?
 - Who can attend with the employee?



THE EMOLUMENTS CLAUSE, THE FOREIGN GIFTS AND DECORATIONS ACT, AND THE WAG

- Can a federal employee attend a party at a foreign embassy?
 - Cost is \$75/person
 - What about her family?



FAIR MARKET VALUE DETERMINATIONS AND WHY THEY ARE IMPORTANT

- Why is the value of the gift important?
 - Who is giving the gift?
 - Who else is going with the employee?



FAIR MARKET VALUE DETERMINATIONS AND WHY THEY ARE IMPORTANT

- How do you determine the value?
 - 5 C.F.R. §2635.203(c)
 - Market Value means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.



FAIR MARKET VALUE DETERMINATIONS AND WHY THEY ARE IMPORTANT

- What if the price is not readily available or know?
 - OGE legal advisory DO-07-003



FAIR MARKET VALUE DETERMINATIONS AND WHY THEY ARE IMPORTANT

- Does the gift need to be reported on a financial disclosure form?
 - WAG gifts are accepted by the employee on a personal basis, not by the agency.



FAIR MARKET VALUE DETERMINATIONS AND WHY THEY ARE IMPORTANT

- Can an employee accept a gift of attendance to a gala ball? A non-sponsor, third party bought an entire table for the ball and is inviting different individuals to fill it. The employee's invitation includes a guest.





QUESTIONS?