

# Ring out the Old, Ring in the New: Ethics Guidance to Keep in Mind as the 111th Congress Ends and the 112th Begins

November 2010

Just in time for roasting on an open fire, here are some quick takes on House and Senate ethics "chestnuts"-issues and situations that come up perennially for corporations and associations (and their lobbyists) at the end of a year, the end of a Congress, or the beginning of a new Congress.

- **Holiday Parties**-In general, it's best to follow the "reception exception": food and refreshments (which may include alcoholic beverages) of "nominal value" offered other than as part of a meal. This basically means "finger food"-hors d'oeuvres or appetizers. Issues often arise as to whether there is a "no utensil" rule embedded in this exception, which has led to much debate about the nuances between forks, skewers, and traditional finger foods and questions as to whether various types of foods would be permissible under the exception.

Questions about what kind of entertainment may be provided to Members and staff at a holiday party also can be tricky. Generally, background music or music performed by "non-name" acts likely will be acceptable (with certain caveats), but a "name" act is more problematic. Consultation with the House Committee on Standards of Official Conduct and/or the Senate Ethics Committee early on in the planning process is prudent, particularly in the case of "name" acts.

Attendance at a holiday party may be acceptable under the

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widely-attended-event exception to the House and Senate gift rules. Under the guidance issued by the House Committee on Standards, this exception may be available if the event is non-"social" in nature, attendance relates to the attendee's official duties, 25 or more people from outside Congress (and apart from the sponsor's personnel) are expected to attend, and attendance is open to people from throughout a given industry or profession or to a range of people interested in a given matter. All four criteria require close examination and analysis.

Invitations to holiday events depend on the rule employed for the event itself. In some situations, the invitation may only come from the sponsors of the events, which is determined by activities undertaken and not merely by funds contributed.

- **Holiday Gifts**-The gift rules are not suspended during the holiday season. Unless some other exception applies to a specific situation, a holiday gift will likely have to qualify as an "item of nominal value" to be permissible. The definition of an "item of nominal value" varies between the two houses, but adherence to the rule is absolutely necessary for lobbyists and lobbyist employers.
- **The Gift Rules and Members-Elect**-Congressional gift rules do not apply to new Members and staff before they take office.

*But caution* in giving such gifts is still advisable. Under the Code of Ethics for Government Service, Members and staff must never be a party to the "evasion" of the rules; a gift given at a time or in a manner that suggests the intent to evade the gift rules should be avoided. Further, if the circumstances surrounding the receipt of a gift by a Member or staffer before he or she has taken office are egregious, the relevant ethics committee could still investigate under the standard prohibiting conduct reflecting on the institution. And the bribery and gratuity laws do apply to Members-elect and to staff "in waiting." (Also, if the Member-elect or prospective staffer is serving as a state or local government official, he or she may be subject to state or local gift rules.) Close examination of all of the facts and circumstances of any gift is recommended.

- **Swearing-In and Honorific Events**-Outside individuals and organizations *may not* pay the costs of, or otherwise subsidize through in-kind contributions, a swearing-in or retirement event put on by a Member or congressional staffer.

However, outside individuals and organizations (including lobbyists and their employers) *may* hold events in honor of Members on the occasion of their swearing-in, or events in honor of Members or staff on the occasion of their leaving Congress provided that any event is done in compliance with several rules, including that the event be genuinely an event of the outside sponsor; *i.e.*, the sponsor alone determines the nature of the event and the make-up of the guest list.

Members and staff may not solicit an outside individual or organization to hold such an event.

Members and staff may not solicit contributions to or support for such an event.

If an event meets the criteria described above-and also meets the criteria for either the widely-

attended-event or reception exceptions under the House or Senate gift rules-the Member or staffer being honored may accept free attendance consistent with those exceptions. But if the criteria are not met, the entire cost of the event could be deemed a prohibited gift to the honoree Member or staffer.

Remember that events "honoring" congressional Members or staff are subject to LD-203 reporting.

- **Employment Negotiations or Agreements with Members and Staff**-The rules and regulations governing employment negotiations and agreements with Members and staff of the House and Senate are too extensive to discuss in detail in this year-end overview. (For a more detailed discussion, see "From Their House to Your House: Employment Negotiations and Arrangements with Members and Staff of Congress" in the January 2010 *Election Law News*.)

The most important point to note is that Members and highly paid staff of both the House and Senate who negotiate or make arrangements for post-congressional employment are subject to notification/disclosure and recusal requirements in connection with such negotiations or arrangements. These requirements apply at different times in the two houses, with the rule in the House applying sooner in the recruitment process than the rule in the Senate.

Post-employment restrictions imposed by federal criminal law apply to Members and highly paid staff after they leave office. For at least one year (two years for Members of the Senate), these restrictions closely circumscribe the ability: of former Members to communicate with any current Member or official (including staff) of the House or Senate; of highly paid former Senate staff to communicate with any current Member or official (including staff) of the Senate; and of highly paid former House staff to communicate, as relevant based on their House employment, with their former employing Member and office, with their former employing committee, or with leadership Members and staff.

This is only a brief overview of questions and issues that commonly come up at year's end and as one Congress transitions to the next. Depending on the facts, specific situations may merit consultation with counsel or even a request to the House Committee on Standards of Official Conduct or the Senate Ethics Committee for informal oral or formal written guidance.