

Leading the Way in Ethics

By: Hilary C. Tompkins, partner, Hogan Lovells



Former Federal Official Perspective



**Solicitor, U.S. Department
of the Interior**

2009-2017

Lead by Example

Navajo Rug

- Gift from my tribe
- Pre-existing relationship
- Solicitor role



Appearances Matter

- Promoting colleague who has past ethics violations



- Stopping ban on plastic bottles when beverage contractors/donor opposes it.

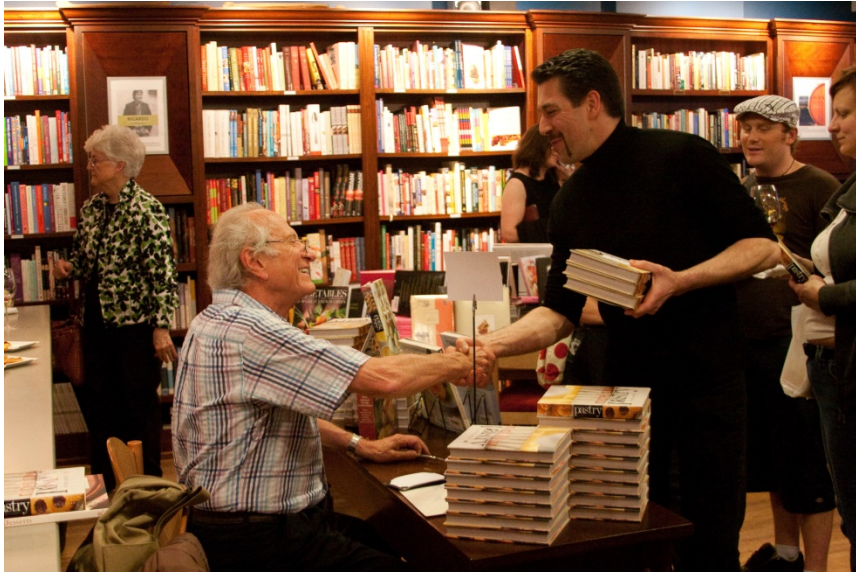


- Gifts to federal officials



Rules of the Road: Ignorance is not a defense

The Book Deal



A photograph of a person silhouetted against a bright sunset sky, standing on a beach and holding a beach ball. The person's reflection is visible in the shallow water. In the background, there are mountains and a large body of water. A large green text box is overlaid on the right side of the image.

Don't Go it Alone

Ask the question!

Featured image from Hogan Lovells 2018 *Capture* Photography Competition

A photograph of two women in an office setting. One woman, with long dark hair and wearing an orange top, is leaning over a laptop. The other woman, with brown hair and wearing a yellow sleeveless shirt, is looking at the laptop screen. Two coffee cups are on the desk. The background is a blurred office environment.

Compliance Department

A phone call away to keep
your troubles at bay!

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Hilary C. Tompkins is a partner at Hogan Lovells in Washington, D.C., where she practices natural resources, environmental, and Indian law. Hilary began her career as an Honors Trial Attorney, U.S. Department of Justice, where she litigated environmental cases. She later represented Indian tribes and served as chief counsel to a former Governor in New Mexico. Hilary continued her public service from 2009 to 2017 in the presidentially appointed, Senate-confirmed position of Solicitor for the U.S. Department of the Interior, where she oversaw all legal matters involving public lands and waters, natural and wildlife resource programs, and the trust relationship with Indian tribes and Alaskan Natives. Hilary is a member of the Navajo Nation.



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Areas of focus

Native American
Natural Resources
Ethics
Federal Agency Decision-making

Education

Dartmouth College, B.A. 1990
Stanford Law School, J.D. 1996

Important Considerations in Government Ethics

Michael Vernick

November 12, 2019

Introduction

- Ethics considerations apply before and after award
- Topics
 - Pre-Award Communications
 - Procurement Integrity Act
 - Conflicts of Interest
 - Bribes, Kickbacks, Contingent Payments
 - Improper Gifts
 - Revolving Door

Pre-Award Communications

- Agencies are encouraged to promote early exchanges of information about future acquisitions
 - Examples of ways to exchange information: Industry or small business conferences, public hearings; market research; presolicitation notices
 - Requests for Information: RFIs may be used when the government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes
 - Note: Responses to RFIs are not offers and cannot be accepted by the government to form a binding contract
 - When specific information about a proposed acquisition that would be necessary for proposal preparation is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable
- After the solicitation is issued, the contracting officer must be the “focal point” of any exchange with potential offerors

Procurement Integrity Act

- Government procurements are subject to strict rules to protect the integrity of fair competition
- The PIA prohibits “[a] person” from “knowingly obtain[ing] contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates”
 - Contractor bid or proposal information includes “information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly”
 - Examples: Cost and pricing information, labor rates, business strategy, documents marked as “contractor bid or proposal information”
 - Source selection information is “information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly”
 - Examples: Offeror prices and costs, source selection plans, technical evaluation plans, evaluation documents, offeror rankings, documents marked “source selection information”

Procurement Integrity Act: Risk Areas

- Inadvertent disclosure by government employees
- “Cozy” relationship with procurement authority
- Hiring competitors’ employees
- Hiring former government employees
- Use of certain consultants on proposals
- Capture & competitive assessment team activities involving accumulation of competitive intelligence

Procurement Integrity Act: Common Misperceptions

- Old data = unprotected data
- NDA allows use and disclosure of covered data for efforts beyond the covered project
- Documents prepared for one employer may be shared and used with subsequent employers
- Documents without restrictive legends are fair game
- Government officials are always authorized to disclose data

Procurement Integrity Act: Practical Considerations

- Mark proposal materials as “contractor bid or proposal information”
- Do not seek PIA-covered information from the government or a competitor
- If an employee inadvertently receives PIA-covered information
 - Isolate and secure the information to prevent further distribution
 - Immediately contact the company’s legal or compliance function

Conflicts of Interest

Personal Conflicts of Interest

- Government employees are prohibited from engaging in any activity that constitutes a personal conflict of interest and are restricted from participating in matters that could undermine their impartiality
- Employees must avoid any circumstances that could create the appearance that a government employee is violating the conflict of interest rules
 - Do not put government employees in a situation in which their responsibilities to the Government (including their objectivity and judgment) are compromised by an outside transaction or relationship
- Determining what circumstances constitute a prohibited conflict requires case-specific consideration and often can prove difficult

Personal Conflict of Interest Example

- Your thinking about inviting a government acquisition employee to serve as an uncompensated member of a not-for-profit charitable organization with which you are affiliated. The not-for-profit does business with her agency.
 - Even though her personal financial interests will not be affected, the employee likely must disqualify herself from participating in the assessment of contract proposals submitted by the not-for-profit because the success of those proposals will be imputed to her as a member of its board of directors.
- The spouse of an employee of the Food and Drug Administration works at medical device company, which has developed a new artificial heart valve requiring FDA approval. The government employee would normally be involved in the approval process. His spouse is a salaried employee of the company and has no direct ownership interest. Nor does she have an indirect ownership interest, as would be the case, for example, if she were participating in a pension plan that held stock in the company.
 - Because her position is such that the FDA's decision will not have a direct and predictable effect on her salary or on her continued employment with the company. As a result, the government employee can participate in the approval process.
 - But, it's possible that impartiality rules may come to bear even if the COI rules do not.

Bribes, Kickbacks, & Contingent Payments

- Bribes, kickbacks, and contingent payments are prohibited in the government contracts arena, both pre- and post-award
- **Bribes:** Employees must never offer, promise, or give, either directly or indirectly anything of value to government employees in order to influence the employee or an official act or in exchange for favorable treatment
- **Kickbacks:** Employees must not provide or offer “kickbacks” or other improper payments to government employees or to higher or lower-tier contractors in order to induce government business
 - Kickback refers to any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to improperly obtain or reward favorable treatment in connection with a prime contract or subcontract
- **Contingent Payments:** Companies may not make payments that are solely contingent on receiving government business
 - Exception: You may use “bona fide” marketing agencies if that marketing agency does not exert or propose to exert improper influence to solicit or obtain government contracts OR hold itself out as being able to obtain any government contract or subcontracts through improper influence

Improper Gifts

- Government employees are prohibited from soliciting or accepting, directly or indirectly, any gift from contractors or their employees
 - Restriction on accepting or soliciting gifts applies to all employees of the Government, including employees who only work part-time for the Government and regardless of pay or leave status.
- “Gift” is defined very broadly and includes anything of value
 - Gifts include any gratuity, favor, discount, entertainment, hospitality, transportation, travel, loan, forbearance, training, or other item of monetary value, whether provided in-kind or through reimbursement

Improper Gifts: Exceptions

- In limited circumstances, gifts may be acceptable
- Examples of acceptable gifts
 - Unsolicited gifts with an aggregate market value of \$20.00 or less, provided that the aggregate market value of individual gifts received from the same donor does not exceed \$50.00 in a calendar year
 - Modest items of food or refreshment, such as coffee, soft drinks, or donuts offered in connection with a business meeting and other than as part of a meal
 - Items with little intrinsic value, such as greeting cards, certificates of appreciation, trophies, and plaques
 - Opportunities and benefits, such as favorable rates and commercial discounts, that your company offers to the public
 - Gifts based on personal or family relationships with the government employee that exist outside of the contractor relationship and that are motivated by the personal relationship
- Limitations on exceptions to the gift rule
 - Cash: Employees must never provide gifts of cash, cash equivalents (e.g., gift cards issued by a credit card company), or investment instruments (e.g., stocks, bonds) of any value
 - Aggregation: Do not provide gifts that, when aggregated, would total more than \$50 to a single government employee in one year
 - Regularity: Do not provide nominal gifts on a regular basis
 - Timing: Gifts or perceived gifts should not be provided during or around sensitive times (e.g., after a presentation related to a prospective contract award) that may lead a reasonable person to question whether the company was seeking to influence an official action

Gift Example

- A Government contractor who specializes in information technology software offers a government employee who supports information technology acquisition activities a \$10 gift card if the employee will recommend to the agency's contracting officer that she select the contractor's products during the next acquisition.
 - Even though the gift card is less than \$20, the employee cannot accept the gift because it is conditional upon official action by the government employee.

Gift Example

- After giving a speech at a government contractor's internal conference, a government employee is presented with an award bearing the company's name, the event date, company logo, and the government employee's name.
 - The employee may accept this item because it is designed primarily for presentation, and has little intrinsic value.

Gift Example

- A Government employee attends a free trade show on official time. The employee voluntarily enters a drawing at an individual vendor's booth which is open to the public.
 - The employee may accept the resulting prize because entry into the contest was not required by or related to her official duties.
- Attendees at a conference, which is not open to the public, are entered in a drawing for a weekend getaway to Bermuda as a result of being registered for the conference.
 - A Government employee who attends the conference in his official capacity could not accept the prize as the event is not open to the public.

Gift Example

- An government employee is invited to attend a cocktail party hosted by a prohibited source. The employee believes that he will have an opportunity to discuss official matters with other attendees while at the event.
 - Although the employee may voluntarily discuss official matters with other attendees, the employee has not been assigned to present information on behalf of the agency and thus cannot accept free attendance to the event.

Gift Example

- Three senior leaders of a government contractor invite a government employee to join them in a golf tournament at a private club at the company's expense. The entry fee is \$500 per foursome.
 - The government employee cannot accept the gift of one-quarter of the entry fee even though he and the company employees have become friendly over the years.
 - As evidenced in part by the fact that the fees are to be paid by the company, it is not a personal friendship but a business relationship that is the motivation behind the gift.

Gift Example

- A company offers a government employee free attendance for two to a private skybox to watch a major league baseball game.
- The skybox is leased annually by the company, which has business pending before the employee's agency.
- The skybox tickets provided to the employee do not have a face value.
 - To determine the market value of the tickets, the employee must add the face value of two of the most expensive publicly available tickets to the game and the market value of any food, parking or other tangible benefits provided in connection with the gift of attendance that are not already included in the cost of the most expensive publicly available tickets.

Government Employees

Employment and Consulting

- **Employment:** Employment discussions with current government employees are subject to strict limitations
 - General focus is to avoid the appearance of a conflict of interest
 - May not negotiate employment with a government employee while that employee is participating in a matter involving your company
- **Consulting:** Current government employees may be allowed to enter into consulting arrangements, subject to strict limitations and government pre-approval requirements
 - Seek prior approval from your company's compliance or legal functions

Government Employees

Revolving Door Restrictions

- Former government employees are subject to “revolving door” restrictions that place limits on their post-government activities
 - Former government employees are subject to
 - a lifetime ban on representing a party before or against the United States on matters with which they were personally and substantially involved while a government employee
 - a two-year ban covering matters within their broader official responsibilities
 - Former senior government officials and employees responsible for procurements are subject to even stricter post-employment restrictions (e.g., one-year ban on appearing before officers or employees of his or her former agency)

Revolving Door Example

- A DoD employee submits a resume to a defense contractor in response to a job opening that she heard about through a friend. By doing so, the employee has begun seeking employment.
 - Because she is not participating in any particular matters affecting the defense contractor, she is not required to notify anyone that she has begun seeking employment.
 - But what if at one time she had handled a matter for the contractor?
 - The employee should inform her ethics official that she is not currently participating in any particular matters affecting the contractor but has previously.
 - The ethics official would advise that is permissible but may also remind her that circumstances could change.
- Because there are many fact-specific drivers, contractors should be aware of potential “revolving door” issues when seeking to hire government employees.



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