

Gov't Interaction Ethics Rules Still Apply In COVID-19 Crisis

By **Ki Hong and Charles Ricciardelli** (April 1, 2020, 5:51 PM EDT)

As the public health crisis caused by the COVID-19 virus unfolds in the U.S. and around the world, federal, state and local governments are making unprecedented decisions to address potential health and economic impacts.

These actions have included imposing significant restrictions on certain business operations, offering financial and other assistance to selected industries and soliciting assistance from the private sector.

All of these decisions present both risks and opportunities for businesses across the country, necessitating increased communication and partnership with federal, state and local officials, including with a company's senior leadership.

It is important to continue to comply with the various rules that regulate interactions with government officials; the following describes certain issues that we have seen arise in the context of interacting with the government regarding COVID-19.

Providing Free Assistance to Government Entities

Governments at the federal, state and local level are seeking help from the private sector to address the COVID-19 crisis. This assistance may range from in-kind donations of goods and services for direct use by a government or its constituents (e.g., donating medical equipment or facilities that can be used to treat patients, as well as consulting or other services), to monetary donations to third parties involved in responding to the crisis, such as certain charitable organizations.

As such, there are different restrictions and prohibitions that must be observed depending on how such assistance is structured, in particular depending on the entity or person on whose behalf the assistance is provided.

For example, if a business provides free services at the personal request of an official, those services may constitute an illegal gift to that official, whereas a gift made to a governmental entity is generally permitted.

When providing a gift directly to a governmental entity, it is generally recommended to enter into a memorandum of understanding or other written agreement acknowledging that the gift has been formally accepted by the government.

Also, it is important to keep in mind that certain jurisdictions maintain specific ethics rules prohibiting any gift or donation to a third party, such as a private charitable organization, if made at the request of an official.

In all cases when providing assistance, one should ensure there is no link between the gift and a particular government decision in violation of applicable honest services fraud or bribery statutes.



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Responding to Requests for Proposals and Similar Solicitations for Goods and Services

In addition to requesting free assistance from the private sector, governments also are seeking to solicit companies to provide necessary materials and services through traditional — although expedited — contracting processes.

While many procurement laws contain provisions for emergency procurements that allow the government to streamline the process of obtaining critical items, it is important to remember that many of the same rules regarding fair bidding will still apply.

Notably, honest services fraud statutes and other anti-corruption laws prohibit providing anything of personal value to a government official, such as a political contribution or a donation to an official's preferred charity, in connection with his or her official government decision.

Furthermore, to the extent a gift or assistance provided to the government is a factor in the government's decision to select your firm in a request for proposals, such information should be included as part of the RFP or other formal bidding documents.

Contracts entered into under these circumstances can come under intense scrutiny once the pressure of the crisis subsides, and prosecutors and the public are particularly sensitive to any real or perceived leveraging of improper factors related to their award. Accordingly, it is essential to observe all procurement rules and take appropriate steps to avoid even the appearance of impropriety in the procurement process.

Disclosing Issues Under Lobby Registration and Reporting Laws

As federal, state and local governments make decisions to address the COVID-19 crisis, it is as important as ever for businesses to ensure that their interests are being protected.

When communicating with public officials regarding these decisions, companies must comply with the various registration and reporting rules regarding lobbying activity, including the disclosure of, among other information, the government decision being lobbied.

Depending on the nature of a company, publicly describing lobbying efforts related to such decisions may raise shareholder or public relations concerns. Relatedly, many lobbying laws allow a filer to exercise a certain level of discretion in describing the issues lobbied.

Please note that various lobbying regulators are pushing back the deadline for submitting lobby reports. These jurisdictions include Illinois, New York state and New York City, all of which have extended the deadlines for recently due or upcoming lobby reports for at least two weeks. We anticipate that other jurisdictions may grant similar extensions in the near future.

An unprecedented crisis can present unique, time-sensitive demands and, with them, the inclination to act first and ask compliance questions later. However, companies should be mindful that the choices made in the heat of the moment may be viewed differently after the fact.

Indeed, as we learned from the fallout of the government's response to the 2008 financial crisis (such as the Troubled Asset Relief Program and Dodd-Frank Wall Street Reform and Consumer Protection Act) there tends to be greater scrutiny in this area, from both a legal and public relations perspective, regarding a company's conduct during a crisis than under normal circumstances.

Thus, it is as important a time as ever to ensure compliance with both the letter and spirit of these laws.