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2003 Illinois Ethics Legislation

Introduction

The General Assembly and Governor agreed on several ethics related bills in the Fall 2003 veto session. These bills have become Public Acts and have changed the landscape of ethical government in Illinois. In May 2003, House Bill 3412 (the "House Bill") passed both the House and the Senate and was sent to the Governor for his signature. The House Bill created the State Officials and Employees Ethics Act (the "Act") and made amendments to existing laws in areas such as ex parte communication during the rule making process, lobbyist registration and governmental appointees. Finding that the House Bill lacked "certain fundamental components" such as enforcement mechanisms, tough revolving door laws, gift ban provisions, ethics training and the regulations of inappropriate public service announcements, the Governor amendatorily vetoed the House Bill. Both houses voted to override his veto and on November 19, 2003 the House Bill became effective as Public Act 93-0615. Senate Bill 702 (the "Senate Bill") included many of the items amendatorily vetoed by the Governor, and in essence amends Public Act 93-0615 by including the Gift Ban provisions and creating an Ethics Commission. The Senate Bill was adopted and signed by the Governor as Public Act 93-0617 (the "Ethics Reform Package"). To fully understand the impact of this new legislation both Public Acts must be read together.

Part I: The State Officials and Employees Ethics Act

Article 10 Gift Ban

The Illinois Gift Ban Act has been repealed and is replaced by the provisions of Article 10 of the Act, which contains the new Gift Ban provisions. The Gift Ban provisions state, in part, that, "no executive branch constitutional officer, member of the General Assembly, full-time or part-time State employee or appointee shall intentionally solicit or accept any gifts from any prohibited source." As defined in the Act, employee includes (i) any person employed full-time, part-time, or pursuant to a contract and whose employment duties are subject to the direction and control of an employer with regard to the material details of how the work is to be performed or (ii) any appointee. The Act goes on to state that appointees are deemed to be any person appointed to a position in or with a State Agency, regardless of whether the appointee is compensated. The Act also applies to the spouse and immediate family living with the officer, member or State employee. A "prohibited source" is defined as any person or entity who is seeking official action by the member, officer or employee; does business or seeks to do business with the member, officer or employee; conducts activities regulated by the member, officer or employee; has interests that may be substantially affected by the performance or non-performance of the official duties of the member, officer or employee; or is registered or required to be registered with the Secretary of State under the Lobbyist Registration Act.

The Act contains the following twelve (12) exceptions:

- (1) Opportunities, benefits and services that are available on the same conditions as for the general public.

- (2) Anything for which the officer, member or State employee pays the market value.
- (3) Any (i) contribution that is lawfully made under the Election Code or under this Act or (ii) activities associated with a fundraising event in support of a political organization or candidate.
- (4) Educational materials and missions. This exception may be further defined by rules adopted by the appropriate ethics commission or by the Auditor General for the Auditor General and employees of the Office of the Auditor General.
- (5) Travel expenses for a meeting to discuss State business. This exception may be further defined by rules adopted by the appropriate ethics commission or by the Auditor General for the Auditor General and employees of the Office of the Auditor General.
- (6) A gift from a relative, meaning those people related to the individual as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, and including the father, mother, grandfather, or grandmother of the individual's spouse and the individual's fiancé or fiancée.
- (7) Anything provided by an individual on the basis of a personal friendship unless the member, officer, or employee has reason to believe that, under the circumstances, the gift was provided because of the official position or employment of the member, officer, or employee and not because of the personal friendship.

In determining whether a gift is provided on the basis of personal friendship, the member, officer, or employee shall consider the circumstances under which the gift was offered, such as:

- (i) the history of the relationship between the individual giving the gift and the recipient of the gift, including any previous exchange of gifts between those individuals;
 - (ii) whether to the actual knowledge of the member, officer, or employee the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift; and
 - (iii) whether to the actual knowledge of the member, officer, or employee the individual who gave the gift also at the same time gave the same or similar gifts to other members, officers, or employees.
- (8) Food or refreshments not exceeding \$75 per person in value on a single calendar day; *provided* that the food or refreshments are (i) consumed on the premises from which they were purchased or prepared or (ii) catered. For the purposes of this Section, "*catered*" means food or refreshments that are purchased ready to eat and delivered by any means.
 - (9) Food, refreshments, lodging, transportation, and other benefits resulting from the outside business or employment activities (or outside activities that are not connected to the duties of the officer, member, or employee as an office holder or employee) of the officer, member, or employee, or the spouse of the officer, member, or employee, if the benefits have not been offered or enhanced because of the official position or employment of the officer, member, or employee, and are customarily provided to others in similar circumstances.
 - (10) Intra-governmental and inter-governmental gifts. For the purpose of this Act, "*intra-governmental gift*" means any gift given to a member, officer, or employee of a State agency from another member, officer, or employee of the same State agency; and "*inter-governmental gift*" means any gift given to a member, officer, or employee of a State agency, by a member, officer, or employee of another State agency, of a federal agency, or of any governmental entity.

- (11) Bequests, inheritances, and other transfers at death.
- (12) Any item or items from any one prohibited source during any calendar year having a cumulative total value of less than \$100.

Each of the exceptions listed in this Section is mutually exclusive and independent of one another.

It is interesting to note that whereas the now repealed Illinois Gift Ban Act contained some twenty-three (23) exceptions, the current Act contains only twelve (12) such exceptions. Most notably absent from the list of exceptions are free attendance at widely held events and golf and tennis.

The Act also allows an officer or employee to avoid a violation of the Act by taking prompt and reasonable action to either return the gift to its source or give the gift or an amount equal to its value to a 501(c)(3) exempt charity.

A person who intentionally violates any provision of the Act is guilty of a business offense and subject to a fine ranging from at least \$1,001 up to \$5,000. Also, an ethics commission may levy an administrative fine of up to \$5,000 against any person who violates the Act. In addition to any other penalty that may apply, whether criminal or civil, a State employee who intentionally violates the Act is subject to discipline or discharge by the appropriate ultimate jurisdictional authority.

The Article 10 Gift Ban provisions are applicable to units of local government and school districts as discussed below.

Prohibited Political Activities

Section 5-15 of the Act addresses prohibited political activities and sets forth certain prohibitions pertaining to government officers and employees.

The definition of an "officer" and "employee" under Section 5-15 is the same definition that is used in the Gift Ban provisions as discussed above and includes all elected or appointed officials as well as employees.

Section 5-15(a) of the Act provides that an employee shall not intentionally perform any prohibited political activity during any compensated time. The Act goes on to specify no less than fifteen (15) items which constitute prohibited political activity. Prohibited Political Activities include the following:

- (1) Preparing for, organizing, or participating in any political meeting, political rally, political demonstration, or other political event.
- (2) Soliciting contributions, including but not limited to the purchase of, selling, distributing, or receiving payment for tickets for any political fundraiser, political meeting, or other political event.
- (3) Soliciting, planning the solicitation of, or preparing any document or report regarding any thing of value intended as a campaign contribution.
- (4) Planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question.
- (5) Surveying or gathering information from potential or actual voters in an election to determine probable vote outcome in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question.
- (6) Assisting at the polls on election day on behalf of any political organization or candidate for elective office or for or against any referendum question.

- (7) Soliciting votes on behalf of a candidate for elective office or a political organization or for or against any referendum question or helping in an effort to get voters to the polls.
- (8) Initiating for circulation, preparing, circulating, reviewing, or filing any petition on behalf of a candidate for elective office or for or against any referendum question.
- (9) Making contributions on behalf of any candidate for elective office in that capacity or in connection with a campaign for elective office.
- (10) Preparing or reviewing responses to candidate questionnaires in connection with a campaign for elective office or on behalf of a political organization for political purposes.
- (11) Distributing, preparing for distribution, or mailing campaign literature, campaign signs, or other campaign material on behalf of any candidate for elective office or for or against any referendum question.
- (12) Campaigning for any elective office or for or against any referendum question.
- (13) Managing or working on a campaign for elective office or for or against any referendum question.
- (14) Serving as a delegate, alternate, or proxy to a political party convention.
- (15) Participating in any recount or challenge to the outcome of any election.

The list of prohibited political activities is broad and includes many items our clients could conceivably run afoul of. An item of particular concern are provisions which would seem to prohibit activities related to passage of a public question or referendum by employees (*i.e.*, teachers, staff, etc. working on a school referendum). Under the provisions of the new Act activities by employees of a school or park district on behalf of a referendum would be a prohibited political activity.

The Act establishes a four-part test to determine if a violation of the Act by an employee has occurred. First, is the person in question an "employee" under the Act? Second, is the prohibited political activity being conducted during "compensated time"? Third, is the activity being conducted intentionally? Fourth, is the activity a "prohibited political activity" under the Act?

The Ban on prohibited political activities applies to units of local government as discussed below.

Application to Units of Local Government

While most of the Act deals with state officials and employees, Article 70 of the Act requires all governmental entities, including units of local government such as park districts, municipalities and other special purpose districts, as well as school districts and community college districts to adopt an ordinance or resolution that is no less restrictive than the Act. The Act states that:

- (1) Within 6 months after the effective date of the Act, each governmental entity shall adopt an ordinance or resolution that regulates, in a manner no less restrictive than Section 5-15 and Article 10 of the Act, the political activities of officers and employees of the governmental entity, and the soliciting and accepting of gifts by and the offering and making of gifts to officers and employees of the governmental entity.
- (2) The Attorney General shall develop model ordinances and resolutions and shall advise governmental entities on their contents and adoption.
- (3) An "officer" means an elected or appointed official; regardless of whether the official is compensated, and an "employee" means a full-time, part-time, or contractual employee.

The Attorney General has issued a model ordinance for units of local government to use as a guide when drafting their specific ordinance. The model ordinance is available on the Illinois Attorney General

website at http://ag.state.il.us/government/ethics_ordinance.html. The Act requires all units of local government and school districts to adopt their ordinance no later than May 19, 2004.

This Act preempts home rule authority and applies to both non-home rule and home rule units alike.

Revolving Door Prohibition

The Act also creates the “revolving door” prohibition. The prohibition applies not only to the government officer, but also to the spouse or immediate family member living with the officer, member or State employee. According to the Act, no executive branch constitutional officer, member of the General Assembly, full-time or part-time State employee or appointee may accept employment or receive compensation or fees for services from a person or entity if the officer, member or employee participated personally and substantially in the decision to award State contracts with a cumulative value of over \$25,000 to the person or entity, or its parent or subsidiary, during the year immediately preceding termination of the employment. The same rule applies if the officer, member or State employee made a regulatory or licensing decision that directly applied to the person or entity, or its parent or subsidiary.

It is important to note that the revolving door rule applies only to persons who terminate an affected position on or after the effective date of the Act.

Shadow Government

The Act adds special government agents to the list of people required to file verified written statements of economic interest. The new section defines a “special government agent” as a person who is directed, retained, designated, appointed or employed, with or without compensation, by or on behalf of a statewide executive branch constitutional officer to make an ex parte communication.

Ex parte communications by special government agents, also known as “shadow government,” must be promptly memorialized and made part of the public record according to the new Section 5-50. “Ex parte communication” means any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory or licensing matters pending before or under consideration by one of the following 31 listed agencies:

<i>Executive Ethics Commission</i>	<i>Department of State Police Merit Board</i>	<i>Department of Public Health and licensing boards under the Department</i>
<i>Illinois Commerce Commission</i>	<i>Motor Vehicle Review Board</i>	<i>Office of Banks and Real Estate and licensing boards under the Office</i>
<i>Educational Labor Relations Board</i>	<i>Prisoner Review Board</i>	<i>State Employees Retirement System Board of Trustees</i>
<i>State Board of Elections</i>	<i>Civil Service Commission</i>	<i>Judges Retirement System Board of Trustees</i>
<i>Illinois Gaming Board</i>	<i>Personnel Review Board for the Treasurer</i>	<i>General Assembly Retirement System Board of Trustees</i>
<i>Health Facilities Planning Board</i>	<i>Merit Commission for the Secretary of State</i>	<i>Illinois Board of Investment</i>
<i>Industrial Commission</i>	<i>Merit Commission for the Office of the Comptroller</i>	<i>State Universities Retirement System Board of Trustees</i>
<i>Illinois Labor Relations Board</i>	<i>Court of Claims</i>	<i>Teachers Retirement System Officers Board of Trustees</i>
<i>Illinois Liquor Control Commission</i>	<i>Board of Review of the Department of Employment Security</i>	
<i>Pollution Control Board</i>	<i>Department of Insurance</i>	
<i>Property Tax Appeal Board</i>	<i>Department of Professional Regulation and licensing boards under the Department</i>	
<i>Illinois Racing Board</i>		
<i>Illinois Purchased Care Review Board</i>		

If the communication is by an interested party to one of the agencies, agency heads or other agency employees, the communication must be memorialized and made a part of the record. If the communication is by someone other than an interested party, it must be immediately reported to the agency's ethics officer by the recipient of the communication. The ethics officer must then require that the communication be made a part of the record. The communication along with detailed information about the communicators will be filed with the Executive Ethics Commission.

The Public Act 93-0617 also amended the Illinois Administrative Procedure Act. Ex parte communication made during the rule making process must now be reported to the agency's ethics officer by the recipient of the communication. The ethics officer must then file the communication with the Executive Ethics Commission detailing all written communications, all written responses to the communications and a memorandum prepared by the ethics officer stating the nature and substance of all oral communications, the identity and job title of the person to whom each communication was made, all responses made, the identity and job title of the person making each response, the identity of each person from whom the written or oral ex parte communication was received, the individual or entity represented by that person, any action the person requested or recommended and any other pertinent information. These procedures are in addition to the House Bill's requirement that the communication be made part of the record of the rule making proceedings.

Lobbyists Serving on Boards

On and after February 1, 2004, a registered lobbyist, his or her spouse, and any immediate family member living with the lobbyist may not serve on a board, commission, authority or task force authorized or created by State law or by executive order of the Governor. This rule does not apply if (1) the person is serving in an elective public office, or (2) the person is serving on a State advisory body that makes nonbinding recommendations to an agency of State government but does not make binding recommendations or determinations or take any other substantive action.

Other Provisions of the Act

Creation of an Executive Ethics Commission for the executive and legislative branches of government to set standards for ethics training and consider complaints about ethics law violations.

Creation of Inspectors General to oversee ethics training and to investigate ethics complaints in executive and legislative branches of government. It also allows for the appointment of Special Inspectors General when an Inspector General has a conflict of interest.

Empowers only the Inspectors General to bring actions to the Commission. The Attorney General represents the Inspectors General before the Commission. The Act allows for a special prosecutor if the Attorney General is incapacitated or has a conflict of interest.

Requires that each executive and legislative branch constitutional officer and the head of each State agency under the jurisdiction of the Executive Ethics Commission designate an Ethics Officer for the office or State agency to act as a liaison between the agency and the Committee and Inspectors General. The liaison is charged with the review of statements of economic interest and to provide guidance to officers and employees as well as interpretation of the Act.

Requires annual ethics training for all State employees and constitutional officers. The training is to be overseen by an Inspector General in consultation with the Attorney General and the Ethics Commission.

Requires that upon a finding of an ethics violation, the Ethics Commission shall release the entire record of the complaint and recommendation, including any fines issued and any rejoinder from the employee's ultimate jurisdictional authority. The Inspectors General and the Attorney General must also release quarterly reports on the number of complaints received and acted upon.

Prohibits candidates and incumbents for statewide and legislative offices to use their names, images or voices in any public service announcements on behalf of any State program. It also prohibits the

use of bumper stickers and other promotional materials with a constitutional officer's name or likeness for such a purpose.

Part II: Amendatory Provisions to Other Acts

In addition to creating the Act, the two Public Acts made several amendments to other existing laws, as part of the Ethics Reform Package. Major relevant changes were made to the Lobbyist Registration Act while minor changes were made to other acts, including the Illinois Administrative Procedure Act, the Election Code, the General Assembly Operations Act and the State Lawsuit Immunity Act.

Lobbyist Registration Act

The Act increases the annual registration fee for lobbyists to \$350 per person and \$150 for entities qualified under Section 501(c)(3) of the Internal Revenue Code. The Act expands and details the rules regarding who must register and when. Registrants must supply many more details about themselves as well as information regarding whom they intend to lobby during the upcoming registration period.

Not later than two business days after being employed or retained, and on or before each January 31 and July 31 thereafter, every person required to register under Section 3 of the Act must file a written statement in the office of the Secretary of State containing the following information with respect to each person or entity employing or retaining the person required to register:

- (a) The registrant's name, permanent address, e-mail address, if any, fax number, if any, business telephone number, and temporary address, if the registrant has a temporary address while lobbying.
- (a-5) If the registrant is an organization or business entity, the information required under subsection (a) for each person associated with the registrant who will be lobbying, regardless of whether lobbying is a significant part of his or her duties.
- (b) The name and address of the person or persons employing or retaining the registrant to perform such services or on whose behalf the registrant appears.
- (c) A brief description of the executive, legislative or administrative action in reference to which such service is to be rendered.
- (c-5) Each executive and legislative branch agency the registrant expects to lobby during the registration period.
- (c-6) The nature of the client's business, by indicating all of the following categories that apply: (1) banking and financial services, (2) manufacturing, (3) education, (4) environment, (5) health care, (6) insurance, (7) community interests, (8) labor, (9) public relations or advertising, (10) marketing or sales, (11) hospitality, (12) engineering, (13) information or technology products or services, (14) social services, (15) public utilities, (16) racing or wagering, (17) real estate or construction, (18) telecommunications, (19) trade or professional association, (20) travel or tourism, (21) transportation, and (22) other (setting forth the nature of that other business).

The registrant must file an amendment to the statement within 14 calendar days to report any substantial changes or additions for the previously filed information. If the purpose of the amendment is to disclose a new agreement to retain the registrant for lobbying services, the amendment must be filed before any service is performed, but in any event not later than 2 business days after entering into the retainer agreement.

Once the Secretary of State has provided adequate software and computer access, all statements and amendments to statements must be filed electronically. At that point the Secretary of State shall promptly make all filed statements and amendments publicly available by means of a searchable database that is accessible through the World Wide Web.

Each registrant must annually submit a picture of himself or herself. A registrant may, however, in lieu of submitting a picture on an annual basis, authorize the Secretary of State to use any photo identification available in any database maintained by the Secretary of State for other purposes.

Registrants must remit a single, annual and nonrefundable \$350 registration fee. All entities qualified under Section 501(c)(3) of the Internal Revenue Code (*e.g.*, charities) must remit a single, annual and nonrefundable \$150 registration fee. Fifty dollars of the fee is deposited into the Lobbyist Registration Administration Fund for administration and enforcement of the Act and is intended to implement and maintain electronic filing of reports under this act. The next \$100 is also deposited into the Lobbyist Registration Administration Fund for administration and enforcement of this act, and any balance will be deposited into the General Revenue Fund.

Under the amendments to the Lobbyist Registration Act, the Secretary of State must electronically file all the expenditure reports required under 25 ILCS 170/6. The reports must then be made publicly available by means of a searchable database accessible through the World Wide Web. The electronic filing must be made available by the Secretary of State not later than 12 months after the November 19, 2003 effectuation of the House Bill. The expenditure report must include (1) the name of each State government entity lobbied, (2) whether the lobbying involved executive, legislative or administrative action, or a combination, (3) the names of the persons who performed the lobbyist services, and (4) a brief description of the legislative, executive or administrative action involved.

Other Amendatory Provisions

Requirement that groups running "sham issue ads" before elections disclose the source of funds paying for such ads.

Increase in the maximum fine for political committees that hide funds they receive right before an election. The fine is now at least 10% and up to 100% of the unreported contribution.

Requires disclosure of any PAC that is financing any political communication.

A ban on the offer or promise of state or official benefits or favors in exchange for campaign contributions.

A ban on mailings from the Legislative Printing Unit and other State-sponsored legislative mailings from February 1 to the day after the Primary Election and from September 1 until 1 day after the General Election, respectively.

A limitation on late-term gubernatorial appointments.

A ban on fundraising by legislators, constitutional officers, or candidates for those positions in Sangamon County on session days late in the Spring Session or in the Veto Session. Formerly, fundraising was banned within 50 miles of the City of Springfield and only during certain parts of the Spring and Veto Sessions.

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