

NEW HAMPSHIRE ADOPTS ETHICS AND LOBBYING REFORM

SB 206 makes significant changes in New Hampshire's lobbying and ethics laws. SB 206 became effective June 2, 2006. This Legislative Update focuses on three specific areas:

- the expanded definition of "lobbying" to include attempts to influence executive branch officials in any legislative, rulemaking, procurement or contract matter;
- the new disclosure rules applicable to lobbyists, which require monthly reports and disclosure of more of the fees paid by lobbying clients to lobbyists; and
- new limits on gifts to state officials where the gifts are not related to official duties, charity events or political fundraising.

This Update presents only a brief summary of the new laws. For more complete information, please contact the primary author, Paul Burkett, or one of our Government Relations professionals.

I. Expanded Regulation of Lobbying

Executive Branch Lobbying Now Regulated.

SB 206 expands the definition of "lobbying" to include efforts to influence executive branch officials in the performance of their duties. RSA 15 now covers representation of a client (for a fee) "to promote or oppose, directly or indirectly, any action by the governor, governor and council, or any state agency ... where such action concerns legislation or contracts pending or proposed before the general court, any pending or proposed administrative rule, or the procurement of goods or services that are being or may be purchased by the state."

Lobbying does not include representation of a client before a state agency in a matter not involving rulemaking, contracting or procurement. Lobbying also does not include efforts by an owner or employee of a company to solicit business from the state.

No Lobbying Occurs Until There is Direct Contact with a Decision Maker.

Importantly, although SB 206 expands the scope of regulated lobbying to cover contacts with executive branch officials, it does not change the basic functional definition of what

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constitutes lobbying. Under prior law and applicable Supreme Court precedent, "lobbying" does not occur until there is direct contact with a decision maker on a matter within the duties of that person. As a result, preliminary actions in tracking legislation, discussing legislation internally or even with agency officials do not themselves constitute lobbying and so will not be subject to any reporting requirements (discussed below) until there is an actual, direct contact with a legislator on the bill.

Lobbying Must Be Part of Person's Job.

A person is a "lobbyist" subject to regulation under RSA 15 only if he "is employed for a consideration ... in a representative capacity

for the purpose[]” of lobbying. Thus, an employee responsible for government relations clearly would be covered, but someone whose responsibilities lie elsewhere (say, a field engineer) who is asked to provide advice to a legislator may not be covered by the lobbying rules. This issue gets more difficult with senior management officials whose duties do not explicitly include government relations but who may be viewed as representing the employer in this area.

Examples:

- It is not lobbying to represent a taxpayer in a state tax audit.
- It is not lobbying to represent a utility company in a ratemaking proceeding.
- It is lobbying to represent a land owner in commenting or testifying on proposed environmental regulations.
- It is lobbying to contact an agency head to advocate for a particular outcome in a rulemaking proceeding.
- It is not lobbying to contact an agency head to discuss pending legislation.

II. Expanded Lobbyist Reporting

What Fees Are Reported?

SB 206 expands lobbyist reporting responsibilities. Under SB 206, lobbyists must report “[a]ll fees received from any lobbying client that are related, directly or indirectly, to lobbying, such as public advocacy, government relations, or public relations services, including research, monitoring, and related legal work.” Prior law required a lobbyist to report only “fees ... [received] in connection with his legislative employment.”

Following this change, it is unclear whether there is a difference between fees that are paid “in connection with” lobbying (prior law) and fees “that are related, directly or indirectly, to lobbying” (SB 206). In either case, there is a

necessary link to actual, direct lobbying. However, the legislature likely meant to cover more fee-generating activities under SB 206 than had been covered under prior law.

As a result, SB 206 appears to expand lobbyist reporting of fees in two ways. First, because “lobbying” now includes efforts to influence executive branch officials in their duties, there will potentially be more “lobbying clients” and more “lobbying” fees to be reported.

Second, under the new reporting system, once a person has made a contact with a legislator or executive branch official that constitutes “lobbying” (and therefore triggers the registration and reporting requirement), a lobbyist must report all fees related to lobbying, including research, legislative tracking and other activities that do not involve actual contact with a government decision maker. Accordingly, it is likely that this change will also result in more “lobbying” fees being reported.

What Other Items Must Be Reported?

One completely new area of regulation under SB 206 is the required disclosure by a registered lobbyist of any “honorarium or expense reimbursement” paid to a state official and all state political contributions made by or on behalf of the lobbyist or any family member of the lobbyist. Under the new law, the term “honorarium includes, but is not limited to, a payment ... for making a speech, preparing a written document, or serving as an advisor or consultant.” If any such payment or contribution is made in a form other than cash and the value is not stated on the face of the item paid or contributed, then the lobbyist must provide the recipient with a written statement of the value of the item paid or contributed.

These are all items that must be reported by the recipient under RSA 15-B (honoraria and expense reimbursements) or RSA 664 (political contributions). This new requirement does not apply to honoraria, expense

reimbursements or campaign contributions paid before June 2, 2006.

When Are Reports Required?

Under SB 206, reports are required every calendar month, whether or not the general court is in session. The reports are due on the second Friday of the month. The first report under the new system is due on July 14. Each report covers activity in the prior month, as well as cumulative amounts received and paid in the calendar year. Prior law required only three reports a year – on April 15, August 15 and December 15.

Transitioning to the New System.

As of the date of this Update, the Secretary of State has not yet published a new monthly reporting form for lobbyists. The law requires the reports to be on a form promulgated by the Secretary of State, but we believe lobbyists should make a filing on a good faith basis on July 14 even if a form is not yet available.

Another transition question is whether fees received prior to the effective date of the new law (June 2, 2006) that were not reportable under the old system but are reportable under the new system have to be included in the “year-to-date” data in the July 14 report. Based on guidance posted on the Secretary of State’s web site, it appears that fees received before June 2, 2006 that were not reportable under prior law (e.g., fees for lobbying on a rulemaking proceeding) should not be reported on the July 14 or any subsequent monthly report. All such fees received after June 2 are reportable.

Examples:

- Fees paid to a person to monitor a bill as it moves through the legislature will not be reportable unless the person directly contacts a legislator regarding the bill.

- If a company engaged a lawyer to testify at a rulemaking hearing in May 2006, then these fees will not be reportable because that activity was not regulated lobbying before June 2.

III. New Gift Rules

What is a Gift?

SB 206 dramatically expands regulation of gifts to public officials and members of a public official’s family. SB 206 expands the law in two ways. First, it expands the definition of “gift” to include any amount of money and “[a]ny other tangible thing, intangible thing, service, or the use thereof” having a value of \$10 or more. Under prior law, the “gift” definition applied only to “money” or “things of value ... with a value in excess of \$50,” and not to potentially ephemeral matters such as intangibles or services. Thus, SB 206 both reduces the value of things (other than money) that can be given from \$50 to \$10 and treats intangibles and services as gifts.

Second, RSA 15-B as amended by SB 206 now expands its prohibition and criminal penalty to apply to both the receiver of the gift and the giver. Prior law only prohibited an elected official from receiving a gift and required the official to disclose all gifts.

These changes will require all persons who have relationships with elected officials to reconsider past practices such as inviting a legislator to a UNH hockey game or taking a legislator to dinner or golf.

There are some exceptions, and none of the following is a “gift” under RSA 15-B:

- A political contribution subject to RSA 664.
- Tickets or free admission to a charitable, ceremonial or political event if:

- (1) The proceeds of the event are subject to the political contribution rules of RSA 664;
 - (2) The event is sponsored by a charitable organization that is registered with the division of charitable trusts or qualified as a charitable organization under section 501(c)(3) of the federal tax code; or
 - (3) The event is published in the house or senate calendar as an event open for attendance by any member of the general court.
- Meals, beverages, lodging or transportation associated with attendance at:
 - (1) Ceremonial or celebratory events that are either open to the public or expected to have an attendance of greater than 50 people; or
 - (2) Any event attended in an official capacity.
 - Any honorarium or expense reimbursement.
 - Money, an object or an intangible thing of value where the donor's act is purely private and personal in nature and the item would have been given even if the recipient were not a state official.

The last exception is potentially the broadest and also the most difficult to interpret. What constitutes "purely private and personal in nature" is not defined or illustrated in the statute. It is noteworthy that this exception covers "[m]oney in any form, an object, or an intangible thing of economic value," but the general definition of gift covers money and "[a]ny other tangible thing, intangible thing, service, or the use thereof." Thus, the exception is apparently limited in that it does

not cover gifts of services or the use of property.

Reporting Requirements.

All covered state officials are required to report on a monthly basis all honoraria and expense reimbursements they receive. As noted above, lobbyists also have reporting requirements with respect to honoraria, expense reimbursements and political contributions.

Examples:

- Paying for a legislator to play in a golf tournament that is either sponsored by a qualifying charity or a political fundraiser is not a gift.
- Paying for an agency head to play in a corporate golf tournament that is held to mark the company's 25th year of operation in the state and that is attended by 75 people is a gift.
- Under SB 206 as drafted, providing volunteer services to a legislator to develop a legislative proposal or to the re-election campaign of a legislator is a gift.

IV. Other Changes Made by SB 206

SB 206 also re-writes the state's financial disclosure rules for state officials and candidates for elective office (RSA 15-A), creates a new executive branch ethics committee (RSA 21-G:29-33) and imposes significant restrictions on volunteer government service by lobbyists and persons associated with lobbyists (RSA 21-G:25-26). This Update does not address these areas, but please contact us if you have any questions about these changes.