

Alert | Political Law & Compliance



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New York’s JCOPE Issues Advisory Opinion on Gifts to Third Parties

New York law has long imposed restrictions on lobbyists and clients of lobbyists, as well as on other individuals and entities with business before the state (Interested Sources), giving gifts to public officials. In recent years, the restrictions were expanded to expressly limit gifts to a third party at the request of a public official, sometimes referred to as “behested” gifts. Indirect giving or gifts to a third party at the request or solicitation of a public official are murkier and implicate several different laws including the Public Officer’s Law, the Lobbying Act, and the New York State Joint Committee on Public Ethics (JCOPE, or the Commission) regulations. Notably, [as we highlighted in April](#), the Coronavirus Disease 2019 (COVID-19) pandemic has spawned an increase in charitable giving, including to philanthropic organizations, newly formed groups helping front-line workers, or those in other sectors who have been directly affected by the economic effects of the current crisis. As such, individuals and entities regulated by New York’s lobbying laws should be aware that charitable giving may be prohibited by law in certain instances. To provide the regulated community better guidance on how to navigate these sensitive waters, on Sept. 22, 2020, JCOPE issued a new [advisory opinion](#) (the Advisory Opinion) to clarify the interplay between various laws regulating gift restrictions made to third parties at the behest of a public official. As noted in the Advisory Opinion, “[a] gift offered or given to a third party at the behest of a public official can...give rise to...a perception that the gift is motivated by factors other than the public interest...and damage public confidence in government.” Although not yet adopted, this opinion provides significant insight into how JCOPE – or at least its staff – will analyze third party gifts.

The Advisory Opinion begins with the presumption that “[a]ny gift made by an Interested Source to a third party upon a public official’s personal solicitation is presumptively prohibited.” In such instances, the solicitation of the gift as well as any gift given in response to the solicitation could violate the law. JCOPE’s opinion warns that it is possible for an Interested Source to violate the gift restrictions even in the absence of a public official’s solicitation, direction, designation, or recommendation. A determination on whether a violation of the law has occurred will depend on the “totality of the circumstance,” and will require a case-by-case analysis based on the circumstances surrounding the gift.

The Advisory Opinion highlights key categories the Commission may consider in evaluating whether a gift to a third party is prohibited:

- **Nature of the Solicitation**: A solicitation may take many forms, and it need not specifically request a financial contribution or any other specific item or favor.

Illustration: Generally, public officials may seek support for third parties via mass solicitations – such as “form letters” which are sent to a general population and may incidentally include Regulated Parties. A response to a mass solicitation or a robocall may be viewed differently than a reply to a personal request from a public official (or his or her intermediary).

- **Substance of the Communication Involving the Solicitation**: The specific discussion between the public official (or his or her intermediary) and the gift offeror is significant. The Advisory Opinion notes that “[a]ny communication that looks like a *quid pro quo* is a clear red flag implicating the gift restrictions, but there are no specific phrases or words that *per se* implicate the ban.” Thus, “[a] prohibited gift could be solicited via a communication that merely identifies a specific third-party organization, or more generally discusses supporting a cause or initiative promoted by the public official.”

Illustration: A public official’s reference to a specific charity or public cause while communicating privately with an Interested Source could constitute an improper solicitation, directive, designation, or recommendation that a gift be tendered to a third party. Additionally, a suggestion that a gift could enable access to the public official for advocacy purposes or for any other benefit could raise concerns. Further, evidence that the Interested Source actually gained access to the public official after making the gift would be weighed in determining whether the gift was intended to influence the public official. This is especially true where access to the public official was gained after the Interested Source made a gift arrangement through an intermediary.

- **Nature and Purpose of the Gift**: The Commission will consider the value of the gift; the relative significance of the gift to the offeror and the public official; and whether the gift serves a general philanthropic purpose, or furthers an individual’s policy or political goals.

Illustration: A public official’s request for individuals and businesses to support of a toy drive during the holiday season would likely be permissible. In contrast, a public official’s personal solicitation for money to support the public official’s policy agenda is likely prohibited.

- **Nature and Purpose of Third-Party Recipient**: Considerations under this factor generally center upon the extent to which the interests of the public official coincide with that of the third-party gift recipient. Other considerations include whether the public official or a relative is involved in operating or managing the organization, and whether the public official is publicly associated with the organization.

Illustration: A gift to a charity that serves the general public interest, such as a charity which engages in cancer screening; heart disease prevention; domestic violence awareness and prevention;

energy conservation; organ donation; emergency or other disaster relief; programs designed to encourage reading; job training and job fairs, etc. is distinct from a gift to a 501(c)(4) organization that was formed in coordination with a public official in order to further the public official's political agenda. A gift made to a governmental entity or to the public at large upon a public official's request could also be subject to review and depending on the overall circumstances, may be impermissible.

- **Public Official's Knowledge of the Gift:** The Commission will consider whether the public official knows or will know the identity of those who respond to the public official's solicitation.

Illustration: A gift given through a "blind" process by which the public official will not learn of donations may be permissible as long as there are no other circumstances demonstrating an intent to influence the public official. In some cases, however, the public official will inevitably learn of the donation (such as the donor being present at a dinner event which required the donor to make a contribution for admission to the event). This fact, "while not dispositive," would be considered in determining the donor's intent to influence along with the other factors discussed throughout the Advisory Opinion.

- **Nature of Pending Business Before the Public Official:** Consideration will be given to the nature of the offeror's pending business before the public official, including, among other things, the status of the business and the significance of that business to the offeror.

Illustration: Consideration will be made as to whether the offeror's business is a routine license application or advocacy for new legislation. If the business concerns legislation, relevant factors to consider include the status of the legislation, whether the business concerns a specific application to the offeror or of general interest, and whether the offeror has actively lobbied on the matter in a way in which the public official is aware or should be reasonably aware of the offeror's interest. Again, while not dispositive, this factor will be considered if other evidence tends to establish that the gift was intended to influence the public official. Therefore, even a pending matter of general application may render a solicitation or a gift to be impermissible, if the matter could specifically benefit the offeror's interests, or the offeror's interest in the matter is known to the public official.

- **Nexus Between the Solicitation and the Pending Business:** The Commission will "consider any nexus between the solicitation and the pending business, including but not limited to the timing of the solicitation and offer, the status of the pending business, and the public official's role with respect to that business." Accordingly, in determining whether the gift was intended to influence the public official, the Commission would review and weigh any evidence that the solicitation or offer occurred close in time to a pending or recent matter before the public official.

Illustration: If the gift is given while a matter is pending or close in time to when a decision is made, or if access to the public official is granted close in time to the solicitation, payment, or receipt of the gift, or if there are communications connecting the gift to the matter, it will likely be difficult to overcome the presumption that the gift is prohibited.

- **Offeror's History of Gift Making:** Consideration will be given to the offeror's history of making gifts to similar organizations or supporting similar causes.

Illustration: A gift may be permissible if the offeror has consistently and historically made donations to support a cause or charity which is independent of any solicitation connected to the public official. The Commission would also consider whether the donation is commensurate in amount to prior donations. In contrast, if the donation is out of the ordinary for that offeror, it could support a finding that the solicitation and the gift are impermissible.

Given the guidance above, regulated parties should consider the circumstances surrounding a solicitation or suggestion to give to third parties, including charitable and philanthropic organizations. According to JCOPE’s opinion, the restrictions on direct giving to a public official “cannot be evaded by arranging to have a third party receive a gift that is meant to influence a public official.” However, this Advisory Opinion may help ensure that Interested Sources can still actively participate in charitable activities, without running afoul of the gift laws.

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