



JCOPE Issues Draft Advisory Opinion On Third-Party Gifts

New York state law prohibits lobbyists and clients of lobbyists and other individuals or entities who have interests before the State from offering or giving a gift to any public official, unless under the circumstances it is not reasonable to infer that the gift was intended to influence such public official. This prohibition extends to children and spouses of the public official, as well as gifts to a third party (including charitable organizations) at the behest of a public official. While some exclusions may apply, gifts to third parties are presumptively impermissible and may implicate the Lobbying Law, the recently promulgated lobbying regulations, the Public Officers Law and criminal laws.

After receiving a number of inquiries about the permissibility of contributions or gifts given to a third party, such as a charitable organization at the solicitation of a public official, the Joint Commission on Public Ethics (“JCOPE”) issued Draft [Advisory Opinion No. 20-02](#) on Sept. 22, 2020 to provide guidance to public officials, lobbyists, and their clients about third-party gifts. The Opinion has not been formally adopted and serves as a resource to those perhaps considering making a charitable donation at the direction of a public official.

As stated in the Advisory Opinion “[a]ny gift made by an Interested Source to a third party upon a public official’s personal solicitation is presumptively prohibited. In such a case, both the solicitation itself, as well as any gift in response could violate the law depending on the totality of the circumstances.” Identifying the circumstances surrounding the gift is key to determining whether that gift is prohibited. For example, an unsolicited gift is presumptively permissible, but the presumption can be overcome with evidence that the totality of the circumstances indicate that the gift was intended to influence a public official.

JCOPE offered a case-by-case analysis of each gift, which includes the following factors: the nature of the solicitation; the substance of the solicitation; the nature and purpose of the gift; the nature and purpose of the gift recipient; the public official’s awareness of the gift; the nature of the gift offeror’s business before the official; the nexus between that pending business, the public official, and the gift; and the offeror’s history with respect to similar gifts. The weight

given to each factor within an analysis will vary depending on the facts and motives of each party in a given case.

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.” State officials cannot knowingly solicit an Interested Source, but can see support from a third party through mass solicitations.

Substance of the Solicitation – “The specific discussion between the public official (or his or intermediary) and the gift offeror is significant. Any 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.” Depending on the totality of the circumstances, a mere reference to a specific charity by a public official to an Interested Source could constitute directing that a gift be tendered to a third party.

Nature and Purpose of Gift – JCOPE will consider the value of the gift, the significance of the gift to the offeror and the public official, as well as whether the gift serves a general philanthropic purpose or furthers an individual’s policy or political goals.

Nature and Purpose of Third-Party Recipient – Factors considered will “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 official is publicly associated with the organization.” In addition, a gift made to a governmental entity or to the public at large upon a public official’s request will also be subject to review and could be deemed impermissible.

Public Official’s Knowledge – JCOPE intends to consider the extent of the public official’s knowledge when it comes to the identity of those who respond to a solicitation.

Nature of Pending Business – Consideration will be given to the nature of the offeror’s pending business before the public official, including the status of the business and the significance of the business to the offeror.

Nexus between Solicitation and Pending Business – JCOPE 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.” Evidence that the solicitation occurred close in time to a pending matter before the public official will be considered in determining whether the gift was meant to influence the official.

Offeror's History – An offeror's history of making gifts to similar organizations and supporting similar causes is also relevant to the analysis. "For example, if the donation is made to support a cause or charity that the offeror has consistently supported over time, independent of any solicitation connected to the public official, and if the donation is commensurate in amount to prior donations, such factors may support a finding that the gift is permissible. Conversely, if the donation is out of the ordinary for that offeror, it may support a finding that the solicitation and the gift are impermissible."

Charitable gifts serve a worthy purpose and are to be encouraged, especially now. Executive Order 202.6 suspended Legislative Law 1-m to the extent that any agency may receive a donation in kind or otherwise provided the donation is made to the state and is administered by a state agency in furtherance of the pandemic response effort. However, gifts solicited by public officials to charitable organizations and other third parties are different and require a deeper analysis that should carefully consider all of the circumstances surrounding the gift to avoid violations or even the appearance of impropriety.

Lobbyists, clients spend heavily in NM legislative races

Lobbyists and their employers poured about \$2.3 million into New Mexico campaigns over the past five months – about one-third of it on behalf of energy giant Chevron – as voters prepare to decide every seat in the Legislature.

The donations are outlined in reports filed with the Secretary of State's Office last week, covering activity from May 5 to Oct. 5.

A lobbyist for Chevron USA reported \$772,500 in contributions on behalf of the company to Republicans and Democrats alike, including \$25,000 apiece to each party's legislative caucus in the House and Senate.

The largest donation in the past five months, according to a Journal analysis, was by Chevron: \$350,000 to New Mexico Strong, a Texas-based political committee that backed Democratic state senators who faced primary challenges from the left.

"We make political contributions to support the election of candidates who believe, like we do, in the value of responsible oil and gas development," Chevron spokeswoman Veronica Flores-Paniagua said in a written statement. "Our contributions are made in accordance with the law."

A gun-control group also weighed in heavily. A lobbyist for the Everytown for Gun Safety Action Fund reported \$155,000 in political contributions to Democratic candidates and numerous political committees.

Other major players include Occidental, Sunland Racetrack and Casino, and ConocoPhillips.

Dede Feldman, a retired Democratic state senator, said the disclosure reports are a vital way for ordinary New Mexicans to track how their own contributions compare with donations by larger special interests.

“The public,” she said, “deserves to know who is funding candidates who purport to speak in their name.”

Feldman, who wrote a book about the state Senate, has co-written reports for nonpartisan groups, such as Common Cause New Mexico and New Mexico Ethics Watch, examining campaign finance and political activity in state government.

Chevron has been a big spender for years, she said. Advocacy groups on both sides of the debate over firearms legislation have also spent heavily, she said, though more of the recent spending has been by gun control groups rather than gun rights groups, such as the NRA.

The donations reported last week come as all 112 seats in the Legislature are on the ballot. Democrats hold a 46-24 edge in the House and a 26-16 edge in the Senate.

The \$2.3 million in reported contributions by lobbyists and their employers went largely to legislative candidates and political action committees. Voters will weigh in on the governor, attorney general and similar executive offices in 2022.

Among the big spenders, according to state records and a Journal analysis, in the most recent five-month period are:

- ◇ The Emissary Group, a consulting firm that reported \$80,000 in contributions on behalf of Occidental, a petroleum company, and \$46,000 on behalf of BNSF Railway.

- ◇ Sunland Park Racetrack and Casino, which reported \$79,500 in political contributions. Lawmakers have been weighing a plan to relax some of the state’s restrictions on racetrack casinos.

◇ Ultra Health, a medical marijuana company whose lobbyist reported \$47,500 in donations. Much of the money went to Democratic candidates, although the company also supported Sen. Mark Moores, one of the few Republican legislators to back legislation legalizing recreational cannabis.

Gov. Michelle Lujan Grisham, a Democrat, has made legalizing marijuana one of her legislative priorities.

◇ ConocoPhillips, a major oil company, which reported \$49,000 in contributions. Proposals to impose new environmental regulations or change the tax system for oil and gas production are perennial topics at the Capitol.