

New York Ethics Opinion: Beware When Making Donations at Behest of Public Officials

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In late September, the New York State Joint Commission on Public Ethics (JCOPE) issued a rather broad advisory opinion underscoring the need for due diligence when making charitable donations at the behest of public officials. Corporate compliance departments and lobbyists are generally familiar with the legal hazards of providing gifts directly to public officials and employees. Less well-known are the regulations that may apply to making charitable donations at the behest of public officials. Throughout the rest of this article, we will follow California's convention in referring to these as "behested payments."

Charitable donations, on their own, generally do not raise any government ethics concerns. However, when such donations are solicited by a public official, they raise the specter that the donor is attempting to curry favor with the public official. To that end, more than a dozen states and certain municipalities specifically regulate behested payments.

Behested payments may be subject to mere reporting requirements, whether on the part of the public official soliciting the payments or the donor. Other jurisdictions may ban behested payments altogether. Typically, such bans are targeted to lobbyists, employers or clients of lobbyists, government contractors, or some other category of prohibited sources. The liability for prohibited behested payments may fall on the public official soliciting the payment, the donor, or both.

Under New York's preexisting gift rules, state officials may not direct impermissible gifts (including donations) to third parties. Gifts from lobbyists, employers or clients of lobbyists, or "interested sources" are

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“presumptively impermissible.”

The recent JCOPE opinion elaborates on when a donation may be considered to have been solicited by a state official, and also when the presumption of impermissibility may be overcome. First, the opinion clarifies that the gift ban applies not only to donations solicited directly and personally by a state official, but also by any intermediary “whom the public official has designated, authorized, or knowingly permitted to act on their behalf.” Such intermediaries may include, but are not limited to, anyone “who openly self-identifies as connected to the official, or someone whom the solicited party understands to be acting for the benefit of the official or on the official’s behalf,” as well as “when the facts clearly demonstrate that an intermediary is, by all appearances, acting for a public official.”

Even in the absence of an explicit solicitation, a donation may be prohibited under the JCOPE opinion if: (1) a state official acknowledges the donation after the fact or “evidence demonstrates the [donor’s] understanding ... that the official would be aware of the gift”; or (2) “the totality of the circumstances indicate [] that the gift was intended to influence a public official.”

The JCOPE opinion also articulates an open-ended approach for determining when a behested payment may overcome the presumption that it is impermissible. For example, factors pointing to a donation’s permissibility may include:

- A donation made in response to a mass solicitation by a state official rather than a targeted ask;
- A relatively low-value donation, such as a toy given in response to a holiday toy drive;
- A “blind” process under which a state official will not know of the donation;
- If the donation is not made soon before or after a donor has a matter before the state official; or
- If the donor has a history of supporting similar organizations or causes irrespective of the state official’s solicitation.

These factors are not exhaustive or determinative under the JCOPE opinion, and the agency “will determine, on a case-by-case basis” whether a behested payment is permissible.

All of this illustrates the need for heightened due diligence when companies are making charitable donations. Importantly, the legal review process should ask why the donation is being made, whether there were any discussions with government officials or their intermediaries regarding the donation, and whether the donation is furthering any political or government relations objectives.