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SUBJECT: The Gift Law

This memorandum is intended to provide a brief summary of the gift law provisions found in the Public Ethics Law (General Provisions, Title 5). For purposes of this discussion, the term “official” refers to public officials (which includes members of boards and commissions) or State officials, other than State officials of the Judicial Branch or members of the General Assembly. The term “employee” refers to individuals who are employed by the Executive, Legislative or Judicial Branches. Questions regarding the application of the gift restrictions of the Ethics Law, and exceptions to those restrictions, with respect to members of the General Assembly, should be directed to the Ethics Advisor to the General Assembly, and with respect to State officials of the Judicial Branch, to the Judicial Disabilities Commission or Judicial Ethics Committee.

The Ethics Law defines gift as “the transfer of anything of economic value, regardless of form, without adequate and lawful consideration.” (§5-101 (p) (1)).¹ Within that broad definition, however, the Ethics Law specifically exempts out “the solicitation, acceptance, receipt, or regulation of a political contribution that is regulated in accordance with: (i) the Election Law Article; or (ii) any other State law regulating: 1. the conduct of elections; or 2. the receipt of political contributions.”²

Gift Solicitation

In General

Section 5-505(a) of the Ethics Law prohibits officials and employees from soliciting gifts for themselves or another. This prohibition against solicitation of any gift by an official or employee applies without regard to value and without regard to the relationship of potential donors to the State or the official's agency. (Commission Opinion No. 93-05). Section 5-505(a) also prohibits an official from directly soliciting or facilitating the solicitation of a gift, even on behalf of another person or entity (e.g., a charitable organization), from an individual regulated lobbyist.

Agency Fundraising

From time to time the Commission receives requests for advice from agencies concerning the application of the Ethics Law (General Provisions, Title 5) to agency solicitations of private entities for funding of State projects or initiatives. The conduct of “agencies” is not regulated by the Ethics Law. However, agencies generally act through their employees, and the Ethics Law does regulate the conduct of individual officials and employees with respect to gifts. As discussed above, § 5-505 (a)

¹Gifts include not only tangible items, but also intangible things such as customer discounts. (See the “Discounts for Goods and Services” discussion in the Miscellaneous Gift Issues section).

²While political contributions are excluded from the definition of gift, the prestige of office provision (§5-506) specifically prohibits the use of public resources or one’s title to solicit a political contribution.

of the Ethics Law prohibits an official or employee from soliciting gifts. Section 5-505 (b) goes on to prohibit acceptance of a gift from individuals or entities that: 1) do business with or seek to do business with the official's or employee's agency; 2) are regulated by the official's or employee's agency; 3) have private interests that can be impacted by an official's or employee's performance of his/her duties; or 4) are regulated lobbyists with respect to matters within the jurisdiction of the official or employee.

In interpreting § 5-505 (a) (solicitation), the Commission has distinguished between soliciting gifts for the benefit of State officials and employees (prohibited) from the solicitation of gifts/donations for agency programs. For example, solicitation by an agency of a local restaurant for discount coupons for agency employees as part of an "employee appreciation day" event would be a solicitation for the benefit of employees, not part of an established program, and would be prohibited under §5-505 (a). On the other hand, the Commission has recognized that in some cases solicitation and gift activities that are clearly part of an agency's mission are matters for agency policy makers to address rather than the Ethics Law³. So, for example, an agency may be able to solicit donations from private citizens or entities to fund agency initiatives (e.g. public health grant programs) where agency employees are not the beneficiaries of the solicited funds.

The Commission has specifically addressed the application of the gift provisions of the Ethics Law to situations in which agencies have sought private contributions or donations for legitimate agency or inter-agency programs. It is the responsibility of the agency to ensure any applicable laws, policies or procedures established by the government branch or agency are followed, including, if required, obtaining proper authorization for the activity. In this regard the agency should consider seeking advice from the Office of Attorney General. The agency should ensure relevant laws, policies and procedures are followed by the officials and employees involved in the fundraising activity, and should address with the officials or employees any failure to do so. In carrying out a fundraising activity that is consistent with established law and policy, there are certain ethics concerns that must be satisfied as follows:

1. Requests for donation to a State agency solicitation should be broad, and not directed at vendors or those regulated by the agency;
2. Employees or officials involved in regulatory and procurement matters should not solicit on behalf of the agency;
3. It should be made clear to those solicited that a donation will not confer any special access or benefit in their dealings with the State;
4. The gifts solicited should not result in personal benefit to any employee or official⁴;
5. All funds and in-kind gifts should be solicited and accounted for in accordance with legal authority for acceptance of gifts and be processed in accordance with any applicable State fiscal, procurement or related accounting principles.

³See, e.g., Opinion 94-13.

⁴Funds to pay for an employee's or official's travel expenses may be acceptable in limited situations, for example where the travel is part of an established agency program and the identification of the individual participants is a matter of agency determination, or where the travel funding is specifically provided for in the context of a contractual relationship. See Opinions 81-6, 81-31 and 82-28.

The Commission will continue to address, on a case by case basis, situations where individual officials or employees solicit or receive gifts outside of a recognized agency program and apply the Ethics Law as appropriate.

Charitable Fundraising

With respect to raising money for charitable causes, the Ethics Law contains certain limitations. As stated above, State employees and officials should not solicit gifts, which would include charitable donations, in their official capacities. If they wish to make or solicit donations as private citizens, not connected to their State positions and not using State resources, they are free to do so. Even in their private capacities, however, they should refrain from fundraising activities that involve solicitation of lobbyists and individuals or entities subject to their contractual or regulatory authority or that of their agency. See Opinion 90-07.

Related to the restrictions on soliciting gifts is a prohibition against State employees and officials using the prestige of their offices or public positions for their private gain or that of another. This prohibition also applies to obtaining contributions for a charity. That is, State employees and officials should not use their positions, to include the authority associated with those positions, to benefit a particular charitable cause, however worthy. This restriction would be violated if reference to one's official title, position or agency affiliation could lead a person to reasonably assume that the agency or the State endorsed the fundraising effort.

The Law does provide for an exception to the prestige of office prohibition. The exception states that “[t]he performance of usual and customary constituent services without additional compensation, is not prohibited under subsection (a) of this section.” The “constituent services” exception, by its very title, applies to elected officials who have a constituency, and for purposes of this memorandum is limited in its application to elected Executive Branch officials (members of the Legislative Branch should seek guidance on the application of the exception from the Joint Committee on Legislative Ethics). Even where the exception applies to provide greater leeway to elected officials, in the area of charitable fundraising the Commission has indicated in previous advice that these officials should refrain from direct solicitation.

Unsolicited Gifts

In General

In addition to the strict prohibition on solicitation of gifts, the Ethics Law limits acceptance of unsolicited gifts by officials and employees if the gifts are from a **controlled donor**⁵ as set forth in § 5-505 (b). Controlled donors include individuals or businesses that: 1) do business with or seek to do business with the official's or employee's agency; 2) are regulated by the official's or employee's agency; 3) have private interests that can be impacted by an official's or employee's performance of his/her duties; or 4) are regulated lobbyists with respect to matters within the jurisdiction of the official or employee. Any analysis of a question concerning the application of the Law's gift limitations necessarily begins with the question: is the gift being given by a controlled donor? If the answer to that question is “no”, the gift limitations do not apply and the unsolicited gift may be accepted. On the other hand, if the answer to the question is “yes”, further analysis is required to determine if one of the

⁵ The term “controlled donor” is not found in the Ethics Law but is commonly used by the Commission to collectively define the categories of donors from whom unsolicited gifts may not be accepted unless an exception applies.

exceptions in § 5-505 (c) applies.⁶ The several exceptions permit an otherwise prohibited gift to be accepted, provided the gift would not: 1) impair the impartiality or independent judgment of the official or employee; or 2) give the appearance of impairing the impartiality and independent judgment of the official or employee.

Exceptions

The following gifts constitute exceptions to the Law's gift prohibitions and may be accepted from a controlled donor:

- Meals and Beverages consumed in the presence of the donor or sponsoring entity.⁷ The key here is that the donor/sponsor of the meal must be in attendance. The offer of a gift of a meal where the donor/sponsor does not participate is not covered by this exception. If the value of the meal exceeds \$20, or the donor provides two or more meals with a cumulative value of \$100 or more, the meal(s) must be reported on the recipient's financial disclosure statement.

Special exception for public officials who are members of a legislative staff (generally higher level managers, committee counsel, etc., who are designated by the presiding officers of the General Assembly). These individuals, while regulated by the State Ethics Commission, are subject to different meals and beverages rules from those discussed above for employees/officials of the executive branch. These individuals may accept meals and beverages only at receptions to which all members of a designated legislative unit are invited, in the company of or on behalf of an invited member of the General Assembly. Gifts received under these circumstances need not be included on the recipient's financial disclosure statement.

- Conference or Meeting Participation. Reasonable expenses for food, travel, lodging, and scheduled entertainment⁸ may be accepted to attend a meeting or conference by an official or employee if the official/employee is a scheduled speaker or scheduled panel member. In the case of an Executive Branch official, if the anticipated value of the expense exceeds \$500, and is being paid by a regulated lobbyist (including an entity that employs a lobbyist), the official must notify the Ethics Commission by letter prior to attending the meeting. If the value of the expenses exceeds \$20, the event must be reported on the recipient's financial disclosure statement.
- Ceremonial Gifts or Awards of Insignificant Monetary Value. A plaque or similar award that is purely ceremonial may be accepted without regard to its value, provided the gift would not impair or appear to impair an official's or employee's impartiality or independence of judgment. Consumer items, as opposed to ceremonial gifts or awards, are not covered under

⁶ Note that an agency may impose stricter limitations on gifts than those contained in the Ethics Law, and in such cases the agency limitations govern. Before accepting a gift that is permitted as an exception under the Ethics Law, officials and employees should check with their agencies to determine if an agency-imposed restriction applies.

⁷ As noted previously, this memorandum does not address the gift law as it applies to members of the General Assembly. The law as it pertains to legislators differs in certain instances, notably in the area of meals and beverages. Questions should be directed to the Ethics Advisor to the General Assembly.

⁸ The term "scheduled entertainment" does not include activities requiring active participation as opposed to passive enjoyment. Therefore, activities such as golfing, hunting, boating (unless the boating event is part and parcel of a meal and beverage event) and similar participatory events are not acceptable scheduled entertainment and exceptions to the gift prohibitions. The Commission previously stated in Opinion 82-7 that if participation in such activities is viewed as an essential agency function, the costs can be officially budgeted.

this provision. Note that the greater the value of an award (other than a purely ceremonial award), the more likely it can be viewed as an impairment of impartiality or independence of judgment. Specific questions should be directed to Commission staff. If the value of the ceremonial gift or award exceeds \$20, it must be reported on the recipient's financial disclosure statement.

- Trivial Gifts of Informational Value. Books, pamphlets or other items with an informational purpose may be accepted. The Law does not prescribe a value limit for this category of gifts, and the Commission has chosen not to strictly define such a limit. However, depending on the nature of such a gift, if it exceeds \$20 in value it may be viewed as an impairment of impartiality or independence of judgment. Specific questions should be directed to Commission staff. If the value of the gift exceeds \$20, it must be reported on the recipient's financial disclosure statement. This exception applies to Executive Branch officials or employees.
- Gifts of Nominal Value. Miscellaneous unsolicited gifts (e.g. coffee mugs, baseball caps) not exceeding \$20 in cost may be accepted. This exception does not cover meals, alcoholic beverages or tickets to sporting events.
- Tickets or Free Admission. Elected constitutional officers (Governor, Lieutenant Governor, Comptroller, Attorney General, State's Attorney, clerk of the circuit court, register of wills, sheriff) may accept tickets or free admission to a charitable, cultural or political event⁹ from the person sponsoring or conducting the event as a courtesy or ceremony to the office. The donor must be the person sponsoring or conducting the event – a gift of a ticket from a regulated lobbyist, a contractor with the recipient's agency or a person or entity regulated by the recipient's agency would not be acceptable if the donor was not sponsoring or conducting the event. If the value of the ticket or admission exceeds \$20, it must be reported on the recipient's financial disclosure statement.

Miscellaneous Gift Issues

- Cash and Gift Cards. Cash and gift cards from controlled donors are never acceptable, regardless of the purpose or the value.
- Tickets to Sporting Events. Tickets to sporting events from controlled donors are never acceptable, regardless of the purpose or the value.
- Gifts from Governmental Entities. Gifts from governmental entities, whether federal, state, local or foreign, are not regulated by the Ethics Law. So, for example, tickets to sporting events from a governmental entity (e.g. a ticket to a sporting event from the University of Maryland or the Maryland Stadium Authority) may be accepted and need not be reported on the recipient's financial disclosure statement. Note, however, that a ticket to a University of Maryland sporting event, provided by a lobbyist, is not acceptable. The focus is on the identity of the donor, not the event.

⁹ In the case of elected constitutional officers of the Executive Branch, the State Ethics Commission determines if an event qualifies as a charitable, cultural or political event. As noted previously, this memorandum does not address the gift law as it applies to members of the General Assembly, and questions pertaining to tickets or free admissions, including if an event qualifies as a charitable, cultural or political event should be directed to the Ethics Advisor to the General Assembly.

- Ticketed Events. If an event requires a ticket for admission, even if the event is centered on a meal, it is treated under the “tickets or free admission” exception that is available only to elected constitutional officers.
- Discounts for Goods and Services. State employees may accept a discount from a controlled donor if it is one that is provided to the public generally. Similarly, discounts offered to all State employees (e.g. State employees’ night at Camden Yards) may be accepted. However, a discount from a controlled donor that targets a subset of State employees (e.g. employees of a particular agency) may not be accepted. Questions concerning discounts offered by controlled donors are often fact specific and should be addressed to Commission staff.
- Door Prizes, Raffles and Similar Awards. State employees who attend a conference or similar event in their official capacities (i.e. on State time, at State expense, etc.) are not permitted to accept door prizes, raffles or similar awards they may win in excess of the \$20 (nominal) value. State employees who win a prize in excess of \$20 should return it or give it to their respective agencies. If entering a prize drawing is voluntary (as contrasted to being automatically entered as an attendee), the best approach is to refrain from participating in the first place (*see* footnote 5 concerning an agency’s ability to impose stricter gift law limitations). Organizations that give prizes with a value of \$100 or more may become a lobbyist if the prize is awarded to an official or employee of the Executive Branch (*see Donor as a Lobbyist* discussion, below).
- Bonus Program Points. The State’s Standard Travel Regulations, which can be found at COMAR 23.02.01.03, should be consulted concerning the ability of an employee to accept bonus points and similar awards offered by airlines, hotels, etc. to travelers when a State employee is engaged in travel involving official State business.
- Lobbyists and Weddings. The Commission has determined that gifts consistent with traditional wedding activities (including the cost of related receptions) are purely “personal and private” in nature, acceptance of which would not be detrimental to the impartial conduct of government. Accordingly, State employees and officials may attend a lobbyist’s wedding and related events, and may invite lobbyists to their own weddings and accept reasonable gifts from them, as exemptions from the restrictions under the Ethics Law. The same holds true if the gift is from a lobbyist who is related to the employee or official by marriage or is otherwise a member of the employee’s or official’s household. If the value of the gift or reception exceeds \$20, or is part of a series of gifts from the same donor totaling \$100 or more, it must be reported on the recipient’s financial disclosure statement,¹⁰ except that a gift received from a member of the immediate family, another child, or a parent of the recipient need not be reported. Where an invitation includes a “guest”, the official’s financial disclosure statement must include the value of the reception for the guest, if that guest is a spouse or dependent child. The Commission also views the cost of a lobbyist’s wedding reception as a gift from the lobbyist, whether or not the lobbyist pays for it. As noted above, this determination does not apply to members of the General Assembly, who should seek advice from the Ethics Advisor to the General Assembly. Lobbyists should consult the Commission’s Special Information Memorandum on gift reporting for guidance on their reporting requirements in this area.

¹⁰ The Commission rejected a suggestion that the cost of a wedding gift could be offset by the cost of the reception, thereby eliminating the need for a recipient to report the gift or the value of the reception on his/her financial disclosure statement. The Commission views full disclosure and transparency as key elements of this exemption.

Gift to the State

The Commission has, both in advisory opinions and informal advice, determined that some gifts which would normally be prohibited by the Ethics Law may be accepted as a “gift to the State” (or similarly, a gift to the agency). For example, in the case of a donor’s offer to pay travel expenses, the Commission has in some situations found such payments to be acceptable as a gift to the State, rather than a gift to the official or employee who actually used the funds, where the travel involved activity that was “of direct and quantifiable benefit” to the State (*see* footnote #3 with respect to contractual provisions that address payment of travel expenses). In determining that certain gifts of travel expenses may be acceptable as a gift to the State, the Commission has provided the following cautionary advice:

Some such gifts, though arguably related to an employee's official duties, may result in improper influences on employees that destroy the arm’s length bargaining relationships that should exist between the State and those doing or seeking to do business with it. For example, we have disapproved provision of expenses where the donor was plainly offering a seminar as part of a general sales/public relations effort. Opinion No. 81-43. We have also barred acceptance of travel expenses by employees in connection with review of a potential vendor's facilities outside of the normal procurement process. Opinion No. 81-46. Nor do we think that gifts should be viewed as to the agency where they are only generally related to agency interests and they involve personal entertainment and favors accruing to the employee personally. Opinion No. 82-7.

Opinion 82-28.

The Commission has also applied the “gift to the State” analysis in cases where tangible items are provided to an employee/official which would be prohibited by the Ethics Law if given to that employee/official. Unlike an offer to pay travel expenses (which can normally be reviewed by the Commission prior to the funds being accepted), a situation involving a tangible gift (a book, a jacket, a painting, etc.) may not allow a recipient to seek advice from the Commission prior to the gift being conveyed. A tangible gift is also different in that a recipient can usually pass it directly to his/her agency without obtaining any benefit from it (in contrast to travel expenses, which are actually utilized by the official/employee). As stated above in the context of travel expenses, the Commission has pointed out that, to be a gift to the State, the gift must actually be of direct and quantifiable benefit to an agency program or to the State.

Recognizing that not every situation can be envisioned or addressed in advance, the Commission strongly encourages officials/employees to seek advice when a gift situation arises, including an offer to pay travel expenses, that has the potential to qualify as a gift to the State.

NOTE: Gifts deemed to be acceptable gifts to the State under the Public Ethics Law must also comply with DBM Policy 02.01.08, Gifts and Grants Acceptance Policies and Procedures. See also the State Finance and Procurement Article, §2-201 (Gifts; Governor Approval) and General Provisions Article, §1-109.

Honoraria

The Ethics Law defines an honorarium as the payment of money or anything of value for: 1) speaking to, participating in, or attending a meeting or other function; or 2) writing an article that has been or is intended to be published. The Ethics Law excludes a payment for writing a book that has been or is intended to be published from the definition of honorarium.

Section 5-505(d) (2) of the Law spells out the conditions under which an employee may accept an honorarium. An official or employee may accept an honorarium if: 1) it is limited to reasonable expenses for the official's or employee's meals, travel, and lodging, and reasonable and verifiable expenses for care of a child or dependent adult that are actually incurred; 2) the honorarium consists of certain gifts otherwise permitted by the Law, specifically ceremonial gifts or awards of insignificant monetary value, unsolicited gifts of a nominal value (do not exceed \$20 in cost); or 3) the employee is a faculty member of a State institution of higher education who does not hold another position as an official that precludes receiving the honorarium.¹¹

In some circumstances the Commission has treated payments as "fees for services rendered" rather than honoraria, removing the question from the honoraria provisions and assessing it as a secondary employment issue. In Opinion 83-11, the Commission considered whether an assistant attorney general who gave a lecture at a course on Maryland construction law could retain a \$100 payment he received for giving the lecture. The Commission determined he could do so under the secondary employment provision of the Ethics Law, but only after concluding that the fee was not for activities that related directly and immediately to the employee's State duties, because if the payment was so related, the lecture was not authorized secondary employment.

Donor as a Lobbyist

Under the lobbying portion of the Ethics Law (subtitle 7), a person becomes a lobbyist, if, for the purpose of influencing any executive action, he/she spends a cumulative value of at least \$100 for gifts (including meals, beverages and special events) to one or more officials or employees of the Executive Branch. A person also becomes a lobbyist if, for the purpose of influencing any legislative action, he/she incurs cumulative expenses of at least \$500. The cost of gifts to legislators would be counted toward the \$500 expense total. The lesson here is that in giving gifts, a donor must be cognizant that the gifts may result in his/her becoming a lobbyist, subject to registration with and regulation by the State Ethics Commission.

Conclusion

An official or employee should be aware that refusing a gift that is offered is always appropriate under the Ethics Law, and may be the best way to handle a situation when questions arise about the acceptability of a gift. When in doubt, contact the State Ethics Commission for advice and guidance.

¹¹ Note that only the third category (faculty members) permits acceptance of a sum of money that is not connected to actual expenses incurred.