



Everyday Ethics for Local Officials

The Gift That Keeps on Giving: Changes to the Gift Rules

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QUESTION

I understand that there are a number of new regulations that modify the Fair Political Practices Commission's gift rules. Can you provide a summary? Why are these rules so complicated?

ANSWER

In 2008, the Fair Political Practices Commission (FPPC) did indeed make modifications to the Political Reform Act's gift rules. One of these changes - the increase in the limit on the annual monetary value of gifts local officials may receive - is very straightforward. Other changes narrow the previous exceptions to the gift reporting and limit requirements; thus, they are more complex.

Here are the highlights. As always, local officials are encouraged to consult with their agency attorneys or the FPPC on specific questions regarding Political Reform Act requirements. Many of these regulations are very complex, and their application in any given situation is not always entirely clear.

Gift Limit Adjusted Upward

In 2008, the rule was that local officials could not accept gifts from a single source that totaled more than \$390 for a calendar year.¹ In addition, gifts can also be the basis of having a disqualifying conflict of interest. The threshold to keep in mind was \$390 over the 12-month period prior to a matter involving the gift-giver coming before the public agency for consideration.² And, of course, gifts totaling \$50 or more must be reported on one's Statement of Economic Interests.³

For 2009-10, the threshold has been changed to \$420.⁴ This means that those officials who are subject to the gift limits may not accept gifts totaling more than \$420 from a single source. For purposes of the disqualification analysis, a local official must evaluate

whether someone involved in a decision has given the official gifts totaling \$420 or more during the preceding 12 months.

Exceptions Narrowed

When considering the gift reporting requirements and gift limits, it's important to keep in mind that for Political Reform Act purposes the concept of a gift is much broader than the kinds of gestures that occur at birthdays and holidays. Any time an official receives something of value from someone, it is considered a gift. This includes meals, entertainment (for example, concert or sporting event tickets) and some forms of travel.⁵

Even though the concept of what constitutes a reportable gift to a public official is broad, a few exceptions exist for certain kinds of gifts that would otherwise be reportable and subject to the annual gift limit. The effect of the 2008 changes has been to narrow some of these exceptions. This means more gestures that benefit public officials are subject to public disclosure and limitation.

Keep in mind that the gift rules reflect a general presumption that if someone does something nice for a public official, the public has a right to know about it. These transparency rules don't make a judgment on whether a public official's decisions might be affected by such gestures. However, by requiring that gifts be disclosed, the rules enable the media and the public to make their own assessment.

Political Fundraiser Tickets

For example, from time to time a public official will be invited by candidates or ballot measure campaigns to attend political fundraisers. The rule now is that a committee or candidate may provide one ticket per event to an official without the invited official having to report the value of the ticket on his or her Statement of Economic Interests.⁶

If the official receives more than one ticket, the face value of the extra tickets must be reported on his or her Statement of Economic Interests.

Nonprofit Fundraiser Tickets

What if a public official receives a free ticket to a local Boys and Girls Club fundraiser? Let's say that the face value of the ticket is \$150; \$80 of that amount covers the cost of the event (food, beverages, entertainment and any gifts to attendees) and \$70 is the amount that goes to the club as the actual donation. The official either knows this because that's what is printed on the face of the ticket or the official asks the club what the official's proportionate share of the food, beverages, gift items or entertainment is at the event.⁷ The official's course of action depends on who is giving the ticket.

Tickets to Fundraisers From 501(c)(3)s

Previously, an official could accept an unlimited number of tickets to qualifying nonprofit fundraisers without having to report those tickets as gifts. It also didn't matter from whom the official received the tickets - the nonprofit or those who had purchased tickets from the nonprofit.

Now, in order to avoid having the ticket be considered a reportable gift, the official may receive only one ticket per event from the nonprofit.⁸ Moreover, the nonprofit has to qualify as exempt from taxes under section 501(c)(3) of the Internal Revenue Code.⁹

In the previous example, if the Boys and Girls Club is a 501(c)(3), then an official may generally accept one such ticket from the club without having to report the gift on his or her Statement of Economic Interests. However, the official must be mindful of limits on the value of what he or she receives as a result of attending this fundraiser and others over the course of the year.

This is because the club, in essence, is giving the official \$80 in the club's costs for the food, beverages, gifts and entertainment associated with the event. Because officials receive these tangible benefits from attending the fundraiser, the rules require officials to keep track of the value of food, beverages, gifts and entertainment at fundraisers from each nonprofit organization over the course of a year.¹⁰ Because it is giving the ticket as a gift, the club does not receive the \$70 donation portion of the ticket, which would have been a benefit to the club, not to the official, and is not an out-of-pocket cost for the club.

In this example involving the Boys and Girls Club, the official should put a note in his or her records about the \$80 in actual benefits (food, drink, etc.). Should the official receive any other invitations to events from the Boys and Girls Club, the official should keep a running tally of the total amount of meals, beverages, etc. received from the Boys and Girls Club over the course of a year.

Suppose the Boys and Girls Club holds these fundraisers every other month and invites the official to all of them. The official can accept the invitation to five of the fundraisers (for a total value of \$400 in meals) but must decline or pay for the sixth fundraiser, to avoid exceeding the annual gift limit of \$420.

What if the fundraiser is particularly fancy and the tickets are \$1,000 each? Let's say the value of the food, beverages, party favors and any entertainment at the event was \$450 because the entertainment involved a famous comedian who charges the fundraiser's organizers a significant fee to perform.

If the club gives a public official a ticket to this kind of event, the official would need to either decline the invitation to attend or pay for at least \$31 of the \$450 meal and other costs associated with attending. Otherwise, acceptance of the ticket would put the official over the \$420 gift limit threshold.

Tickets to Fundraisers From Non-501(c)(3)s

What if the official receives the ticket from a company, the XYZ Development Company, which purchased a table at either of these Boys and Girls Club events (the fancy event and the not-so-fancy event)? In this scenario, the official could accept the ticket to the not-so-fancy event and report that he or she received a gift of \$80 (the actual cost of the event) from the company. The official does not have to report the \$70 donation portion of the ticket, since that money benefits the Boys and Girls Club, not the official.

For the fancy \$1,000 event where the value of the food, beverages, gifts to attendees and entertainment was \$450, the official would have to say, "Thanks, but no thanks" because accepting the ticket would exceed the \$420 gift limit from the company. Alternatively, the official could reimburse the XYZ Development Company for \$31 or more, to bring the total amount of benefit the official receives from attending the fundraiser to less than \$420. The official would also have to report the amount (in this example, \$419) on his or her Statement of Economic Interests.

The same scenario would occur if the same fundraiser was for a non-501(c)(3), such as a local chamber of commerce. The official would need to report the value of any food, drinks, gift items and entertainment he or she received of \$50 or more by attending the fundraiser. Again, the total value of such food, drink, gift items and entertainment from the nonprofit could not exceed \$420 over the course of a single year.

Gifts to an Agency

From time to time, individuals and companies will make a gift to a public agency as opposed to an individual public official. Some gifts, of course, aren't used by individual officials (for example, land for a new library or ballpark). Other kinds of gifts (say a voucher for a night at a hotel, or a discounted lease rate on vehicles), are more typically used by identified officials in the performance of their duties for the agencies.

The Fair Political Practices Commission made significant changes on how public agencies treat these gifts. In addition to limiting how the gifts may be used, the changes require local agencies to adopt policies and disclose both the policies and how individual gifts are handled.

Non-Ticket Gifts to an Agency

Any time an agency receives a gift, it must report:

- The amount of the gift and the date it was received;
- Who gave the gift, their address and, if the gift-giver is not an individual, the nature and interests of the entity that gave the gift;

- If the person or entity providing the gift raised funds from others in order to be able to give the gift, then information about these contributing individuals or companies;
- How the agency used the payment/gift (including, if the gift was used for travel, the date and place(s) of travel and a breakdown of total expenses for transportation, lodging, meals and other expenses); and
- The name title and department of the official who used the payment/gift.¹¹

This report must be made within 30 days of using the gift.¹² The report is a public record¹³ and must be accessible either through the agency's website or, if it doesn't have a website, it must be accessible from the Fair Political Practices Commission's website.¹⁴ These forms must be kept on file for four years.¹⁵

Note that the rules also limit who may use the gift. The gift-giver can't designate by name or type of position who may use the gift.¹⁶ If the gift,¹⁷ would involve a personal benefit to a public official, the agency head decides who will use it but can't decide to use it him- or herself.¹⁸

Special rules apply to who may use gifts of travel, meals or beverages. In the past, elected or other high level officials would use those gifts (for example, to study a development project similar to one being proposed in their jurisdictions). Under the new regulation, elected officials and certain department heads¹⁹ cannot use a gift if it involves travel, meals or beverages.²⁰ Gifts of travel also cannot exceed the agency's adopted reimbursement rates.²¹ And, of course, the gift must be used for official agency business.²²

The rules include exceptions for higher education research projects and federal payments for education or other inter-agency programs.²³

Ticket Gifts to Agency

Special rules apply if a public agency receives tickets or passes from outside entities. The threshold question is who should use the tickets. As with any use of public resources, the question turns on the agency's analysis of what identifiable, worthy public purposes might be served in how the tickets are used. For example:

- The agency might re-gift the passes by giving them to a community group or others. For example, the Police Athletic League might be able to enhance its program supporting physical activity, teamwork and sportsmanship if the tickets are to a sporting event involving teams that can help underscore these themes.

- If the agency has an “Employee of the Month” program designed to recognize superior performance and good ethics, a worthwhile public purpose might be to use the tickets to recognize such performance.
- If there are employees’ whose responsibilities require them to be at the event, then having them attend satisfies a public purpose. Note that the responsibilities must be in writing.

The key task is for the public agency to identify underlying, worthwhile public purposes for the use of any gifts of tickets in a policy that is posted on the agency’s website.²⁴ The Fair Political Practices Commission rules explain what the policy must contain.

If such use involves public officials otherwise subject to the gift limit and reporting requirements, the tickets are not subject to the limit and reporting requirements if:

- The agency decides who should use the ticket or pass consistent with its adopted policy; and
- The gift giver plays no role in the decision on who should use the ticket.²⁵

No matter who uses the tickets, the agency must disclose publicly on its website (on a form provided by the FPPC), how it used the tickets (or the FPPC’s website, if the agency doesn’t have a website).²⁶

Add an Ethics Section to the Public Agency’s Website

The Fair Political Practices Commission’s rules place a heavy emphasis on posting information on agency websites.

One idea is to create a section on the public agency website that includes all ethics-related information about the agency. Examples could include any ethics-oriented mission and values statements, any agency adopted code of ethics, any signed statements from public officials agreeing to abide by the code of ethics, statements of economic interests, and of course, policies and disclosures required to be posted on an agency website by Fair Political Practices Commission rules.

This puts the required postings in context with an agency’s overall commitment to ethics.

Gifts of Tickets in General

Gifts of Tickets from Private Individuals or Entities

Special rules apply to gifts of tickets that give a public official admission to a facility, event, show, performance and the like. If the gift is from a person or company, the official must report the face value of the ticket on his or her Statement of Economic Interests. An exception is if the official can demonstrate that he or she performed a role or function at the event, in which case the official is in essence showing that he or she received the ticket in exchange for services performed at the event.²⁷

Valuing the Cost of Travelling on Private Aircraft

Gifts of travel are of course reportable and subject to the annual limit. The value of travel given on a commercial aircraft is the value of the fare the commercial airline would charge a member of the public. In terms of valuing travel received on non-commercial aircraft, the Fair Political Practices Commission amended the regulations to say that the way to calculate the value of a seat or seats on the plane is:

The normal charter fare or rental charge for an airplane of comparable size

Divided by

The number of public officials (as defined) on the flight.²⁸

Then the official needs to add the value of any additional benefits (food, beverages and entertainment), unless that is already included in the commercial or charter fare.²⁹

Why Are These Rules So Complicated?

Originally, the Fair Political Practices Commission carved out broader exceptions to the gift reporting rules for tickets to fundraisers, as well as gifts to and from public agencies. One interpretation of the recent amendments to the rules is that the Fair Political Practices Commission believed that these exceptions (what some might have called them “loopholes”) were being abused--hence the narrowing of the exceptions.

This underscores a general dynamic with respect to ethics regulations. Most started out as fairly general and straightforward. Regulators add layers of complexity in response to charges that, in essence, the rules are not fully doing their job of promoting public trust and confidence in public officials. This usually is because the regulators receive reports of instances in which public officials engage in conduct that may not conflict with the letter of the rules, but does conflict with the spirit of the rules.

This dynamic, and the frustrations that such complex rules create for local officials, is why it can be a wise strategy to set one's sights higher than the law's minimum requirements when faced with a situation that could potentially diminish the public's trust. Walking too close to the line that divides legal from illegal conduct not only is a legally risky strategy (since the rules are sufficiently complex that this line is not always clear), but it invites further regulation.

When It Is Better to Neither Give Nor Receive

The law is clear that any use of public resources must serve public, as opposed to personal or political purposes.³⁰ This is one of the reasons that even charitable contributions by a public agency should be accompanied by findings on how supporting that charity benefits the taxpayers in the agency's jurisdiction.

Moreover, personal or political use of public resources subject an official to both fines and jail time.³¹

Now, new Fair Political Practices Commission rules seem to say that any time a public agency uses resources to benefit an official, as opposed to the public, the official must consider those benefits a gift subject to the reporting requirements and gift limits. More specifically, the rule says that any time an agency pays for an official's food, beverages, entertainment, goods, or services, those payments must be reported by the official as a gift, unless the payment is a lawful expenditure of public moneys.³² The rule includes an exception for nominal amounts.

Local agency attorneys believe that the regulation is designed to prevent paying for things that benefit a public official personally, without any corresponding public benefit. Examples might include purely social dinners, greens fees for golfing, or a birthday present. Local agency attorneys interpret this regulation as not precluding such things as working lunches or dinner before a meeting.

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ILG gratefully acknowledges Michael Martello's assistance with this column. Martello is city attorney of Mountain View and chairs the League's City Attorneys Department Fair Political Practices Commission (FPPC) Committee.

Endnotes:

- ¹ 2 Cal. Code Regs. § 18940.2; Cal. Gov't Code § 89503.
- ² 2 Cal. Code Regs. § 18703.4.
- ³ Cal. Gov't Code § 87207(a)(1).
- ⁴ 2 Cal. Code Regs. § 18940.2; Cal. Gov't Code § 89503.
- ⁵ Cal. Gov't Code § 82028(a).
- ⁶ 2 Cal. Code Regs. § 18946.4(c).
- ⁷ 2 Cal. Code Regs. § 18946.4(a)(1) and (2).
- ⁸ 2 Cal. Code Regs. § 18946.4.
- ⁹ 2 Cal. Code Regs. § 18946.4(b).
- ¹⁰ 2 Cal. Code Regs. § 18946.4(b).
- ¹¹ 2 Cal. Code Regs. § 18944.2(c)(3).
- ¹² 2 Cal. Code Regs. § 18944.2(c)(3).
- ¹³ 2 Cal. Code Regs. § 18944.2(c)(3)(D).
- ¹⁴ 2 Cal. Code Regs. § 18944.2(c)(3)(F).
- ¹⁵ 2 Cal. Code Regs. § 18944.2(c)(3)(G).
- ¹⁶ 2 Cal. Code Regs. § 18944.2(c)(1).
- ¹⁷ See 2 Cal. Code Regs. § 18944.2(b)(1) (Note that section 18944.2 (c)(1) refers to the agency controlling the use of the "payment." Section 18944.2(b)(1) defines "payment" as including a monetary payment for, or provision of goods and services to, an agency).
- ¹⁸ 2 Cal. Code Regs. § 18944.2(c)(1).
- ¹⁹ 2 Cal. Code Regs. § 18944.2(d)(1) (section 87200 filers).
- ²⁰ 2 Cal. Code Regs. § 18944.2(d)(1).
- ²¹ 2 Cal. Code Regs. § 18944.2(d)(2).
- ²² 2 Cal. Code Regs. § 18944.2(c)(2).
- ²³ 2 Cal. Code Regs. § 18944.2(e) and (f).
- ²⁴ 2 Cal. Code Regs. § 18944.1(c).
- ²⁵ 2 Cal. Code Regs. § 18944.1(b)(2).

²⁶ 2 Cal. Code Regs. § 18944.1(d).

²⁷ 2 Cal. Code Regs. § 18944.1(a).

²⁸ 2 Cal. Code Regs. § 18946.6(b).

²⁹ 2 Cal. Code Regs. § 18946.6(c).

³⁰ *See* Cal. Gov't Code § 8314(c); Cal Penal Code § 424(a).

³¹ *See* Cal. Gov't Code § 8314(c); Cal Penal Code § 424.

³² 2 Cal. Code Regs. § 18944.3.