



## NEW YORK STATE COMMISSION ON PUBLIC INTEGRITY

### GUIDELINES CONCERNING THE PROPRIETY OF A STATE AGENCY ACCEPTING GIFTS

Gifts may occasionally be offered to State agencies. A gift may benefit the agency's official purposes. The Guidelines that follow are intended to provide guidance to State agency heads and ethics officers concerning the acceptance of such gifts. For the purposes of these Guidelines, a "gift" is anything of more than nominal value offered or given to a State agency under circumstances in which it may be reasonable to infer that the gift was intended to influence an action or decision of the State agency.

The Guidelines are not intended to provide answers to questions raised by specific factual situations. Rather, the Guidelines provide best practices as guidance for those instances when a State agency is offered or given a gift. These Guidelines are not binding upon the New York State Commission on Public Integrity ("Commission") in any action or proceeding.

#### STANDARDS FOR ACCEPTANCE OF GIFTS BY A STATE AGENCY

The former New York State Ethics Commission ("Ethics Commission") issued several Advisory Opinions concerning the propriety of a State agency accepting a gift.<sup>1</sup> In Advisory Opinion No. 92-1, the Ethics Commission offered several guidelines as to when it would be permissible for an agency to accept a gift. First, it is necessary to determine whether the agency has the statutory authority to accept gifts. An agency ought to seek guidance from the Attorney General to ascertain whether it has such authority. If the Attorney General determines that the State agency does not have the statutory authority to accept gifts, then the agency, in consultation with the Attorney General and, perhaps, others, may determine an alternative course of action.

**EXAMPLE:** State Agency A participated in a conference with other entities, which included vendors. During the conference, booths were set up for the vendors to display their products and explain their services. At the conclusion of the conference, one of the vendors wanted to donate their product to State Agency A. The product would benefit the agency's official purposes. State Agency A, however, did not have the statutory authority to accept gifts. After consultation, it was determined that State Agency B had the requisite authority to accept the gift on behalf of State Agency A. Once it was determined that there was an avenue to accept the gift, since the product was more than nominal value, State Agency A still had to ascertain whether it was reasonable to infer that the gift was offered or given to influence an action or decision of State Agency A.

Second, if the agency has the requisite statutory authority to accept gifts, the Ethics Commission stated in Advisory Opinion No. 92-1 that the agency head's authority to accept gifts from regulated persons and entities "must be tempered by consideration of Public Officers Law §73(5) which precludes accepting gifts under certain circumstances, and §74 which prohibits conflicts of interest." While these statutory provisions are not directly applicable to gifts to agencies, they serve as guidelines. Therefore, the agency head "must at all times be cognizant of actual and potential conflicts of interest when accepting contributions ...."

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<sup>1</sup> The Public Employee Ethics Reform Act of 2007 created the New York State Commission on Public Integrity. The thirteen-member Commission assumed the powers of the New York State Ethics Commission and the New York Temporary State Commission on Lobbying. See, Chapter 14 of the Laws of 2007. Executive Law §94(1) states that "[t]his section shall not revoke or rescind any regulations or advisory opinions issued by the state ethics commission and the temporary lobbying commission in effect upon the effective dates," *i.e.*, September 22, 2007.

The agency head must take reasonable steps to assure that gifts are not accepted from individuals or entities where it is reasonable to infer that the gift was offered or given with the intent to influence the State agency. Such individuals and entities would include those who are involved in litigation against the agency or under investigation by the agency. The agency must not only remain impartial, but must appear impartial as well.

In addition, it may be reasonable to infer that a gift from other potential donors, such as lobbyists or applicants for permits or licenses, is intended to influence an action or decision of the State agency because of the donor's relationship with the agency. For purposes of determining whether the gift is intended to influence the State agency, the ethics officer should consider the source, timing and amount of the donation before accepting the gift. The donor should not be seen as attempting to curry favor.

**EXAMPLE:** A telecommunications company wants to give new, upgraded cell phones to all the field employees of a State agency. The telecommunications company has an open, pending bid with this State agency to provide telecommunication services to its central office for a five-year period. The State agency has the requisite authority to accept gifts and the additional cell phones for all field employees would benefit the agency's official purposes. However, because there is a pending contract before the agency on another telecommunications matter, the timing of the donation, the source of the donation and amount of the donation are all suspect in these circumstances. Therefore, the offer of new cell phones should be declined.

Finally, since the agency head who was the subject of Advisory Opinion No. 92-1 was authorized to delegate duties to agency employees, the Ethics Commission stated that the authority to accept contributions should not be delegated to those employees involved in the agency's regulatory functions.

The Commission reaffirms the guidance for gifts set forth in Advisory Opinions Nos. 92-1, 95-38, 96-2, 97-6 and 97-10. While it is not possible to identify all gift scenarios, the Commission offers the following guidelines with respect to other circumstances in which gifts may be offered to a State agency.

#### **HOLIDAY GIFTS**

As the Commission discussed in Advisory Opinion No. 08-01, sometimes a gift may be sent to the agency head or other employees with the intent that the gift be shared among others in the agency. Frequently during the holiday season, an agency head may receive candy, fruit or flowers from an individual or entity that is a disqualified source. As indicated above, the agency head must be cognizant, at all times, of actual and potential conflicts of interest when accepting contributions, including during the holidays. The Commission offers the following guidelines concerning this circumstance.

First, if an employee receives such a gift, the employee should promptly notify the ethics officer.

Second, after the ethics officer has been so notified:

- a) If the gift is a non-perishable item, or if the gift is a food item the value of which is more than the cost of returning the gift to the donor, the gift should be returned to the donor with a letter advising that gifts may not be accepted and should not be sent in the future. If the donor continues to send gifts on an annual basis after being notified, the matter may be referred to the Commission.
- b) If the gift is a perishable item, such as flowers, plants or fruit, or if the gift is a food item the value of which is less than the cost of returning the gift to the donor, the item may be placed in a "break room" or public place so that employees or members of the public can partake of it, or the item may be donated to a local charity. In either case, a letter should be sent to the donor advising that gifts may not be accepted and should not be sent in the future. If the donor continues to send gifts on an annual basis after being notified, the matter may be referred to the Commission.



EXAMPLE: A vendor delivers to the main reception desk of a State agency a gift basket of fruit. Since the item is perishable, the gift is donated to the local food pantry. In addition, a letter is sent to the vendor indicating that the gift could not be accepted and was given to the local food pantry, and informs the vendor not to send any other gifts the agency.

### FREE OR SAMPLE ITEMS

State agencies may receive free products in order to determine whether the product will be beneficial to the agency. Services or products may be offered free of charge either on a trial basis or in return for the right to refer to the State agency's use of the product or service for marketing purposes. These types of offers provide the State agency with a potentially beneficial opportunity to try new products and services at minimal or no expense to the State.

In such circumstances, the timing, source and amount of any products or services offered without charge should be considered. No samples may be used for the personal benefit of any State employee. Any subsequent determination to purchase the same or similar product or service must be pursued in a manner consistent with procurement laws and guidelines. If the State agency determines not to accept the offer of product or services, the product should be returned to the donor.

There are also circumstances in which samples of new products are offered to a State agency for the purpose of testing their suitability for use in that agency's facilities. These items are provided in very limited quantities, serve a State agency purpose, and may be utilized or consumed in the testing process. As discussed above, adherence to procurement laws and guidelines is the best method for insuring that the use of such samples does not improperly affect the procurement process.

There may also be situations in which the sample item offered to a State agency for the purpose of testing is not consumable, such as books or computer software. In such circumstances, if the State agency determines that the sample item will not be utilized by the State agency, then the sample item should be returned to the donor.

EXAMPLE: A software company offers to a State agency the use of a new software product that will assist the agency in tracking cases throughout the State. The State agency accepts the offer and uses the software for six months as a demonstration project in one of its regional offices. At that time, the agency determines that it would be beneficial for the State agency to invest in this software for all of the regional offices. The State agency must comply with procurement laws and guidelines when purchasing the additional software.

EXAMPLE: The same software company offers their product on a trial basis to a State agency. After utilizing the software in its regional office, the agency determines that it does not provide all of the necessary programs that the State agency requires. The agency is to return the software to the company.

Under no circumstance may a State officer or employee utilize a sample item for personal use or gain. It is permissible to request a colleague to review or evaluate a sample item to determine whether it would support or promote a State agency purpose. On the other hand, by giving the item to another individual or entity, the State officer or employee may have violated Public Officers Law §74(3)(d), which prohibits a State officer or employee from using his or her official position to secure unwarranted privileges or exemptions for himself or others, or Public Officers Law §74(3)(h), which requires a State officer or employee to pursue a course of conduct that will not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust.



**EXAMPLE:** A State University professor meets with a representative of a text book publishing company who wants the professor to consider to a new series of text books for her students. The representative leaves a sample series for the professor's review. The professor reviews the series and decides not to use that series next semester. The professor then places the sample books on her personal Ebay account, and sells them. The professor has violated Public Officers Law §74(3)(d), which prohibits a State officer or employee from using or attempting to use her official position to secure an unwarranted privilege or exemption for himself or others, and Public Officer Law §74(3)(h), that requires State officers and employees to pursue a course of conduct that will not raise suspicion about the public that she is likely to be engaged in acts that are in violation of her trust.

### **GIFTS FROM OTHER GOVERNMENTAL ENTITIES**

In some instances, a representative from another governmental entity may offer a gift to a unit of a State agency. For example, a local governmental entity may offer a gift to a State agency unit that provided training. Similarly, representatives from a foreign country may offer a gift after visiting a State agency for educational purposes.

Gifts that are offered to a unit of a State agency by another government official or entity, pursuant to their official duties, are generally permissible. We are guided by Public Officers Law §73(8)(e), the "government-to-government exception," which provides that the two-year and lifetime bars do not apply when a former State officer or employee carries out duties as an elected official or employee of a federal, State or local government or agency.

However, there may be instances in which, due to the donor entity's relationship with the State agency, such a gift may be improper depending upon the timing, source and amount of the gift. This would include gifts to agencies that license or regulate the activities of the donor entity, are involved in litigation with the donor entity, or audit the activities of the donor entity. In these circumstances, the guidelines discussed above regarding gifts to a State agency should be considered before accepting such a gift.

**EXAMPLE:** A delegation from a European government meets with State officers and employees to discuss the mass transit system. The delegation members bring a variety of foods from their country as a gift for the State officers and employees. While it is generally permissible to accept the gifts from the delegation, the employees are to notify the Ethics Officer of the gift when it is received. The agency Ethics Officer must be given the opportunity to determine whether it is permissible to accept the gift.

**EXAMPLE:** A State agency provides a two-day training to local government employees on recent changes in the statute that the local government employees are responsible for implementing. The State agency also licenses the activities of the local government agency; however, there are no pending applications for license renewals at the time of the training. The local government employees send a gift basket of fruit as a thank-you for the training. The State officer or employee is to notify the agency Ethics Officers that the gift has been received. Because it is a perishable item, the fruit basket may be put in a "break room" so that any employee may partake. However, a letter should be sent to the local governmental entity advising gifts should not be sent in the future.

**EXAMPLE:** State employees from the central office of region "A" of a State agency visited State employees at the central office of region "B" of the same State agency to learn about their operations and several of their departments. In appreciation for their help with respect to several new initiatives as a result of the visit, the employees of Region A sent gift certificates for coffee and donuts to the central office staff of region B. The acceptance of the gift certificates is permissible. In this instance, the donors are employees from another region within the same State agency.

### **GUIDANCE**

State officers and employees are encouraged to consult with the Commission concerning an offer of a gift to a State agency.

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