

AGENCY RULES

CONFLICTS OF INTEREST BOARD

■ NOTICE

Notice of Adoption of Rule Defining Prohibited Gifts From Lobbyists and Amendments to the "Valuable Gifts" Rule

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Conflicts of Interest Board by Sections 2603(a) and 2604(b)(5) of the New York City Charter and Section 3-228 of the New York City Administrative Code that the Conflicts of Interest Board has adopted a new rule, Section 1-16 of Title 53 of the Rules of the City of New York, defining prohibited gifts by lobbyists, and has adopted certain corresponding amendments to its existing rule on valuable gifts, Section 1-01 of Title 53. Pursuant to a notice published on October 27, 2006, in The City Record, a public hearing was held on the proposed rule on December 8, 2006, at 22 Reade Street, New York, New York. The Board received comments from the City Council and from Citizens Union, as well as a joint comment from the Human Services Council of New York, Lawyers Alliance for New York, and the Nonprofit Coordinating Committee of New York.

The text of the new rule and of the amendments is set forth below.

[New matter is underscored and deleted matter is bracketed.]

§ 1. Section 1-01 of chapter 1 of Title 53 of the rules of the city of New York is amended to read as follows:

SECTION 1-01. VALUABLE GIFTS

(a) For the purposes of Charter §2604(b)(5), a "valuable gift" means any gift to a public servant which has a value of \$50.00 or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form. Two or more gifts to a public servant shall be deemed to be a single gift for purposes of this subdivision and Charter §2604(b)(5) if they are given to the public servant within a twelve-month period under one or more of the following circumstances: (1) they are given to the same person; and/or (2) they are given by persons who the public servant knows or should know are (i) relatives of domestic partners of one another; or (ii) are directors, trustees, or employees of the same firm or affiliated firm.

(b) As used in subdivision (a) of this section: (1) "relative" shall mean a spouse, child, grandchild, parent, sibling, and grandparent; a parent, domestic partner, child or sibling of a spouse or domestic partner; and a spouse or domestic partner of a parent, child, or sibling; (2) firms are "affiliated" if one is a subsidiary of the other or if they have a parent firm in common or if they have a stockholder in common who owns at least 25 percent of the shares of each firm; (3) "firm," "spouse," and "ownership interest" shall have the meaning ascribed to those terms in section 2601 of the Charter; (4) "domestic partner" means a domestic partner as defined in New York City Administrative Code §1-112.21.

(c) For the purposes of Charter §2604(b)(5), a public servant may accept gifts that are customary on family or social occasions from a family member or close personal friend who the public servant knows is or intends to become engaged in business dealings with the City, when:

(1) it can be shown under all relevant circumstances that it is the family or personal relationship rather than the business dealings that is the controlling factor; and

(2) the public servant's receipt of the gift would not result in or create the appearance of:

(i) using his or her office for private gain;

(ii) giving preferential treatment to any person or entity;

(iii) losing independence or impartiality; or

(iv) accepting gifts or favors for performing official duties.

(d) For the purposes of Charter §2604(b)(5), a public servant may accept awards, [and] plaques [valued at less than \$150.00] and other similar items which are publicly presented in recognition of public service, provided that the item or items have no substantial resale value.

(e) For the purposes of Charter §2604(b)(5), a public servant may accept free meals or refreshments in the course of and for the purpose of conducting City business under the following circumstances:

(1) when offered during a meeting which the public servant is attending for official reasons;

(2) when offered at a company cafeteria, club or other setting where there is no public price structure and individual payment is impractical;

(3) when a meeting the public servant is attending for official reasons begins in a business setting but continues through normal meal hours in a restaurant, and a refusal to participate and/or individual payment would be impractical.

(4) when the free meals or refreshments are provided by the host entity at a meeting held at an out-of-the-way location, alternative facilities are not available and individual payment would be impractical; and

(5) [when it is customary business practice to hold a meeting over meals or refreshments and customary business practice for one party to make payment for the other and payment by the public servant would be inappropriate, provided:

- (i) that the selection of the restaurant and the selection of the meal also conform to customary business practice; and
(ii) the public servant, except in the case of an elected official, reports acceptance of such meals or refreshments to his or her agency head on a monthly basis or to a deputy mayor if the public servant is an agency head; and

(6) when the public servant would not have otherwise purchased food and refreshments had he or she not been placed in such a situation while representing the interests of the City.

(f) For the purposes of Charter §2604(b)(5), a public servant may:

(1) accept meals or refreshments when participating as a panelist or speaker in a professional or educational program and the meals or refreshments are provided to all panelists;

(2) be present at a professional or educational program as a guest of the sponsoring organization;

(3) be a guest at ceremonies or functions sponsored or encouraged by the City as a matter of City policy, such as, for example, those involving housing, education, legislation or government administration;

(4) attend [an annual] a public affair of an organization composed of representatives of business, labor, professions, news media or organizations of a civic, charitable or community nature, when invited by the sponsoring organization, provided that this exception does not apply when the invitation is from [a civic, charitable or community] an organization which has business dealings, as defined in Charter Section 2601(8), with, or a matter before, the public servant's agency;

(5) be a guest at any function or occasion where the attendance of the public servant has been approved in writing as in the interests of the City, in advance where practicable or within a reasonable time thereafter, by the employee's agency head or by a deputy mayor if the public servant is an agency head.

(g) For the purposes of Charter § 2604(b)(5), a public servant who is an elected official or a member of the elected official's staff authorized by the elected official may attend a function given by an organization composed of representatives of business, labor, professions, news media or organizations of a civic, charitable or community nature, when invited by the sponsoring organization. For the purpose of this subdivision, the authorizing elected official for the central staff of the council is the speaker of the council.

(h) (1) For the purposes of Charter § 2604(b)(5), a public servant's acceptance of travel-related expenses from a private entity can be considered a gift to the City rather than to the public servant, when:

- (i) the trip is for a City purpose and therefore could properly be paid for with City funds;
(ii) the travel arrangements are appropriate to that purpose; and
(iii) the trip is no longer than reasonably necessary to accomplish the business which is its purpose.

(2) To avoid an appearance of impropriety, it is recommended that for public servants who are not elected officials, each such trip and the acceptance of payment therefore be approved in advance and in writing by the head of the appropriate agency, or if the public servant is an agency head, by a deputy mayor.

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§ 2. Chapter 1 of Title 53 of the rules of the city of New York is amended by adding a new section 1-16, to read as follows:

Section 1-16: Prohibited Gifts From Lobbyists and Exceptions Thereto

(a) Pursuant to Administrative Code § 3-225, no person required to be listed on a statement of registration pursuant to § 3-213(c)(1) of the Administrative Code shall offer or give a gift to any public servant.

(b) For purposes of this section:

(1) the persons required to be listed on a statement of registration pursuant to § 3-213(c)(1) of the Administrative Code include (i) the lobbyist, (ii) the spouse or domestic partner of the lobbyist, (iii) the unemancipated children of the lobbyist, and (iv) if the lobbyist is an organization, the officers or employees of such lobbyist who engage in any lobbying activities or who are employed in such lobbyist's division that engages in lobbying activities and the spouse or domestic partner and unemancipated children of such officers or employees;

(2) the term "lobbyist" shall have the same meaning as used in § 3-211 of the Administrative Code;

(3) the term "offer" shall include every (i) attempt or offer to

give a gift, or (ii) attempt or offer to arrange for the making of a gift;

(4) the term "give" shall include every (i) tender of a gift, or (ii) action as an agent in the making of a gift, or (iii) arrangement for the making of a gift;

(5) the term "gift" shall include any gift which has any value whatsoever, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form.

(c) For purposes of Administrative Code § 3-225 and this section, the following gifts shall not be prohibited:

(1) de minimis promotional items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an organization's name, logo, or message in a manner which promotes the organization's cause;

(2) gifts that are customary on family or social occasions from a family member or close personal friend, when it can be shown under all relevant circumstances that it is the family or personal relationship rather than the lobbying activity that is the controlling factor and the public servant's receipt of the gift would not result in or create the appearance of:

- (i) using his or her office for private gain;
(ii) giving preferential treatment to any person or entity;
(iii) losing independence or impartiality; or
(iv) accepting gifts or favors for performing official duties;

(3) awards, plaques, and other similar items which are publicly presented in recognition of public service, provided that the item or items have no substantial resale value;

(4) free meals or refreshments in the course of and for the purpose of conducting City business under the following circumstances:

- (i) when offered during a meeting which the public servant is attending for official reasons;
(ii) when offered at a company cafeteria, club or other setting where there is no public price structure and individual payment is impractical;
(iii) when a meeting the public servant is attending for official reasons begins in a business setting but continues through normal meal hours in a restaurant, and refusal to participate and/or individual payment would be impractical;
(iv) when the free meals or refreshments are provided by the host entity at a meeting held at an out-of-the-way location, alternative facilities are not available and individual payment would be impractical; or
(v) when the public servant would not have otherwise purchased food and refreshments had he or she not been placed in such a situation while representing the interests of the City.

(5) meals or refreshments when participating as a panelist or speaker in a professional or educational program and the meals or refreshments are provided to all panelists;

(6) invitation to attendance at professional or educational programs as a guest of the sponsoring organization;

(7) invitation to attendance at ceremonies or functions sponsored or encouraged by the City as a matter of City policy, such as, for example, those involving housing, education, legislation or government administration;

(8) invitation to attendance at a public affair of an organization composed of representatives of business, labor, professions, news media or organizations of a civic, charitable or community nature, when invited by the sponsoring organization;

(9) invitation to attendance by a public servant who is an elected official, a member of the elected official's staff authorized by the elected official, or a member of the central staff for the council authorized by the speaker of the council at a function given by an organization composed of representatives of business, labor, professions, news media or organizations of a civic, charitable or community nature, when invited by the sponsoring organization;

(10) travel-related expenses from a private entity which is offered or given as a gift to the City rather than to the public servant, so long as: (i) the trip is for a City purpose and therefore could properly be paid for with City funds; (ii) the travel arrangements are appropriate for that purpose; and (iii) the trip is no longer than reasonably necessary to accomplish the business which is its purpose;

(d) Nothing in this section shall be deemed to authorize a person required to be listed on a statement of registration pursuant to § 3-213(c)(1) of the Administrative Code to offer or give a gift to any public servant in violation of any other applicable federal, state or local law, rule or regulation, including but not limited to the New York State Lobbying Act.

STATEMENT OF BASIS AND PURPOSE

On June 13, 2006, Mayor Michael Bloomberg signed into law Local Law No. 16 of 2006. This law amends the New York City Administrative Code in relation to gifts by lobbyists. See Ad. Code § 3-225, as added by Local Law No. 16 of 2006,

effective December 10, 2006. The newly added Section 3-225 of the Administrative Code provides that "No person required to be listed on a statement of registration pursuant to section 3-213(c)(1) of subchapter 2 of this chapter shall offer or give a gift to any public servant." Id.

Section 3-228 of the Code further provides that:

The conflicts of interest board, in consultation with the clerk, shall adopt such rules as necessary to ensure the implementation of this subchapter, including rules defining prohibited gifts and exceptions including de minimis gifts, such as pens and mugs, gifts that public servant may accept as gifts to the city and gifts from family members and close personal friends on family or social occasions, and to the extent practicable, such rules shall be promulgated in a manner consistent with the rules and advisory opinions of such board governing the receipt of valuable gifts by public servants.

Ad. Code § 3-228, as added by Local Law No. 16 of 2006, effective December 10, 2006.

The Board was, therefore, required to adopt rules defining prohibited gifts from lobbyists and exceptions including de minimis gifts, gifts that public servants may accept as gifts to the City, and gifts from family members and close personal friends on family or social occasions within the meaning of Section 3-225 of the Administrative Code.

In addition, Section 3-228, quoted above, directed that, to the extent practicable, these rules be consistent with the Board's rules and opinions concerning the receipt of gifts by public servants. In its consideration of the new rules for gifts from lobbyists, the Board accordingly examined its existing rule on gifts to public servants, its Valuable Gift Rule, Section 1-01 of Chapter 1 of Title 53 of the Rules of the City of New York. In examining Section 1-01, the Board identified a few provisions which the Board concluded should be amended. The instant rulemaking therefore includes both these few amendments to Section 1-01, the existing Valuable Gift Rule governing receipt of gifts by public servants, and the new Section 1-16 governing the giving of gifts by lobbyists, and, as mandated by Local Law 16, aims to conform these provisions to the extent practicable.

Amendments To Existing Board Rule § 1-01

The Board adopts four amendments to Section 1-01:

- Section 1-01(d) currently permits the acceptance of publicly presented awards and plaques for public service when the award or plaque is valued at less than \$150.00. This subdivision is amended by dropping any reference to dollar amount and instead providing that the award, plaque, or other similar item has no substantial resale value. This amendment is intended to make clear that, for example, an engraved item costing a few hundred dollars would typically be permissible, while a cash gift of \$100.00 would not fall within the exception.
The prior Section 1-01(e)(5) is repealed. That paragraph provided, in summary, that when it is customary business practice to hold a meeting over a meal, and customary business practice for one party to pay for the other, and payment by the public servant would be "inappropriate," the acceptance of the meal by the public servant is permissible. In reviewing this provision, the Board concluded that it is difficult to identify circumstances where payment by the public servant would be inappropriate, and indeed can much more readily contemplate circumstances where payment by a City vendor, for example, would not be appropriate. The Board has no record of having approved the acceptance of a meal pursuant to this provision and concluded that retaining the paragraph does not serve a City purpose.
Section 1-01(f)(4) is amended by deleting the word "annual" from the description of the public events or functions for which, under the described conditions, a public servant might accept free admission. Over the years the Board has observed that some organizations have significant public events more frequently than annually and that not infrequently these are events where attendance by certain public servants would advance the interests of the City.
Section 1-01(f)(4) is further amended by correcting what appears to have been a small, unintended drafting error. That provision, as previously written, permitted the attendance at annual public events of an organization composed of representatives of "business, labor, professions, news media or organizations of a civic, charitable or community nature," when the public servant is invited by the sponsoring organization, except when the invitation was from a "civic, charitable or community" organization that has business with or matters before the public servant's agency. There does not appear to be any reason for this limiting proviso to have included only "civic, charitable or community" organizations, and not, for example, to have included the other types of inviting organizations, which also might have business with a public servant's agency. The amendment accordingly makes clear that the exception which this subdivision offers is not available when the inviting organization is any organization with dealings with the public servant's agency.

Section 1-16

The remainder of this rulemaking consists of the Board's response to Local Law 16 of 2006, that is, to give clear guidance regarding the prohibition of gifts by lobbyists to public servants and the exceptions to that prohibition. This is embodied in a new Rule 1-16 of Chapter 1 of Title 53 of the

Rules of the City of New York, whose text is set forth above, and which in summary provides the following:

Section 1-16(a): This subdivision incorporates provisions of the newly enacted prohibition against persons required by Ad. Code Section 3-213(c) to be listed on a lobbying registration statement offering or giving a gift to a public servant.

Section 1-16(b)(1): This paragraph reiterates the categories of individuals required by Ad. Code Section 3-213(c) to be listed on a lobbyist registration statement.

Section 1-16(b)(2): This paragraph defines "lobbyist" to have the same meaning as used in Ad. Code Section 3-211, the definitions section of the City's lobbying law.

Section 1-16(b)(3): This paragraph defines the term "offer" to mean the attempt or offer to give a gift, or the attempt or offer to arrange for the making of a gift.

Section 1-16(b)(4): This paragraph defines "give" to mean the tender of a gift, acting as an agent in the making of a gift, or arranging the making of a gift. This language tracks the lobbyist gift ban set forth in California Government Code Section 86203. This explicit prohibition against acting as an agent in the making of a gift would, for example, make clear that it would not be a successful defense to a charge of making an impermissible gift that a lobbyist was being reimbursed by his or her firm or client and therefore was not the true gift giver.

Section 1-16(b)(5): This paragraph defines "gift." It repeats the language of Board Rules Section 1-01(a), but replaces that provision's reference to a value of \$50.00 or more with a prohibition against gifts of "any value whatsoever."

Section 1-16(c): This subdivision identifies those gifts that will not violate the prohibition of Section 3-225. In particular, as required by Section 3-228, it lists the exceptions for *de minimis* gifts, for gifts from family and close friends, and for gifts to the City, in each case attempting whenever practicable to be consistent with Board Rules Section 1-01 governing what gifts public servants may receive.

Section 1-16(c)(1): This paragraph defines permissible *de minimis* gifts to be promotional items, including mugs, t-shirts, and similar items, with no substantial resale value and bearing an organization's name, logo, or message. Section 1102(22)(a) of Title 42 of the Louisiana Revised Statutes provides a similar exception for "promotional items having no substantial resale value."

Section 1-16(c)(2): This paragraph on permissible gifts from a family member or a close personal friend takes its language from Board Rules Section 1-01(c) and is intended to be consistent with that rule.

Section 1-16(c)(3): This paragraph, regarding acceptable awards, plaques, and other similar items, mirrors the above proposed amended Board Rules Section 1-01(d).

Section 1-16(c)(4): This paragraph on gifts to a public servant of free meals and refreshment when the public servant is conducting City business mirrors the above amended Board Rules Section 1-01(e).

Section 1-16(c)(5): This paragraph mirrors the language of Board Rules Section 1-01(f)(1).

Section 1-16(c)(6): This paragraph tracks the language of Board Rules Section 1-01(f)(2).

Section 1-16(c)(7): This paragraph tracks Board Rules Section 1-01(f)(3).

Section 1-16(c)(8): This paragraph, concerning attendance at annual event of various types of organizations at the invitation of the sponsoring organization, tracks — with one significant exception — the above amendment to Board Rules Section 1-01(f)(4). This provision differs from Section 1-01(f)(4) in that it does not include the limiting condition that the sponsoring organization may not have business with the public servant's agency. The Board deletes this limiting condition from Section 1-16(c)(8) because many not-for-profit organizations, for example, wish to invite leadership of the City agency supporting their work to their annual fundraising event, and agency leadership may in general permissibly attend such public events pursuant to the provisions of Board Rules Section 1-01(f)(5), which permits such attendance on the written certification of an agency head or deputy mayor that the attendance is in the interests of the City.

To forbid lobbyists to extend such invitations may, however, in some cases severely restrict, if not effectively prevent, any such invitation, because in some smaller organizations in particular many if not most of the organization's executive staff are named in the organization's lobbyist registration statement. Thus, to say that the invitation must, as Section 1-01(f)(4) provides, come from the sponsoring organization but to forbid the leadership of the organization to extend such invitations appears contrary to the legislation's directive that, whenever practicable, the "receiving" provisions of Chapter 68 and the "giving" provisions of this newly enacted legislation be synchronized.

Section 1-16(c)(9): This paragraph, regarding the attendance by elected officials and their designated staff at certain public events when invited by the sponsoring organization, tracks the language Board Rules Section 1-01(g). The Board notes that, with the above described deletion from Section 1-16(c)(8) of the limiting condition against gifts from those with matters before a public servant's agency, Section 1-16(c)(9) might appear redundant. The Board indeed does not suggest any substantial difference exists between the affairs or functions described in these two provisions, but nevertheless has determined to retain both provisions in deference to the legislative directive that to the extent practicable these restrictions on gift giving synchronize with the Board's existing rules on receipt of gifts by public servants.

Section 1-16(c)(10): This paragraph, regarding permissible gifts of travel related expenses for City business purposes, tracks Board Rules Section 1-01(h) (1).

Section 1-16(d): This subdivision is simply a caution

that conduct not prohibited by Local Law 16 of 2006 may nevertheless be prohibited by other legislation, most notably by the New York State Lobbying Act.

It should be noted that the Board has not included in Rule 1-16 an analog to Board Rules Section 1-01(f)(5), which permits attendance at events or functions where the agency head or deputy mayor provides written certification that attendance is in the interests of the City. The Board does not view the extension to lobbyists of that exception to the gift ban to be consistent with the legislative intent to restrict gifts from lobbyists. Moreover, as a practical matter, the agency head certification of Section 1-01(f)(5) would provide little aid to the lobbyist/donor, since the prospective donor typically could not know whether the agency head would indeed certify that the public servant's attendance would be in the City's interests.

The Board conducted a public hearing on December 8, 2006, at which time it heard testimony from the Executive Director of Citizens Union and from the Ethics and Employment Counsel to the City Council. Their testimony, which tracked written submissions they also presented, were generally supportive of the Board's proposal. Citizens Union noted a concern that these rules be interpreted to permit the continued presence of elected and appointed officials at annual events, receptions, educational breakfasts, and the like hosted by civic groups and non-profits that are registered as lobbyists, stating that such events, where food and beverages are often served, provide an important venue for the exchange of ideas and information among those committed to making New York a better city. It is the Board's view that Rules Sections 1-16(c)(4) through (c)(9) will permit the offer of invitations to such events in all appropriate cases and that the analogs to these provisions in Rules Section 1-01 will permit public servants to receive these invitations in all appropriate cases.

The Board also received a joint written comment from the Human Services Council of New York, the Lawyers Alliance for New York, and the Nonprofit Coordinating Committee of New York. That comment makes two specific requests: first, that the Board clarify precisely who is covered by the gift ban, and, second, that the gift ban permit the offer of "goody bags" or "gift bags" at charitable events in cases where the bags contain more than the promotional items permitted under Rules Section 1-16(c)(1). In each case the Board appreciates the concerns raised, but believes that in each case the question is better dealt with through advisory opinion than through rulemaking. In the case of further identifying those persons required to be listed in a registration statement, an advisory opinion might be sought from the Office of the Clerk, or from the Board, and in either case these agencies will likely consult with each other in any response. In the case of the offer of "goody bags," the Board notes that it addressed the question of a public servant's receipt of gift bags by advisory opinion (see Board Opinion No. 2006-2).

d27