

March 27, 2008

Government Ethics Alert

Navigating the Oregon Government Ethics Commission's Gift Rules

New ethics laws became operative on January 1, 2008, so all public officials in Oregon (whether elected, employed or volunteer) should be familiar with these requirements that affect their activities as public officials. Whether they are public officials or not, other individuals should also be aware of the new laws because their interactions with public officials may be affected.

One of the major changes in the law is that public officials may not during a calendar year accept any gift or gifts from a single source with an aggregate value in excess of \$50. (Previously, the limit on gifts to public officials was \$100 in a calendar year.) The definition of what constitutes a "gift" has also changed, and items like meals, beverages and other expenditures on behalf of a public official may count against the annual limit.

On March 7, 2008, the Oregon Government Ethics Commission (OGEC) promulgated new rules to implement the new government ethics requirements of Senate Bill 10 (2007) and House Bill 2595 (2007). The rules went into effect immediately. The OGEC also promulgated temporary rules related to filing of Statements of Economic Interest. The rules are available at http://www.oregon.gov/OGEC/admin_rulemaking.shtml. This alert focuses on the permanent rules adopted by the OGEC.

The permanent rules seek to clarify some of the terms and requirements of the new ethics laws. The rules deal with 1) the value of items or services received by public officials; 2) resale value of unsolicited tokens or awards; 3) attendance at receptions, meals or meetings under the gift exceptions; 4) gift exceptions related to travel; 5) gift exceptions related to receptions and entertainment; 6) the source of gifts; and 7) definitions of various statutory terms. This alert provides a brief overview of the permanent rules but should not be considered an exhaustive commentary on both the rules and the statutory requirements.

Value of Items and Services Received by Public Officials
OAR 199-005-0005

This rule is intended to guide public officials in determining the value of items or services they receive in order to comply with reporting requirements and gifts and honoraria limits.

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Generally, the value of merchandise, goods or services is the fair market value of those items or services. Any portion of the value of merchandise, goods or services that a public official transfers to a 501(c) tax exempt organization will not be counted in the value of an item or service received by the public official. The per person cost at a reception, meal or meeting includes all costs (food, beverage, facility rental, service, etc.) other than any amount donated to certain non-profit organizations.

Example: A source with a legislative or administrative interest in a public official invites the public official to a \$100 per plate dinner to benefit a charitable organization. The cost of the meal is \$30, the donation to the charitable organization is \$70, and the reportable benefit to the public official is \$30.

NOTE: Any amount over \$50 would be in violation of law unless the expenditure meets a specific exemption in the law from the definition of "gift."

When there is no price established to attend a reception, meal or meeting, reasonable methods of calculating the per person value of the event include:

1. Divide the total amount spent on food, beverages and other costs, excluding contributions to certain non-profit organizations, by the number of persons reasonably expected to attend the event.
2. Divide the total amount spent on food, beverages and other costs, excluding contributions to certain non-profit organizations, by the number of persons who actually attend the event.
3. Calculate the actual amount spent on the public official.

NOTE: The rule refers at various times to "charities" and "501(c) tax exempt organizations." 501(c) tax exempt organizations need not be charitable in nature, so it is unclear whether the rules intend to limit pass-through of benefits by public officials only to charitable organizations. However, because of the specific reference to "501(c) tax exempt organizations," in contrast with the more general reference to charitable organizations, it is likely that the rules apply to 501(c) tax-exempt organizations, whether they are "charitable" or not. The "other costs" referred to in the rules may include such expenses as incidental entertainment or facility rental.

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Resale Value of Unsolicited Tokens or Awards OAR 199-005-0010

Engraved or personalized items that include a public official's name are presumed to have a resale value of less than \$25 unless the item is made from some valuable material that would be worth more than \$25 in its raw form.

NOTE: This exception to the gift definition applies to tokens or awards of appreciation, and the underlying rationale is that putting most public officials' name on a plaque devalues it.

Attendance at Receptions, Meals or Meetings OAR 199-005-0015

The rules explain criteria for determining whether expenditures for receptions, meals or meetings under ORS 244.020(5)(b)(E) are exempt from the \$50 per year gift limits. (This exception applies to "admission or the cost of food or beverage consumed by the public official" when the public official appears to speak or answer questions as part of a regularly scheduled program). The rules specify that the expenditure is exempt if *all* of the following factors are satisfied, although it may still qualify if not every factor is met.

1. A large number of persons or groups are invited to the event.
2. The invitations or programs for the event are sent out in advance.
3. The event is publicized.
4. The reception, meal or meeting is open to the public.
5. Written materials such as a printed program are available.
6. The public official delivers a planned speech or remarks to the entire audience.
7. The public official participates in a formal question and answer session before the entire audience.

NOTE: This exception is unusually subjective. For example, what constitutes a "large number" of invitees is not specified, nor does the rule make clear what "open to the public" or the "entire audience" means. In addition, while the presence of all of the factors makes the expenditure a non-gift, the presence of only one factor probably does not, and the rule doesn't explain where the line should be drawn between these two extremes.

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Gift Exceptions Related to Travel OAR 199-005-0020

This rule addresses issues related to the gift exceptions in ORS 244.020(5)(b)(F) and (H), that allow public officials to accept gifts of payment for travel and reasonable expenses over and above the \$50 per year gift limit when they are representing a governmental entity.

The rule provides that a public official “represents” a unit of government when the public official makes an authorized appearance in an official capacity on behalf of the unit of government. The public official’s supervisor may authorize the public official’s appearance, and individual statewide or local elected officials may authorize their own appearances.

The rule also defines the terms “fact-finding mission,” “trade promotion” and “economic development activities.”

NOTE: ORS 244.020(5)(b)(H) requires that in order to fall within the gift exceptions a trade promotion or fact-finding mission must be officially sanctioned, and expenses related to economic development activities must be approved in advance. The rule allows individual local *and* statewide elected officials to authorize their own travel, but only allows *statewide* elected officials to approve their own expenses in advance.

Gift Exceptions Related to Receptions and Entertainment OAR 199-005-0025

The government ethics statutes generally prohibit public officials from accepting gifts of entertainment (with two exceptions discussed below). The rules define “entertainment” generally as amusement or diversion. Examples of entertainment “. . . include, but are not limited to concerts, plays, movies, operas, sporting events, participating in sports (golf, skiing, hunting or fishing, etc.), comedy shows, and similar events.”

One exception allows public officials to appear at an entertainment event for a ceremonial purpose. Examples of appearing for a ceremonial purpose include throwing the first pitch at a baseball game, appearing in a parade and ribbon cutting ceremonies. Staff of the public official may also attend the entertainment event if they are performing official duties.

The second exception allows public officials to benefit from paid entertainment if the entertainment “is incidental to another event.” The rules provide a dictionary definition of “incidental” and suggest that a singer or band at an awards dinner is allowable, while personal participation in the entertainment (such as a golf tournament) is not.

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Source of Gifts OAR 199-005-0030

The source of any gift is the individual or entity that ultimately pays the bill. The \$50 gift limit under ORS 244.025 applies separately to each public official and to his or her spouse, relatives and members of household. Each of these individuals may accept gifts with an aggregate value of \$50 from a single source with a legislative or administrative interest in a calendar year.

NOTE: It is important to remember that the gift limits only apply to public officials who receive gifts from persons with a "legislative or administrative interest" in the governmental entity which the individual serves. The term "legislative or administrative interest" has been defined in Oregon law for a number of years, and it requires an "economic interest, distinct from that of the general public" in official action "subject to the action or vote of a person acting in the capacity of a public official." The rules do not provide guidance about how to put this standard into practice. However, if a "source" has no legislative or administrative interest in the public official's actions, the public official may accept gifts from that source without limit.

Various Definitions OAR 199-005-0035

This rule includes definitions for "official capacity," "official compensation package," "reimbursement of expenses," "confidential information," "authorized by" (for the purposes of the new contracts provisions) and "agent or otherwise" (for purposes of the government ethics laws, a public official is a person serving the state or a political subdivision, including as an "agent or otherwise").

CONCLUSION

Oregon's new government ethics laws set a number of new standards for public officials and those with whom they interact in conducting official business. Neither the ethics statutes nor the rules promulgated by the OGEC provide comprehensive guidance to help Oregonians understand what conduct is allowable and what conduct is prohibited.

If you have questions about the applicability of the ethics laws and regulations, you may request formal guidance from the OGEC, based on either actual or hypothetical circumstances. OGEC staff will also provide informal advice about such matters, but compliance with staff opinions may not protect persons from complaints that they have violated the law.

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The revised ethics statutes can be accessed at http://www.leg.state.or.us/bills_laws/ either in bill form (see Senate Bill 10 and House Bill 2595) or as codified in ORS Chapter 244.

If you have further questions or we can be of assistance, please feel free to contact us.

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