



HAWAI‘I STATE ETHICS COMMISSION

State of Hawai‘i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai‘i 96813

IMPACT STATEMENT FOR ETHICS COMMISSION’S ADMINISTRATIVE RULES

The Hawai‘i State Ethics Commission (“Commission”) is proposing several new chapters of administrative rules, on “Gifts and Fair Treatment,” “Conflicts of Interests,” “Post-Employment Restrictions and Contracts,” and “Lobbying.” This Impact Statement was prepared as part of the rulemaking process.

A. The Commission offers the following comments and examples to Title 21, chapter 7, entitled “Gifts and Fair Treatment”:

§ 21-7-3 Acceptable items

Comments:

- *Gifts received by spouses or dependent children: If the spouse of a legislator or employee receives two tickets to an event, solely because of the spouse’s employment or community work, the legislator or employee may attend the event with the spouse unless it appears as though the gift was offered with the intention of influencing the legislator or employee. The same is true for gifts received by dependent children of legislators or employees.*
- *Gifts from family members or personal friends: Gifts generally may be accepted where the gift is based upon a familial or personal relationship and no reasonable person would conclude that a gift is being given to influence or reward the recipient for the performance or nonperformance of the recipient’s state duties. However, where such a relationship exists, the recipient may consider voluntarily recusing her- or himself from taking official action involving (directly or indirectly) the individual offering the gift to avoid any appearance of impropriety.*
- *Reporting events: Where a legislator accepts the offer of a ticket to an annual dinner held by a charitable organization in the legislator’s district, and the ticket costs \$250 with a tax-deductible amount of \$200, the legislator must report having received a \$250 gift, with a meal valued at \$50 and the tax-deductible portion of the ticket of \$200.*
- *The items listed in §21-7-3(a) need not be reported on a gifts disclosure statement either because (1) they are not gifts for which there could be a reasonable inference of influence on the legislator or employee, or (2) they would never approach the gifts reporting threshold of more than \$200. Items that exceed \$200 generally would not fit the criteria for acceptance under subsections (a)(1), (a)(4), (a)(7), or (a)(9).*

§ 21-7-4 Offers of travel

Comments:

- *Gifts of travel are often acceptable because of their benefit to the State. For example, if the National Association of Attorneys General wishes to pay for two Deputy Attorneys General to attend a training on effective litigation techniques, and the recipients will travel in economy class and stay at a modestly priced hotel, the gift of travel may be accepted. If, however, an organization wishes to pay for a Deputy Attorney General to fly first-class to a ski resort and stay at a five-star hotel, the trip generally may not be accepted. Recipients are advised to contact the Commission for guidance prior to acceptance.*

§ 21-7-5 Valuation of gifts

Comments:

- *If the face value of a ticket to an event is \$100, but at the time the ticket is offered as a gift the event is sold out and tickets on the secondary market are \$500, the value of the ticket is \$500.*

§ 21-7-6 Imputing gifts to others

Example:

- *When a donor provides a gift of food to a legislative office, the legislator is presumed to be the recipient of the gift.*

§ 21-7-9 Fair Treatment

Comments:

- *Door prizes: One who attends an event in his or her official capacity is prohibited from accepting a door prize or complimentary item of more than nominal value that is won or offered at the event. Acceptance may be permissible, however, if the item is accepted on behalf of the State and becomes property of the State. For example, an employee who wins a laptop computer at a conference the employee attends in the employee's official capacity may turn the item over to the employee's state agency to become part of the agency's inventory.*
- *Honoraria: One who gives a speech as part of his or her official duties may not accept an honorarium from a non-state source for giving the speech, because he or she is already compensated by the State to perform such a duty.*

- *Political campaign activities: The use of state resources for political campaign activities is prohibited. These include, but are not limited to, soliciting support for political candidates for office, organizing or publicizing political fundraisers, and organizing activities such as sign-waving to support political candidates for office.*
- *Fundraising: State resources may be used for fundraising activities in limited situations, including:*
 1. *Non-coercive fundraising to support a charity or purpose officially sponsored and endorsed by the State.*
 2. *Non-coercive fundraising for humanitarian causes officially endorsed by the State, e.g., to support victims of a natural disaster.*
- *Volunteer activities: A state employee may serve as an uncompensated officer, director, or volunteer of a nonprofit organization affiliated with the employee's state agency and whose sole purpose is to assist and support the state agency. So long as the employee receives no compensation from the nonprofit organization, and the employee is authorized by the director of the employee's agency or other relevant authority, the employee may use state resources, including state time, to benefit the organization.*
- *Travel: Except in very limited circumstances, state officials may travel only in economy class. If possible, mileage credit accrued on state travel shall be used for state travel. If such credit cannot be used for state travel, it may be applied to personal travel subject to approval by the Comptroller or other relevant authority. Similarly, travel upgrades or other benefits earned while on state travel that cannot be applied to state travel may be applied to personal travel subject to approval by the Comptroller or other relevant authority.*
- *Use of state resources for private business purposes: the State may rent public facilities (such as school cafeterias), sell advertising space at public facilities, and/or otherwise engage in transactions with private entities, so long as state facilities are generally offered on equal terms to all would-be purchasers.*

B. The Commission offers the following comments and examples to Title 21, chapter 8, entitled “Conflicts of Interests”:

§ 21-8-1 Conflicts of Interests, Officer or Director of Private Organization
in Employee’s State Capacity

Examples:

- (1) An employee of a state agency sits as a director of a non-profit organization by virtue of the employee’s state position. The employee is not prohibited from taking official action, in the employee’s capacity as a state employee, affecting that non-profit organization.*
- (2) An employee of a state agency sits as a director of a non-profit organization by virtue of the employee’s state position. The employee’s spouse is employed by the non-profit organization. The employee is prohibited from taking official action, in the employee’s capacity as a state employee, affecting that non-profit organization.*

C. The Commission offers the following comments and examples to Title 21, chapter 9, entitled “Post-Employment Restrictions and Contracts”:

§ 21-9-1 Agency or subdivision thereof

Comments:

- Role in former agency: the former director of an agency would likely be prohibited from representing another person before any section of that agency; in contrast, an individual who worked for a subsection of a large agency – and had minimal contact with other subsections of the agency – may not be prohibited from representing another person before a different subsection.*

D. The Commission offers the following comments and examples to Title 21, chapter 10, entitled “Lobbying”:

§ 21-10-1 Definitions

Comments and Examples:

- *The Commission may consider any guidance provided by the Internal Revenue Service in determining whether an activity constitutes “lobbying.”*
- *Example 1: A lobbyist for a bank attends a political fundraiser and speaks with a state representative. The two discuss the bank’s current profits and financial outlook, but do not discuss any potential legislation or regulatory issues that might affect the bank. Such discussion is not considered lobbying.*
- *Example 2: A lobbyist for a non-profit organization that focuses on environmental issues attends a social event and speaks with a state senator. The two discuss, in general terms, the need to pass stronger legislation on the state level to protect coral reefs. Such discussion is considered lobbying.*
- *Example 3: Several staff members of a non-profit organization research and write a paper on whether a policy proposal from another state would be feasible here in Hawai‘i. The organization does not engage in lobbying and does not intend to use the paper in support of any lobbying efforts. After spending many hours on the project, the organization determines the proposal would not be feasible in Hawai‘i and the project is shelved. The work on this project is not considered lobbying.*
- *Example 4: Same facts as in #3, except that the organization initially plans to use the paper in lobbying; after researching the issue, however, the organization abandons the issue and does not use the paper for any lobbying efforts. The work on this project is not considered lobbying.*
- *Example 5: Same facts as in #3, except after concluding the research, the organization decides that it will ask the legislature to pass legislation on the issue and uses its research paper to support its position. The work on this project is considered lobbying.*
- *Example 6: A business pays for a public opinion poll to see whether the public would support a legislative initiative. The poll does not attempt to influence the individuals being polled, but merely asks for their opinions on the issue. The results are not shared publicly and the business never pursues the issue. Expenditures on this public opinion poll are not considered expenditures for the purpose of lobbying.*

- *Example 7: Same facts as in #6, but the results are made public (to influence legislators' willingness to consider the legislation) and/or cited in the business's testimony. Expenditures on the public opinion poll are considered expenditures for the purpose of lobbying.*

§ 21-10-3 Exclusions from registration requirement

Comments and Examples, subsection (2):

- *Example 1: The director of a state agency testifies on a bill affecting one of her agency's programs. The director is not required to register as a lobbyist, nor is the agency required to submit a statement of contributions and expenditures.*
- *Example 2: A state agency hires a private sector individual to lobby on behalf of the agency. The lobbyist is subject to the registration and reporting requirements, and the director of the state agency is responsible for submitting statements of contributions and expenditures.*

Comments and Examples, subsection (4):

- *Example 3: A client seeks an attorney's advice about the application of a proposed new law. The attorney provides the advice and does not engage in any other lobbying activities. The attorney does not need to register as a lobbyist or file a statement of contributions and expenditures, and the client need not report the attorneys' fees as a lobbying expense.*
- *Example 4: A client asks for an attorney's help in amending a law. The attorney drafts testimony, meets with legislators, and testifies on the proposed amendment. This is lobbying, and the attorney must register and file a statement of contributions and expenditures if the activities meet the threshold for registration and reporting as set forth in HRS § 97-2.*

Comments and Examples, subsection (5):

- *Example 5: A Senate committee is scheduled to hear a bill amending the tax code. The committee chair emails an economist and asks her to testify and provide her expert opinion on the bill. The economist is not subject to either the registration or reporting requirements for this testimony. If the economist engages in other lobbying, however – that is, lobbying other than at the direct request of the Senator – she must register as a lobbyist and submit expenditure reports if she meets the threshold requirements for registration/reporting.*
- *Example 6: A House committee is scheduled to hear a bill that will affect the hotel industry. A Representative knows of an executive at a hotel who is interested in the bill and telephones the executive to tell him the bill has been scheduled. The executive testifies on the bill. The executive shall register as a lobbyist and submit statements of contributions and expenditures if the executive meets the threshold requirements for registration/reporting.*

§ 21-10-4 Background work in support of lobbying

Comments:

- *This Rule is intended to allow individuals to “ghost write” testimony – and to perform background research and administrative work – without having to register as a lobbyist, provided several strict conditions are met. A registered lobbyist must supervise the work; the work must be reported on the joint statement of contributions and expenditures or on a registered lobbyist’s statement as provided by §21-10-5(c); and the individuals performing background work may not directly communicate with legislators or agency employees regarding the subject matter of the legislation.*

§ 21-10-5 Statement of contributions and expenditures

Comments:

- *This rule addresses the statutory requirement that statements of contributions and expenditures be filed by up to three different entities (the client, the employing organization, and the lobbyist; or, in the case of lobbyists employed in-house by the client, by the client/employing organization and the lobbyist), even though the statements refer to the same lobbying activity. This rule creates a single, client-based report, rather than requiring separate reports from the client, the employing organization, and the lobbyist. This single, client-based reporting method avoids double (or triple) reporting, and also avoids the current practice of having lobbyists submit expenditure reports listing “zero” expenditures (because all expenditures were covered by the client and/or the employing organization). This method will also provide better information to the public, insofar as the public can see – in one place, on one report – all sums expended to benefit a particular client.*
- *If a lobbyist represents multiple clients, the lobbyist must be listed on each client’s statement of contributions and expenditures.*

§ 21-10-6 Contributions for the purposes of lobbying

Comments and Examples:

- *Reporting contributions: The identity of a contributor need not be reported where the United States Constitution, Hawai‘i Constitution, or other law permits the contributor’s identity to be withheld. Contributions need not be explicitly earmarked for lobbying to be reportable; if the contributor reasonably should know that the contribution will be used primarily to support lobbying then it is reportable (e.g., if the primary purpose of an organization is legislative advocacy, then a contributor should reasonably know a donation will be used for lobbying).*
- *Example 1: A trade organization made up of several different companies is formed to promote the industry, offer education to its members, and engage in legislative advocacy. Each member company pays annual dues. The trade organization must report that portion of the dues that is attributable to the lobbying effort.*

§ 21-10-7 Reporting of expenditures

Comments:

- *Lobbyists should be aware of the State Ethics Code's restrictions on certain gifts and benefits. See HRS §§ 84-11, 84-11.5, 84-13; HAR chapter 21-7.*

§ 21-10-8 Expenditures for the purpose of lobbying

Comments and examples:

- *Example 1: Paid staff of a non-profit organization dedicated to serving the needs of the elderly meet to discuss the current state of elder affairs and what issues they currently face. Without more, expenditures relating to this meeting are not reportable lobbying expenditures. However, if the group discusses proposed legislation or how the organization should respond to bills, then expenditures relating to this meeting are reportable lobbying expenditures. If the group spends a portion of the meeting discussing lobbying efforts and a portion discussing non-lobbying work, then expenditures for the pro rata share of the meeting devoted to lobbying should be reported.*
- *Example 2: A non-profit organization that lobbies on health care puts on a brunch and invites members of the legislature to discuss both the mission of the organization and legislation that the organization would like introduced. Expenditures relating to the brunch are reportable.*

§ 21-10-9 Accounting issues in statements of contributions and expenditures statements

Comments:

- *Clients often pay lobbyists a set monthly or yearly sum, where the lobbyist may perform both lobbying and non-lobbying work for the client. In such situations, the client has two options:*
 - *Option #1: Report the entire sum as a lobbying expense. This is a clear and straightforward way to report expenditures, as neither the client nor the lobbyist must track the hours spent lobbying nor determine whether a particular activity constitutes "lobbying." This method may result in over-reporting, however, as some work performed by a lobbyist may not constitute "lobbying."*
 - *Option #2: Track the lobbyist's hours on lobbying and non-lobbying activities, and report the pro rata share of the lobbying expense (taking into account the "lump sum" rules discussed above). The Commission will presume that a lobbyist's hourly rate is the same for both lobbying and non-lobbying activities; a client that contends*

it pays a lobbyist \$100 an hour for lobbying but \$2,000 an hour for non-lobbying activities will likely face an enforcement action for violating the reporting requirements of HRS § 97-3 and these rules.

Examples:

- *Example 1: A client hires a consultant to run radio ads during the January/February reporting period. The consultant does not bill the client until March. The expenditure is reported on the January/February contributions and expenditures statement.*
- *Example 2: A client pays a lobbyist a flat fee of \$24,000 a year to lobby. This fee is divided into monthly installments of \$2,000; however, the lobbyist and client do not know – when filing the January-February report – whether the lobbyist will be lobbying more or less in March-April (or May-December) than in January-February, and thus do not know how to apportion the \$24,000. Reporting only \$4,000 for the January-February period, however, generally understates the amount of lobbying done by the client during that period, whereas reporting \$16,000 for the May-December period generally overstates the amount of lobbying done by the client during that period. The Ethics Commission’s experience is that, where a lobbyist focuses exclusively on the state legislature, the split is generally 40% for January-February, 40% for March-April, and 20% for May-December. A client and lobbyist with this type of lump-sum (or lump-sum-in-installments) arrangement may use the 40/40/20 model unless the lobbyist has a good faith belief that expenditures for lobbying will deviate substantially from this model; this 40/40/20 reporting is intended as a “safe harbor” for clients and lobbyists who receive flat-fee payments on a periodic basis (excluding special sessions of the legislature). Rather than using this estimate, however, clients and lobbyists may calculate the actual expenditures by first calculating the lobbyist’s effective hourly rate (that is, the number of hours the lobbyist is expected to work over the course of the year divided by the total expenditure for the year), multiplying that hourly rate by the actual number of hours lobbied, and then reporting that amount as the expenditure during the relevant reporting period. Any client who pays a lobbyist on an hourly basis, however, should use report actual expenditures (rather than estimates) using an accrual basis.*