



## Guidelines For Applying T.C.A. § 3-6-305(b)(3) Relative to Gifts Between Close Personal Friends

### **INTRODUCTION:**

The Comprehensive Governmental Ethics Reform Act of 2006 (the “Ethics Act” or “Act”), T.C.A. § 3-6-101, *et seq.*, sets forth certain standards of conduct for lobbyists, employers of lobbyists and listed public officials.

T.C.A. § 3-6-305(a)(1) provides, with certain exceptions,<sup>1</sup> that “No employer of a lobbyist or a lobbyist may provide a gift, directly or indirectly, to a candidate for public office, official in the legislative branch, official in the executive branch, or immediate family of such candidate or official.” T.C.A. § 3-6-305(a)(2) reciprocally provides, “A candidate for public office, an official in the legislative branch, or an official in the executive branch, or the immediate family or such candidate or official, may not solicit or accept directly or indirectly a gift from an employer of a lobbyist or a lobbyist.” T.C.A. § 3-6-305(b) lists exceptions to this prohibition. These Guidelines address only the exception contained in T.C.A. § 3-6-305(b)(3) for gifts based upon a non-business purpose and motivated by close personal friendship.

“Gift” means, generally, “any payment, honorarium, subscription, loan, advance, forbearance, rendering or deposit of money or services, unless consideration of equal or greater value is received.” T.C.A. § 3-6-301(11).

In addition to the exceptions listed in T.C.A. § 3-6-305(b), the definition, itself, contains two exceptions. Violations of the gift prohibitions may result in civil penalties of up to ten thousand dollars (\$10,000). T.C.A. § 3-6-306.

“Candidate for public office” means any individual who has made a formal announcement of candidacy or qualified under the law of this state to seek nomination for election or elections to any state public office, or has received contributions or made expenditures except for incidental expenditures to determine if one shall be a candidate, or has given consent for a campaign committee to receive contributions or make expenditures with a view to bringing about that person’s nomination for election or the election to state public office, and any individual who has been nominated for appointment as an official in the legislative or executive branch. T.C.A. § 3-6-301(6).

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<sup>1</sup> For a complete list of exceptions, see T.C.A. § 3-6-301(11) and §3-6-305(b)(1) – (11) .

“Official in the executive branch” means the governor, any member of the governor’s staff, any member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee Regulatory Authority, or any member or employee of any executive department or agency or other state body in the executive branch. T.C.A. § 3-6-301(19).

“Official in the legislative branch” means any member, member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house of the general assembly who takes legislative action. “Official in the legislative branch” also includes the secretary of state, treasurer, and comptroller of the treasury and any employee of those offices. T.C.A. § 3-6-301(20).

“Immediate family” means a spouse or minor child living in the household. T.C.A. § 3-6-301(12).

## **DISCUSSION:**

The Tennessee Ethics Commission (“Commission”) is aware that close personal friendships exist between lobbyists, on the one hand, and employers of lobbyists and candidates for public office, legislative officials, executive branch officials, and the immediate families of such candidates and officials, on the other hand. The Commission has received many questions as to how it will interpret and apply the exception to the ban on gift giving when such gifts are motivated by a close personal friendship. Therefore, until such time as the Commission promulgates rules on the matter, the Commission is issuing Guidelines to provide assistance to lobbyists, employers of lobbyists, candidates for public office, legislative and executive branch officials, and the immediate families of such candidates and officials as to what gifts appear to be permissible under T.C.A. § 3-6-305(b)(3).

T.C.A. § 3-6-305(b)(3) provides an exception for “gifts that are given for a non-business purpose and motivated by a close personal friendship, but only to the extent such gifts are specifically defined and authorized by the rules of the ethics commission.” [Emphasis added.]

Thus, the Ethics Act provides an exception for those gifts from lobbyists or employers of lobbyists to candidates for public office (“candidates”), legislative or executive branch officials (“public officials”), and immediate family of such candidates and public officials, which are: (1) given for a non-business purpose and (2) motivated by a close personal friendship. In assessing whether a gift meets these criteria, the Commission will take the following factors into consideration:

1. Whether the lobbyist or employer of a lobbyist is paying for or providing the gift out of his or her own personal funds, or whether the

gift is instead being charged to the lobbying firm or to the employer of the lobbyist; whether the lobbyist is reimbursed by the lobbying firm or the employer of the lobbyist; or whether the cost of the gift is taken as a business deduction by the lobbyist, lobbying firm or employer. A gift that is expensed or the cost of which is reimbursed, or for which a business deduction is taken, will tend to indicate that the gift was provided for a business purpose.

2. Whether there has been a history of gift giving between the lobbyist or the employer of a lobbyist, on the one hand, and the candidate, public official, or his or her immediate family, on the other hand; and the nature of the previous gift giving. The longer the practice, the more likely the gift giving is for a non-business purpose and a result of a close personal friendship. In addition, if the gift giving began prior to the candidate's or public official's attaining his or her status as such, and the pattern of gift giving remains consistent, then there is greater likelihood that the gift was a result of a close personal friendship rather than for a business purpose.
3. Whether the candidate or public official, or immediate family member, has reciprocated with a gift to the lobbyist or the employer of the lobbyist in the past, and whether the gift has been of similar value. The presence of such a reciprocal gift will tend to indicate the existence of a non-business purpose and a close personal friendship.
4. Whether the lobbyist or the employer of a lobbyist provides the same or similar items to other candidates, public officials, or the immediate families of such candidates or public officials at the same time, who are not also close personal friends. If similar gifts are provided to other candidates or public officials who are not close personal friends, it tends to negate the inference that the gift is provided based on a close personal friendship and supports the inference that it is for a business purpose.
5. Whether the timing and circumstances of the gift are appropriate. When a lobbyist or an employer of a lobbyist has a matter that is currently before or will shortly be before a public official, a gift to such official is more likely to be construed as being motivated by a business purpose unless there are countervailing reasons for the timing of the gift.
6. In the case of a gift given by an individual who works for an employer of a lobbyist, whether the individual is involved in lobbying activities on behalf of the employer of a lobbyist. If the giver is not involved in lobbying activities, the gift is more likely to be construed as being

based on a close personal friendship rather than being for a business purpose.

As in all gift situations, to overcome any uncertainty as to the legality or the appropriateness of the gift from a lobbyist or an employer of a lobbyist, a candidate, public official or a member of his or her immediate family may (a) pay the lobbyist or the employer of a lobbyist the fair market value of the gift, (b) pay for the gift directly, or (c) decline the gift. Any individual subject to the Commission's jurisdiction may request an advisory opinion from the Commission as to the application of the exception, based on specific facts and circumstances.

**CONCLUSION:**

Whether a gift provided by a lobbyist or an employer of a lobbyist to a candidate, public official or a member of his or her immediate family will qualify for the exception contained in T.C.A. § 3-6-305(b)(3) must be decided on a case-by-case basis, subject to the six factors outlined above in these Guidelines and any other relevant facts in the particular situation that are made known to the Commission.