

## Memorandum

To: Ethics Resource Team  
From: Roger Berry  
Re: Advisory Opinions on Financial Disclosure and other ethics issues.  
Date: 26 October 1995

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In preparation for the December 4, 1995 meeting of the Ethics Subcommittee, members were asked to consult their caucuses on a number of issues which are listed below. Please review these issues and refer to the section of this memo which suggests what questions you may wish to address. Your responses can be as long as you like, and please feel free to refer us to any reference materials. Responses should be submitted by November 13, 1995, but please contact me if you have any questions concerning the timing. Once again, thank you for your participation on this project.

### CATEGORIES OF FINANCIAL DISCLOSURE

During the last meeting of the Ethics Subcommittee, members were asked to review the following issues and consult their caucuses. The issues discussed below refer to a potential code of conduct for elected officials.

#### 1. Shareholdings

- What are the limits and disclosure requirements concerning shareholdings?
- Does disclosure include a listing of the specific companies?
- Does disclosure include the number and value of shares in addition to the source of shares?

#### 2. Outside Employment

- What are the limits and disclosure requirements concerning outside employment?
- Does disclosure include listing the particulars of the employment?

#### 3. Directorships

- What are the limits and disclosure requirements concerning directorships?
- Does disclosure include listing the particular companies?

#### 4. Retainers

- Can legislator's accept retainers for professional services?
- What are the disclosure requirements?

#### 5. Consultancies

- What are the limits and disclosure requirements concerning consultancies?

#### 6. Sponsorships

- What are the limits concerning a legislator's freedom to accept sponsorship in the form of staff and resource assistance from outside organizations?
- What are the requirements for disclosure?

#### 7. Gifts, Benefits, Hospitality

- What are the limits on accepting gifts and hospitality?
- What are the requirements for disclosure?
- What belongs to the individual and what belongs to the government?
- What are the limits and regulations concerning benefits such as school fees, insurance, etc. which can be provided by an outside source?

#### 8. Overseas Visits

- What travel needs to be disclosed?
- If a political party pays for one of its MP's to travel abroad, does this trip need to be disclosed?
- If an MP is invited to advise political parties involved in sensitive negotiations (such as Ireland or Israel), does this trip need to be disclosed even though there are issues of "quiet diplomacy"?

## 9. Overseas Gifts and Benefits

- What gifts and benefits may be accepted during official overseas travel?
- What are the disclosure requirements?

## 10. Land and Property

- What are the disclosure requirements concerning land and property holdings?
- How specific is the disclosure? Does disclosure include divulging the exact location of the holdings, the area of the holdings, etc.?
- Does disclosure include the value and debt involved in the holding? How are value and debt calculated for purposes of disclosure?

## 11. Pensions

- What are the limits and disclosure requirements concerning pensions?
- Are there different requirements for public (government pensions provided to elected officials) and private pensions?

## METHOD OF DISCLOSURE

During the subcommittee meeting, the Speaker also suggested that members should consider some further issues concerning the method of filing disclosures. The following questions were raised.

### 1. When must financial disclosures be filed?

### 2. How often must financial disclosures be updated?

- These requirements will probably differ between categories.

### 3. What is the period covered by disclosure requirements?

- Is the period the time of service, or does it extend to cover a period following the termination of service?

4. Do financial disclosure requirements cover spouses and dependent children?

- How are spouses and dependent children defined?

5. Are financial disclosures open to public inspection or are they confidential?

- Requirements could differ depending on the category of disclosure.

### **GOVERNING FINANCIAL DISCLOSURE**

After the subcommittee meeting, Speaker Ginwala suggested several further questions which she would like to have addressed before the next meeting on December 4.

1. Are the rules covering financial disclosure promulgated through legislation or through parliamentary rules?

2. What body processes financial disclosures?

3. What countries have Ethics Committees and do they handle financial disclosures?

- How are the Ethics Committees Constituted? Is it constituted by law or parliamentary rule? Is it a parliamentary committee or an independent committee?
- Who belongs to the Ethics Committee?

4. What sanctions are there for offenses concerning financial disclosure?

### **RESOURCE TEAM SUGGESTED ASSIGNMENTS**

The following suggested assignments should help guide your responses to this advisory request. You are free to alter your area of discussion and overlap between respondents is indeed desirable as we would like to give the subcommittee a comparison of different ways of addressing these issues. If you would like to alter the focus of your response please contact Roger Berry via email. As much as possible, write your responses as an advisory opinion, and where possible suggest different options and examples.

Congresswoman Elizabeth Furse  
Congressman Arno Houghton  
Congresswoman Sheila Jackson Lee

As elected members of Congress how do you view financial disclosure rules? How do you define the purpose of those rules? Would you recommend any changes to the current rules governing financial disclosure in the United States Congress? Do you feel that financial disclosure rules unduly infringe on your privacy? If so, how? Finally, should an independent body or a committee of the house oversee the implementation of ethics rules such as those governing financial disclosure?

Stuart Gilman  
Bernard Raimo

Taking the categories of financial disclosure listed above, please discuss your opinion on what principles should guide the debate in the ethics subcommittee and what issues should be considered for each category? In a parliamentary system such as South Africa's, should the rules addressing financial disclosure apply equally to all members whether they are in the cabinet, a committee chair or are simply a back-bencher? What recommendations do you have concerning the governing body which should oversee the implementation of ethics rules such as those covering financial disclosure? Should parliament develop legislation or parliamentary rules to govern financial disclosure?

Robert L. Schiff  
Fred Wertheimer

As representatives of nongovernmental, public interest organizations concerned with Congressional ethics, could you please describe the importance of financial disclosure laws in developing legitimacy for a legislative institution. What principles do you believe should guide the discussions concerning financial disclosure? What are the essential elements to include in public disclosure? How do you think members of the ethics subcommittee can learn from the successes and failures in the United States Congress concerning these issues?

Dennis Thompson

Please discuss the options for creating a body to govern the implementation of ethics provisions. What examples would be worthy for the subcommittee to consider? What are the benefits and drawbacks to having a Congressional committee versus an independent body? What principles do you believe should guide the subcommittee's work on financial disclosure? Should parliament develop legislation or parliamentary rules to govern financial disclosure?

Frederick Schauer

Please discuss the impact of financial disclosure laws on the privacy of elected officials? How are these intrusions of privacy justified? Concerning financial disclosure, how does one define limits to the intrusion of privacy for elected officials? Should parliament develop legislation or parliamentary rules to govern financial disclosure?

**APPENDIX III**

**U.S. Laws on Integrity and Public Ethics**

**By**

**Stuart Gilman**

# Explanatory Paper Relating to U.S. Laws on Integrity and Public Ethics

Stuart Gilman

## I. Introduction.

This paper provides an overview of ethics programs in the public sector of the United States. It discusses the Federal Government ethics community, including the U.S. Office of Government Ethics (OGE) and other agencies and entities within the executive branch of the Federal Government that have policy and program responsibility in the area of Government ethics, integrity and accountability. The paper discusses the authority and programs of the Office of Government Ethics in some detail. The paper then presents information on State and local government ethics programs and on the ethics codes of professional associations which have significant membership employed in the public sector.

## II. Basic Principles.

Government ethics regulation in the United States rests upon certain fundamental principles. First and foremost is the central concept that public office is a public trust. This principle requires Government officials and employees to place loyalty to the Constitution above agency interests, personal benefits and private gain. Closely related to this is the principle that employees shall act impartially and not give preferential treatment to any private organization or individual.

These principles are deeply ingrained in the concept of democracy and in constitutional values of due process and fundamental fairness. For that reason agencies charged with ethics responsibilities in the United States have the dual responsibility of preventing misconduct on the part of employees as well as protecting the integrity of the Government.

Government authority in the U.S. is derived from the consent of the governed and therefore, Government officials, whether elected or appointed, are ultimately accountable to the citizenry. The paramount duty of Government officials is to serve the public interest.

## III. The Federal System.

Distinct systems of ethics laws and regulations exist at the Federal, State and local government levels. At the Federal level, for example, laws and regulations apply in such areas as financial disclosure, conflict of interest, employee conduct, and fraud and mismanagement of Federal programs. Each of the States also has its own statutes and regulations, covering many or all of these areas, that apply within its jurisdiction. In addition, many local government bodies have regulations, ordinances or policies that



address issues of ethics and accountability at the local level.

At the Federal level, in a number of areas, separate legal requirements apply to, and are independently administered by, each of the three branches of Government: legislative, judicial and executive. In the legislative branch, for example, each of the Houses of the Congress has established its own rules of conduct for Members and staff which are administered by its own committees. Ethics matters fall within the scope of the Select Committee on Ethics in the Senate and within the Committee on Standards of Conduct in the House of Representatives. Similarly, in the judicial branch, ethics matters such as the financial disclosure system, are administered by the Judicial Conference of the United States. In the executive branch, the Office of Government Ethics is responsible for providing overall direction for the individually administered ethics programs of the Federal departments and agencies.

#### IV. Federal Agencies and Officials With Ethics Responsibilities.

The concept of "Government ethics" has a very broad scope in the U.S.; no single office or agency has jurisdiction over the entire array of laws and regulations on ethics and accountability. Accordingly, several agencies have responsibility for maintaining Government ethics, accountability and employee discipline, either at the policy or the programmatic level.

Of the many Federal agencies in the U.S. which have responsibilities for ethics matters, three have a central role and deserve to be highlighted here:

1. The United States Office of Government Ethics (OGE)\* was created to oversee the enforcement of the conflict of interest statutes and to create and enforce standards of conduct for Federal employees. (Much of the rest of this document will deal with the roles and functions of this critical agency.)
2. The Office of Special Counsel (OSC) was created to protect Federal employees, including "whistle-blowers," in the Federal system as well as to enforce restrictions on political activity by Government employees. "Whistle-blowing" is the activity of reporting waste, fraud and abuse either inside or outside an agency. OSC protects employees from reprisals and ensures they are not punished for reporting illegal or improper activities. (Documentation attached includes the Whistleblower Protection Act of 1989 {PL-101-12} and Re-authorization of OSC in 1994 which expands its responsibilities.)
3. The Federal Election Commission (FEC) was created to

oversee and ensure the fairness and properness of elections at the Federal, State and local levels in the United States.

In addition to these three agencies, there are several other entities which have responsibilities that normally fall under the category of Government ethics, including: the Executive Office of the President, the U.S. Department of Justice, Inspectors General, the Merit Systems Protection Board, General Services Administration, Office of Personnel Management, and the General Accounting Office. In some areas, responsibility may overlap to some extent. (For a more detailed account of the functions of these agencies, refer to Appendix I.)

#### V. OGE and the Federal Ethics Community.

The Office of Government Ethics is administered by a Director who is appointed by the President, with the advice and consent of the Senate, for a 5-year term. OGE provides overall policy leadership and direction for the ethics program in the executive branch.

The executive branch ethics program is decentralized, with each department or agency having the responsibility for the management of its own ethics program. That responsibility rests with the head of each agency who, in turn, by statute must delegate that authority to a Designated Agency Ethics Official (DAEO)\* who is responsible for the day-to-day, on-site management of the agency's ethics program. The DAEO, in turn, is held accountable for his or her program by the Director of OGE.

Ethics program management by the DAEO and other delegated ethics officials includes giving advice and providing guidance on potential or actual conflicts of interest between an employee's official duties and his or her personal and financial interests, the standards of ethical conduct, financial disclosure, post-employment restrictions and other matters. In addition, DAEOs are responsible for providing ethics training and education to their employees regarding the criminal statutes and the standards of ethical conduct, for assisting in individual employee disciplinary actions, and for implementing and maintaining their agency's public and confidential financial disclosure systems.

OGE maintains a close liaison with the DAEOs and other ethics officials at approximately 125 agency ethics offices throughout the executive branch.

#### VI. OGE Programs, Responsibilities and Activities.

## A. Code of Ethical Conduct.

In 1989, the President of the United States updated principles of ethical conduct for employees of the executive branch. Not only do these principles provide general guidance for public servants, but they were also used as a basis for issuing detailed regulations provided in the Standards of Ethical Conduct for Employees of the Executive Branch. (A Code of Ethics is enclosed in your information packet.)

## B. Transparency: The Use of Financial Disclosure to Ensure Public Confidence.

### 1. Public Financial Disclosure.

OGE has general oversight of the public financial disclosure system within the executive branch. The theory of public financial disclosure is rooted in post-Watergate concepts of "Government in the Sunshine," which aims to promote public confidence in the integrity of Government officials. Since 1979, senior executive branch employees have been required to disclose, in a public system, their personal financial interests to demonstrate in part, that they are able to perform their duties without finding themselves in a potential or real conflict of interest which could compromise the public's confidence and trust. Some of the more noteworthy features of the public financial disclosure system is its broad scope and the availability of reports to the general public. (A copy of the public financial disclosure form, the SF 278, is enclosed in your information packet.)

Under U.S. law, there is broad coverage of high-level officers and employees under the public disclosure system. In the executive branch this includes: (1) the President; (2) the Vice President; (3) executive branch employees classified above GS-15 including the Senior Executive Service and certain high-ranking uniformed officers; (4) administrative law judges; (5) certain employees in confidential or policy-making positions; (6) high-ranking postal officials and employees; (7) the Director of the Office of Government Ethics and each Designated Agency Ethics Official; and (8) certain civilian employees in the Executive Office of the President who hold a commission of appointment from the President and who are not otherwise covered.

### 2. Confidential Financial Disclosure.

OGE also oversees the uniform confidential financial disclosure system within the executive branch. Similar to the public financial disclosure system, the confidential financial disclosure system also ensures that other, less senior executive branch employees, whose Government duties involve significant discretion in certain sensitive areas, report their financial holdings and outside business activities to their employing agencies. This process facilitates the agency review of possible conflicts of interest, assists the agency in administering its ethics program, and assists in counseling employees to avoid conflicts of interest. (A copy of the confidential financial

disclosure form, the SF 450, is enclosed in your information packet.)

### 3. Resolving Financial Conflicts of Interest.

If an ethics official finds, from reviewing an employee's financial disclosure report, that an employee has a potential or actual conflict of interest, the conflict may be resolved using one of several remedies, including resignation, recusal, waiver, divestiture, and blind trust:

- Resignation from a position may be required if an individual's position in a non-Federal entity could result in a conflict of interest or the appearance of a conflict of interest with his Federal duties.
- Recusal or disqualification from participation in a particular matter may be necessary in an instance where the individual holds certain assets that may conflict with his official responsibilities.
- Waiver may be granted which allows an employee to continue to participate in a particular matter if the ethics official determines that the financial interest is not so great to affect the integrity of a Government employee's services.
- Divestiture may be required where none of the above solutions will resolve an employee's conflicting financial interests. Divestiture requires that the individual sell his conflicting financial interest.
- Blind trust may be established if an individual has holdings of such a nature or magnitude that they would frequently present potential financial conflicts.

### C. Nominee Clearance Process.

OGE participates in the process of clearance of Presidential nominees to Senate-confirmed positions. Prior to the announcement of a nominee's name, there is an informal review process of the draft financial disclosure report that is undertaken by the White House Counsel's Office, by the agency where the nominee will serve, and by OGE to assess the report for any potential conflicts and to determine how they should be resolved.

When a nominee is formally nominated by the President, the nominee's financial disclosure report is submitted to OGE for its formal review and certification. Only when OGE has transmitted the report and its clearance letter to the appropriate committee of the Senate, will the Senate hold the nominee's confirmation hearing.

### D. Regulatory Authority and Consultation and Guidance.

OGE has responsibility for issuing executive branchwide regulations in a number of areas including rules governing conflicts of interest, post employment, standards of conduct, public and confidential financial disclosure systems and honoraria.

OGE provides interpretive guidance on conflict of interest laws, standards of conduct, post employment and financial disclosure. OGE issues both formal advisory opinions and informal letter opinions, as well as policy memoranda. OGE also regularly consults with agency ethics officials on individual cases.

#### E. Education and Training.

Each executive branch agency is required to maintain a program of ethics training to ensure that employees are aware of and understand ethics requirements. OGE provides leadership for agency training efforts by conducting workshops in Washington, DC and throughout the United States for ethics officials. OGE also supports agency training programs by developing training and educational materials such as pamphlets, a computer-based ethics game, an interactive video game, and single-issue videotapes.

As an example of some of these training materials we have attached three separate pamphlets, each targeted at employees with specific levels of responsibility and experience.

#### F. Enforcement.

OGE is responsible for reviewing agency programs to determine compliance with statutory and regulatory requirements. This monitoring responsibility is one means of assuring that programs are operated at a quality level. OGE management analysts reviewing agency programs focus on structure and staffing, public and confidential financial disclosure systems, ethics education and training, and counseling and advice. OGE has the authority to order corrective action with respect to agency programs and may recommend that an agency take certain disciplinary action in the case of individual employees. However, because agencies almost always respond positively to OGE recommendations regarding their ethics programs, it has rarely been necessary to order corrective action on the part of agencies.

### VII. Application of U.S. Ethics Laws.

#### A. Areas Covered by Ethics Laws.

Some areas covered by ethics laws and regulations include actual and potential conflicts of interest, inappropriate use of confidential information, the acceptance of gifts, misuse of one's position, outside employment, and post employment.

##### 1. Actual Conflict of Interest. The financial

interests of a Federal employee's spouse, minor children, general partner, or organization in which the Federal employee is serving as officer, director, trustee, general partner, or employee are also imputed to the Federal employee and are therefore disqualifying interests. In addition, the interest of any person or organization with whom the Federal employee is negotiating or has an arrangement concerning prospective employment is also treated as a disqualifying interest of the Federal employee.

2. Appearance of Conflict of Interest. Under the general appearance standard contained in the Standards of Conduct issued by OGE, employees are directed to avoid any actions creating the appearance that they are violating the law or the ethics standards set forth in the rule. An appearance of a conflict would be judged "from the perspective of a reasonable person with knowledge of the relevant facts." OGE has also promulgated regulations that are intended to ensure that employees take appropriate steps to avoid an appearance of loss of impartiality in the performance of official duties. These regulations establish procedures for dealing with such situations.

3. Inappropriate Use of Confidential Information. Federal ethics regulations address a form of "insider trading," that is, the use of nonpublic confidential Government information to benefit a Government employee's own personal financial interest.

4. Acceptance of Gifts. A gift includes almost anything of monetary value. A Federal employee of the executive branch may not solicit or accept a gift that is given because of the employee's official position or accept a gift that is offered by a person or organization whose interests could be affected by the employee's official actions. The gifts rules exclude certain items, for example, a cup of coffee, from the definition of gift and provide for a number of exceptions, for example, honorary awards such as the Nobel Prize, from the prohibition.

5. Misuse of Position. Another issue concerns the use of official position to benefit an official, or perhaps a business partner, relative or friend of an official.

6. Outside Employment. Ethical issues and concerns often arise whenever a Government official continues to practice his or her former occupation or otherwise to engage in outside employment while holding public office. There is a great potential for conflict when an official acts in an official capacity in a

matter that could have an effect upon the official's private business or professional interests.

7. Post employment. U.S. law addresses a number of concerns that may arise after a public official or employee leaves his or her office or position and becomes involved in matters in which the Government has an interest.

Generally, under U.S. law, no Governmentwide prohibition would restrict employment with any particular employer once a Federal employee leaves the Government. U.S. post-employment statutes do, however, restrict the matters on which a person may act after they have left Government service. Former Government employees are permanently barred from "switching sides," i.e., representing anyone in a particular matter involving specific parties in which the United States has a direct and substantial interest and in which the former employee participated personally and substantially as a Government official. Depending on a Government official's level of responsibility, other post-employment restrictions may apply.