

A Practical Approach to Establishing and Maintaining A Values-Based Conflicts of Interest Compliance System

by

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The purpose of a conflicts of interest system is to promote both the reality and the perception of integrity in government by preventing conflicts of interest violations before they occur.

Introduction

- I. Context, Purpose, Principles, History, and Basis of Conflicts of Interest Systems
- II. Structure of an Effective Conflicts of Interest System
- III. A Step-by-Step Approach to Establishing a Conflicts of Interest System
- IV. Making a Conflicts of Interest Program Work

Conclusion

- Appendix A A Summary of Ethics Reform
- Appendix B Model Conflicts of Interest Compliance System
- Appendix C Model Annual Disclosure (Asset Declaration) Form

Introduction

After listening to a presentation on New York City's conflicts of interest law, a representative of a certain nation informed his hosts that New York City's gift rule would not work in his country because in his country it was the custom, when a government official performed a service, to give that official a goat. The New York City host then asked, perhaps a bit ungraciously, "But what if I can afford only a chicken?" "Ah," said the visitor, "That's a problem."

It is, indeed, a problem. Having met with representatives from almost a third of the nations of the world, from six continents, from the richest nations on earth to the poorest, from

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every form of government, the New York City Conflicts of Interest Board has experienced first hand that conflicts of interest problems are remarkably the same throughout the world. The resolution of those problems will, of necessity, vary from culture to culture, people to people, government to government, and nation to nation. But the problems are the same.

This article seeks to provide a structure to address those conflicts of interest issues.¹ And by “conflicts of interest” one means divided loyalty – that is, conflicts, primarily financial conflicts, between one’s private interests and public duty. To be sure, a conflicts of interest (ethics) law successful in the United States may prove a disaster in Senegal or Japan.² What works well in New York City may fail miserably in Teheran or Seoul. A highly effective big city conflicts of interest system may promote only dissention and frustration in a rural village, even in the same country.³ In ethics regulation, one size never fits all. Thus, the “model” law set forth in Appendix B to this article offers less a model than a jumping off point for creating a conflicts of interest system indigenous to the particular government. That said, with audacity, this article suggests that, regardless of the system of government, culture, religion, size, or wealth of a nation, province, or city, a common template for a conflicts of interest system exists that provides an enormously flexible framework within which to address conflicts of interest issues. Some countries have already established a highly sophisticated conflicts of interest system. But many other countries have barely begun to consider these issues. And even in jurisdictions like the City of New York, with a long history of conflicts of interest regulation, room for improvement exists.⁴

¹ Appendix A to this article summarizes the basic points.

² For example, in one nation, the high unemployment rate, coupled with cultural norms, places enormous pressures on public officials to find government jobs for their relatives. There, perhaps, a prohibition on such efforts may foster disobedience and even contempt of the law, necessitating not prohibition but disclosure and regulation.

³ As a result of their size, geographical limitations, and reliance, in some countries, upon volunteers, municipalities may present conflicts issues that are not present for nations or provinces. For example, in smaller jurisdictions, conflicts are virtually inevitable. And often, government officials and citizens know one another – and one another’s business. See United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption*, p. 25 (2009) (“In situations where conflicts of interest cannot be avoided (e.g., in small communities), there must be procedures which safeguard the public interest without paralyzing the work of the agency in question”).

⁴ See generally Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 319-390 (1989). The website of the New York City Conflicts of Interest Board (<http://www.nyc.gov/ethics>) contains not only substantial material about the City’s conflicts of interest system but also materials of interest to other governments, including an International Visitors Manual and links to other useful websites.

I. Context, Purpose, Principles, History, and Basis of Conflicts of Interest Systems

Dr. Martin Luther King, Jr., once said that a positive peace is not the absence of tension but the presence of justice.⁵ So, too, ethics in government is not merely the absence of corruption but the presence of integrity. This article, then, makes one assumption, one value judgment: regardless of the type of government a nation has, integrity in government, both in reality and in the perception of the governed, is critical if that government is to govern effectively. If one rejects that assumption, then one should read no further. But if one agrees with that assumption, then among a nation's highest priorities must be the implementation of an effective conflicts of interest system, for such a system forms both the cornerstone and keystone of government integrity.

Indeed, even a hasty review of newspaper headlines reveals the critical need for implementing a conflicts of interest program in virtually every nation. Even if one sets aside external pressures from companies and lending agencies that may refuse to do business with a country that lacks a viable conflicts of interest program, one sees that, increasingly, internal forces within nations threaten (sometimes successfully) to topple the government or create anarchy because of unaddressed conflicts of interest issues, whether real or only perceived. And as every politician knows, an incorrect perception can be just as devastating as reality.

A. Context of Conflicts of Interest Systems

A word should be said about the place of a conflicts of interest program within a comprehensive anti-corruption and transparency framework.⁶ A conflicts of interest system, as discussed below, seeks to promote the reality and perception of integrity in government by preventing conflicts of interest violations before they occur. A criminal anti-corruption system seeks to catch and punish the corrupt public servant and deter corruptible public servants from engaging in criminal conduct, such as bribery, kickbacks, and theft. Personnel rules, such as time and attendance requirements, regulations on reimbursement of expenses, and prohibitions on sexual harassment, seek to establish guidelines on personnel matters for both elected and appointed public officials and a basis for disciplining appointed public servants.

Contrary to popular belief, the main reason for enacting transparency laws, such as freedom of information and open meetings regulations, is a practical reason; these laws enable a broad range of people, including, where appropriate, private citizens themselves, to spot potential or actual conduct and interests of public officials that constitute conflicts of interest and corruption. As law enforcement and conflicts of interest officials well know, even the richest government on earth lacks the resources to police every possible violation of conflicts of interest and anti-corruption statutes; these officials must, of necessity, depend upon reports from superiors, subordinates, and co-workers of the wrongdoer, as well as upon, in some societies, the media and private citizens and companies. The same is true of so-called whistleblower laws, that

⁵ Martin Luther King, Jr., *Letter from Birmingham Jail* (April 16, 1963).

⁶ See United Nations Convention Against Corruption, Art. 8(1) ("In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system").

is, laws that prohibit retribution against employees who perform their duty as citizens and as public officials to inform (“blow the whistle”) on someone committing a conflict of interest. These whistleblower laws seek to protect not some vague democratic ideal but rather the sources of information that incriminates wrongdoers, information that the enforcing authority, regardless of the type of government, may never acquire without a cooperative whistleblower.

Purchasing regulations, such as competitive bidding requirements, also play a role in a comprehensive anti-corruption program, as do prohibitions on an elected official accepting campaign contributions from someone doing business with the official’s agency (so-called “pay-to-play” restrictions), as well as registration of lobbyists and restrictions on gifts by lobbyists. Civil service laws, election laws, and campaign finance laws may also help deter corruption and conflicts of interest. Finally, in some countries, laws protecting individual rights, such as anti-discrimination statutes or freedom of speech guarantees, may serve to support an anti-corruption system.

These various statutes, rules, and programs intersect and overlap but tend to focus on certain kinds of issues. For example, if a mid-level manager accepts free tickets to some sports event from a contractor with whom he is dealing on behalf of the government, that matter will probably be handled primarily as a conflicts of interest issue. If the manager then attends the game on government time using a government car and driver, the matter will probably also become a disciplinary issue. If the tickets turn out to be merely one of many gifts the manager has accepted from contractors with whom he has dealt on behalf of the government, gifts that coincided with his approving the award of a contract to the contractor, then a criminal corruption investigation will probably be initiated.

For these purposes, public officials are often divided into three groups:

- The incorruptible,

Whose conduct reflects the nation’s values and who comply with the applicable laws, rules, and regulations, *provided the official knows what those rules and regulations are and understands them.*

- The corrupt,

Whose conduct reflects a view of public service as a means to personal enrichment, scorning the nation’s values and disregarding applicable laws, rules, and regulations.

- The corruptible,

Whose conduct will usually reflect the nation’s values and who will generally follow the applicable laws, rules, and regulations, but who are susceptible to the temptation to go astray.

Conflicts of interest and anti-corruption laws apply to each of these groups in varying ways:

- The incorruptible

To guide their actions, these officials require only an understandable conflicts of interest code, timely advice and training, and clear personnel rules.

- The corrupt

Having little regard for the public interest, these officials must be removed from public service as quickly as possible and criminally prosecuted.

- The corruptible

These officials require not only knowledge of the conflicts of interest code, timely advice and training, and clear personnel rules but also convincing proof that the code, rules, and official misconduct criminal laws will be strictly enforced.

Thus, anti-corruption laws focus overwhelmingly on the corrupt official. These laws address corrupt activity like bribery and kickbacks and theft of government funds and services. The enforcement of these laws requires undercover agents and wiretapping and sting operations. One must not minimize the importance of such laws and such law enforcement activities. One visitor to the Conflicts of Interest Board, for example, explained that he had a hard time worrying about an official having an after-hours job with a company that did business with the official's government agency when so many other officials were stuffing bribe money into their pockets. But that visitor was wrong. He *should* worry about the honest official who has an after-hours job with a company doing business with the official's government agency.

Here's why. Suppose one says to a public official of any nation in the world: "Since your government focuses so much on anticorruption, most of your public servants must be corrupt." That public official will be justifiably insulted and will bluntly state, "No. In fact, most of our public servants are honest." Of all the national representatives the Conflicts of Interest Board has met with from around the world, not one of them has said that most of their public officials are corrupt. In fact, the exact opposite is true. Throughout the world, most public servants are honest and want to do the right thing. *So what are we doing for those honest public servants?*

Are we providing them with guidance on how to stay out of ethical trouble? Are we protecting them against superiors or co-workers or outside forces that try to lead them astray? Are we reassuring our citizens that our public servants are serving the public and not themselves? Do we have a system in place that keeps our honest public servants honest and that discourages dishonesty, not by punishing it but by preventing it? Are we creating a culture of integrity, not because of a fear of being caught but because of a commitment to values? That is what a conflicts of interest system does. And that is why it is so critically important. Yet, too often in the concern over corruption and the rush to combat it, a government fails to address the needs of its honest officials.

Two common American sayings are relevant here: First, “we can’t let the tail wag the dog.” And, second, “sometimes a carrot (help) is better than a stick (threats).” If most public servants are honest – and if one wishes to keep them that way – then one *must* provide them with an effective conflicts of interest system. One cannot let that little tail of corrupt officials wag the great big dog of an honest public service. And beating up on honest public servants – telling them constantly that they are being watched and will be severely punished if they go astray – in the long run will not instill much self-confidence or pride or efficiency in those officials. The carrot of guidance and protection will go much farther toward those goals for honest public officials than the stick of anti-corruption law threats. *For that reason, conflicts of interest violations that do not rise to the level of corruption (that is that do not constitute bribes or kickbacks or theft) must be prosecuted and punished civilly rather than criminally.* Requiring that such violations be investigated by the criminal investigative services and prosecuted by state prosecutors not only wastes precious criminal justice resources but also transforms otherwise honest, though straying, public officials into crooks, seeks to employ a sledgehammer to swat a fly, and in the public’s mind elevates a relatively minor offense into a crime.

B. Purpose and Principles of Conflicts of Interest Systems

As stated at the head of this article, the purpose of a conflicts of interest system lies in promoting both the reality *and the perception* of integrity in government by *preventing* conflicts of interest violations *before* they occur.⁷ Inherent in this purpose are certain axioms - certain first principles - against which every government conflicts of interest system must be measured. Indeed, it is important to understand not only what such a system is but also what it is not. If one expects this system to do what it is not designed to do, one will be very disappointed. Unfortunately, few public officials, and even fewer private citizens, understand these underlying principles. But until one understands what a conflicts of interest system does and does not do, one cannot possibly draft, implement, interpret, or enforce an effective conflicts of interest program. It is not possible.

Thus, one may identify at least eight fundamental principles that underlie a conflicts of interest system. Such a system:

- Promotes both the reality and the perception of integrity in government;
- Focuses on prevention, not punishment;
- Is not intended to catch crooks but instead recognizes the honesty of the majority of public officials;
- Does not regulate morality (in most countries);
- Saves the government money;
- Requires that the public have a stake in the system;
- Must be tailored to the particular nation, society, and culture; and
- Undergirds the essential values of the nation.

⁷ See United Nations Convention Against Corruption, Art. 7(4) (“Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest”). See generally Chapter 2 (“Preventive measures”) of the Convention.

Each of these principles is discussed below.

First, a conflicts of interest system seeks to promote not only integrity in fact but also the public and private perception that those in government are acting with integrity. Whatever system of government a nation has, how can that government function effectively if the public believes that its officials are corrupt, even if they are not?

Second, in sharp contrast to criminal anti-corruption laws such as bribery and kickback statutes, a conflicts of interest system focuses not on punishment but on prevention. The goal lies not in punishing a conflict of interest violation after it occurs but in stopping that conflict of interest violation from ever occurring, for once the violation occurs, the damage is done: it is just one more nail in the coffin of public confidence in the integrity of government. Therefore, with this system, one does not wish to punish a violation of law; one wishes to prevent that violation. Prevention is what this system is all about. That is why, as discussed below, conflicts of interest advice and education are so critical.

Third, conflicts of interest systems are not intended to catch crooks. These systems are not so much anti-corruption as they are pro-integrity. Indeed, these systems *assume* that the vast majority of government officials are honest and want to do the right thing, an assumption that is borne out in fact. For example, the City of New York has over 300,000 employees and a very active anti-corruption system in place. How many *corrupt* officials does New York City catch each year? Perhaps 100. How many more corrupt employees are not caught? Suppose (and this is highly unlikely) it is 20 times as many – 2,000 employees. That is still only the tiniest fraction of the City work force that might be corrupt. That is why conflicts of interest most often result from ignorance of what the requirements are. That is why officials need to know – and, in the opinion of this author, have a right to know – what the rules are. That is why training and education is the single most important responsibility of a conflicts of interest agency.

A conflicts of interest system, therefore, guides the incorruptible and helps deter the corruptible. It has virtually no effect on the corrupt – on the bribe receivers and kickback takers; for them society has those undercover operations and criminal laws and jail time. But that is for prosecutors, not for conflicts of interest agencies. Conflicts of interest agencies are not in the business of catching crooks.

That said, despite the inherent honesty of public officials, numerous conflicts of interest violations exist. That is true in New York City, in the United States government, and throughout the world. Yet despite those violations, the existence of an active and effective conflicts of interest agency not only reduces the number of violations but also reassures the public that the government is honest.

Fourth, in most countries, though not in all, a conflicts of interest system does not regulate morality. Often conflicts of interest laws are referred to as ethics laws, but that is a misnomer. In most countries, so-called ethics regulations are not really about ethics at all, in the sense of right and wrong, good and evil, morality and immorality. Rather, as noted above, they are about the reality and perception of divided loyalty, of conflicts, primarily financial conflicts, between one's *private* interests and *public* duties. It may be “unethical,” for example, for an education minister to spend

50,000 dollars in government funds for a new bathroom for his office when many students do not even have textbooks, but that is not a conflict of interest and would not violate most government conflicts of interest regulations, nor should it. That is why in those countries in which the prevailing heritage is Judeo-Christian, contrary to what many public officials so often tell us, the Ten Commandments are not enough, because one is not dealing with morality.

To be sure, in those countries in which government and religion are inseparable, a conflicts of interest system may indeed form an integral part of the moral code. But in other countries one must be careful to distinguish between conflicts of interest and unethical conduct, lest one fail to provide sufficient guidance to officials or lest one suggest to citizens that the conflicts of interest system can solve moral problems, when in fact it cannot.

Fifth, although a conflicts of interest system is not really intended to punish inefficiency, it does save money. For example, such a system prevents sweetheart deals (that is, actions by a public official that favor a private party to the detriment of the government) with former government employees or with a relative or private business partner of a current government official. This system protects the public against, for example, a customs inspector looking the other way instead of imposing duty on an import because he works on the outside for the importer. In capitalistic systems, these laws also level the playing field for the private sector, particularly for small businesses, which cannot afford to give 50-dollar bottles of scotch at holiday time or to hire high-priced former government officials or to send current government officials to the Canary Islands in winter. So while a conflicts of interest system has no announced economic intent, it does have a positive economic impact.

Sixth, regardless of the type of government the nation has, the public, including private citizens and companies, should have a stake in the conflicts of interest system. In most jurisdictions in the United States, however, a private company, for example, can with virtual impunity offer a gift to a public servant, who, if he or she accepts the gift, may well violate the conflicts of interest law, pay a substantial fine for that violation, and even lose his or her job. But, as long as the gift does not rise to the level of a bribe, the company that caused the public servant to violate the law will suffer no penalty whatsoever. Not only grossly unfair to the public servant, such a result undermines support for the conflicts of interest system, encourages private companies to circumvent that system, subjects public officials to a “siege mentality,” where they feel unprotected in the face of attacks from outside the public service, and thus promotes disrespect for integrity in government.⁸

Seventh, as noted above, conflicts of interest problems appear strikingly similar throughout the world; and thus a template for a conflicts of interest system that is globally uniform exists. But the resolution of conflicts of interest problems within the context of that system must be tailored to the particular nation, society, and culture. For example, a prohibition on a public official having an ownership interest in a company doing business with the government will probably work quite well

⁸ Specifically, conflicts of interest laws may prohibit inducement of a government official to violate the conflicts of interest code (*see* section II(A) below), appearances by the private business or employer of a government official before the official’s government agency (section II(A)), applicant disclosure (section II(B)(2)), and penalties such as debarment and disgorgement (section II(C)(5)).

in an urbanized society but may prove disastrous in a rural community. And in different societies the same words may have a substantially different impact and meaning. As U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., wrote, “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”⁹

And finally, eighth, perhaps most important of all, a conflicts of interest system should undergird the essential values of the nation. For example, in a society that purports to be democratic, the conflicts of interest system should encourage citizen participation in government by providing guidance to public officials and reassurance to citizens that their public servants are serving the public and not themselves. In a society that sets obedience to God above all else, the conflicts of interest system should encourage that obedience by strengthening officials’ and the public’s commitment to conflict-free government as a reflection of God’s will. In a society that proclaims government to be the servant of the proletariat, the conflicts of interest system should ensure that the public service acts, and appears to act, in the interest of the people and not in the interest of the individual official.

C. The Antiquity of Conflicts of Interest Systems

In view of the importance of conflicts of interest systems, one should not be surprised at their antiquity. In the United States, conflicts of interest regulation originated largely in the contracting scandals during the American Civil War,¹⁰ although instances of limited legislation arise much earlier. For example, in 1830 New York City enacted a law prohibiting members of the Board of Alderman and Board of Assistants from having an interest in a contract, expense, or consideration to be paid under an ordinance of the Common Council.¹¹ But in the United States, the watershed event for ethics regulation occurred in 1972 with the Watergate scandal that forced President Richard Nixon to resign¹² and culminated in the enactment of the Ethics in Government Act of 1978.¹³

In Germany, formal ethics regulations date back at least to 18th century Prussia.¹⁴ In France, Louis IX promulgated comprehensive governmental conflicts of interest restrictions in 1254.¹⁵ As discussed below, the Qur’an contains over 50 verses addressing corruption. The Hebrew Scriptures are replete with conflicts of interest concerns, as when, for example, God

⁹ *Town v. Eisner*, 245 U.S. 418, 425 (1918) (citation omitted).

¹⁰ 12 Stat. 577 (1862); 12 Stat. 696 (1863); 13 Stat. 123 (1864).

¹¹ New York City Laws of 1830, Ch. 122, § 11. *See also* 10 Stat. 170 (1853) (prohibiting government employees from assisting in the prosecution of any claim against the United States).

¹² *See* <http://www.washingtonpost.com/wp-srv/politics/special/watergate/> (last viewed June 21, 2012).

¹³ Public Law 95-251, codified as amended in 5 U.S.C. app. 4.

¹⁴ Preussisches Allgemeines Landrecht, part 2, tit. 10 (1794).

¹⁵ Louis IX, Grande Ordonnance (Dec. 1254), discussed in David Schacher, A “New” Model Conflicts of Interest Law, reproduced at http://www.nyc.gov/html/conflicts/downloads/pdf2/municipal_ethics_laws_ny_state/louis_ix_et_hics_law.pdf (last viewed June 21, 2012).

condemns the house of Eli and ousts them as priests at Shiloh because they convert for their own use the people's sacrifices.¹⁶

By the time of the Han Dynasty in the 3rd Century B.C.E. China, the ethical principles of K'ung Tzu, known in the West as Confucius, which precluded corruption, had become the foundation of the public service. Over 2,500 years ago, the Buddha enjoined bribery. The 18th Century B.C.E. Code of Hammurabi contains punishment for improper official conduct; for example, a corrupt judge suffers a stiff fine and removal and permanent debarment from holding judicial office.¹⁷ And throughout the ancient Hindu texts of the Vedanta and the Upanishads run threads of anti-corruption, particularly in the concept of dharma (the principle of doing right things, of justice), and in the Tirukural's elucidation of artha, which includes good government ("The tyrant's request for gifts from his people is like the armed highway robber's demand couched in the language of politeness").

D. Values-based and Compliance-based Conflicts of Interest Systems

Conflicts of interest are inevitable. The question is how one controls them.

Those who structure government conflicts of interest programs have developed two primary approaches, approaches that most see as competing and incompatible. In fact, however, these two approaches not only complement one another but are inextricably linked, a sort of yin and yang of a conflicts of interest construct.

The first, inherently Western-based approach demands a compliance-based system, although some Eastern cultures, such as those reflecting a Buddhist tradition, may also focus on negative rather than solely on positive admonitions. In a compliance-based conflicts of interest system, laws and regulations prohibit specific interests and conduct. For example: "A public official may not accept a gift from any person or firm doing business with the government." This approach offers one substantial benefit: it gives clear guidance to public officials as to what actions are permissible and what actions are not. This approach, however, contains two overwhelming drawbacks. First, it transforms correct government conduct into a series of rules. As a result, a compliance-based approach is divorced from those values and ethics that promote a public service that is not merely non-conflicted but that is affirmatively devoted to advancing the public good. Since in a compliance-based system what is not prohibited is allowed, that system invariably focuses officials' attention not on doing what is right but on not doing what is wrong, not on doing one's best but on not doing one's worst. Second, as a related point, a compliance-based conflicts of interest system cannot promote the essential values of the nation because rules are negative whereas values almost invariably reflect positive and aspirational principles. Rules do not inspire. Values do.

The second approach to a conflicts of interest system is values based. A values-based conflicts of interest system exhorts public officials to strive for and attain certain standards. For example: "Public officials shall place the interest of the public before themselves." Properly crafted, this approach clearly promotes essential national values. It also encourages the official

¹⁶ 1 Samuel 2:12-36.

¹⁷ Code of Hammurabi, § 5 (ca. 1780 B.C.E.).

always to strive toward an ideal, not to do the ethical minimum but to do the ethical maximum. Such a system properly deserves the name not merely of a conflicts of interest system but of an ethics system, for by professing values, not merely rules and regulations, it inculcates in public officials ethical standards. But a values-based conflicts of interest system possesses one devastating drawback: it provides no clear guidance to public officials as to what is and what is not permitted in actual, real-life circumstances and thus also offers little reassurance to the people that their public officials are in fact acting in the public interest.

Thus, both compliance-based and values-based conflicts of interest systems contain significant defects. The answer to this dilemma lies in transmuting these apparently contradictory systems into a single unified whole. Many professionals, such as lawyers, doctors, and teachers, are already familiar with such an approach. For example, the Standards of Professional Conduct of the Bar Council of India Rules contain both general admonitions and specific injunctions, such as:

It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other.... An advocate shall not act on the instructions of any person other than his client or his authorised agent.¹⁸

Similarly, the New York State Bar Association divided its former Lawyer's Code of Professional Responsibility into

- Canons
 - one sentence “statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession” –
- Ethical Considerations
 - “aspirational in character and represent[ing] the objectives toward which every member of the profession should strive” – and
- Disciplinary Rules
 - “unlike the Ethical Considerations,...mandatory in character...[and] stat[ing] the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”¹⁹

Similarly, a values-based conflicts of interest compliance system, combining both the yin of a values-based approach and the yang of a compliance-based approach, should first set forth a values-based Code of Ethics for Public Officials, which draws upon, reflects, and undergirds the essential values of the nation. As the philosopher Bertrand Russell cautioned, “[r]ules of conduct, whatever they may be, are not sufficient to produce good results unless the ends sought

¹⁸ Bar Council of India Rules, Chapter II, Standards of Professional Conduct and Etiquette, Section II (Duty to Client), ¶¶ 15, 19.

¹⁹ New York State Bar Association, *The Lawyer's Code of Professional Responsibility*, p. 2 (1994).

are good.”²⁰ Then out of that code of ethics should be drawn specific, compliance-based conflicts of interest rules (a Conflicts of Interest Code), violation of which may subject the offending public official not only to dismissal but also to civil fines and, in appropriate cases, to criminal prosecution. As an example, Appendix B to this article sets out a values-based code of ethics for a medium-sized Western-style government, followed by a compliance-based conflicts of interest code.

Thus, for example, in countries tracing their legal system to the Code Napoléon, the Preliminary Title (1803) of that Code and the Declaration of the Rights of Man and of the Citizen (1789) may provide foundational documents from which to draw ethical precepts. Similarly, in a country whose law is based upon Shariah, which is drawn from the Qur’an and other Muslim religious sources, the code of ethics would lay out those principles from the Shariah that address conduct by public officials. As explained by Dr. Yassin El-Ayouty, a retired Principal Officer at the United Nations and the Founder and President of Sunsglow,

- (1) In the Qur’an, there are about 50 verses enjoining corruption, corruptors, and corrupted. The term in Arabic is FASAD (corruption).
- (2) FASAD is regarded as (a) Evil (to society) and (b) Insurrection (FITNAH) against society.
- (3) FASAD, after reform has been undertaken, is a bigger sin as it represents regression.
- (4) All the prophets, beginning (in the Qur’an) with Moses, have warned against corruption.
- (5) Corruptors in the eyes of God are losers.
- (6) God is against corruption as it retards development and chokes off progress.
- (7) Those who lord it unjustly over their subjects are agents of corruption.
- (8) FASAD is an instrument of selling people short (ripping them off).²¹

Out of the principles enjoining FASAD in the Shariah may be drawn specific legal prohibitions on conflicts of interest. Those legal prohibitions will address the same issues as analogous legal prohibitions in other countries with very different cultures and traditions, although the substance of the prohibitions must, of course, be tailored to the specific society, as noted above.²²

²⁰ Bertrand Russell, *How I Came by My Creed* (1929), at <http://www.users.drew.edu/~jlenz/br-creed.html> (last viewed June 21, 2012).

²¹ April 14, 2005, fax from Dr. Yassin El-Ayouty to Mark Davies, on file with the author.

²² See United Nations Convention Against Corruption, Art. 8 (“Codes of conduct for public officials”). Generally, codes of conduct may be either values-based or compliance-based. The Convention appears to contemplate both. See United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption*, p. 21 (2009) (“Codes will state the standards of behaviour of public officials and translate them into specific and clear expectations and requirements of conduct”).

E. Cautions

Before proceeding to the structure and adoption of a conflicts of interest system, one should note two final cautions. First, one should approach academic articles on conflicts of interest programs with great care. With all due respect to academics (and the author of this article is and has long been a law professor), most academic pieces on conflicts of interest laws display an appalling ignorance of how these laws play out in practice. A conflicts of interest program is not some kind of glass bead game. When a government enacts and enforces a conflicts of interest system, it interferes in people's lives in a very fundamental way, where even a hint by the enforcing agency that an official may have engaged in improper conduct can destroy a career or throw an election or rob a public official of his or her livelihood. A conflicts of interest system is serious business.

Second, one should heed an admonition too often forgotten by those who zealously seek reform: one must never let the perfect be the enemy of the good. If one waits to establish a conflicts of interest system until one can implement the perfect system, then no system will ever be implemented at all. A good system is better than no system. That said, a poor system is worse than no system at all. If certain minimal requirements (discussed below) cannot be met, then the government is well advised not to attempt to implement a conflicts of interest system. Experience teaches that a poor system will generate substantial, ultimately overwhelming, criticism and undermine public confidence in the integrity of government.

With the fundamental purpose of conflicts of interest laws and their underlying principles in mind, and mindful of the need to ensure that conflicts of interest rules reflect societal values, one may turn to the structure of an effective conflicts of interest system.

II. Structure of an Effective Conflicts of Interest System

An effective conflicts of interest system rests upon three pillars. Removal of *any* of these pillars causes the entire structure to collapse. The first pillar is a sensible, clear, and comprehensive conflicts of interest code derived from a values-based statement of the public duties of public officials. The second pillar is sensible disclosure – transactional disclosure, applicant disclosure, and annual disclosure (asset declaration). The third pillar is effective administration by an independent ethics body, preferably a conflicts of interest board or commission, that provides quick answers to questions about the conflicts of interest code, that trains officials in the requirements of that code, that regulates disclosure, and that enforces the code, conducting investigations of possible violations and imposing fair and appropriate penalties.

All three pillars are essential. Again, removal of any of them will topple the entire system. Therefore, a conflicts of interest system that does not meet these requirements – for example, that lacks an effective enforcement mechanism – is not only a flawed system; it is a bad system. And, again, a bad conflicts of interest system is worse than no conflicts of interest system at all.

Each of these three pillars is described in detail below.²³

A. First Pillar: Conflicts of Interest Code

The first pillar of a conflicts of interest system is the conflicts of interest code. As noted above, although, in order to provide clear guidance to officials and reassurance to citizens, this code will be compliance based, it *must* be derived from the essential values inherent in the national ethics fabric. Indeed, in many societies, a conflicts of interest code will be unintelligible apart from those values. Thus, the government may wish to set forth, as the very first section of the conflicts of interest law, a clear statement of the values from which the conflicts of interest code is derived. Depending on the particular society, this statement itself may derive from a fundamental religious or spiritual work (e.g., the Shariah, the Hebrew Scriptures, the Vedanta and Upanishads, the teachings of the Buddha), from a political or human rights work widely accepted in the country (e.g., Declaration of the Rights of Man and of the Citizen (26 August 1789), Universal Declaration of Human Rights (10 December 1948), Das Kapital, Mao Zedong Thought, or Deng Xioping Theory), from a cultural or ethical work (e.g., Analects of K'ung Tzu), or from a compilation of expressions on the duties of public officials. The more heterogeneous the society, the more likely the last option will prevail.

The conflicts of interest code, which derives from and reflects that statement of values for public service (the code of ethics), forms the heart and soul of a conflicts of interest system. The conflicts of interest code must be clear, comprehensive, straightforward, sensible, and short, must be tailored to the particular government, and must set out an inclusive list of do's and don'ts that will guide and protect honest public officials. Simple and sensible. Public officials cannot obey a code they do not understand and will not obey (or only grudgingly obey) a code that does not make sense to them. In the world of conflicts of interest, common sense reigns supreme. Particularly in the Western world, where resort to attorneys sometimes seems the norm rather than the exception, one must remember that the vast majority of government employees are laypersons with limited access to attorneys. In describing effective presentations to juries, American trial lawyers use this adage: KISS – “keep it simple, stupid” - an admonition that the drafters of conflicts of interest codes should take to heart.

Lawyers in common law countries should take care not to overuse definitions, which lawyers love but laypersons hate. Therefore,

- Limit definitions to a minimum.
- Do *not* clutter up the conflicts of interest code with definitions; put them in a separate section.
- Never allow a definition to expand the scope of the prohibitions in the code; definitions should always narrow, never expand, the scope of a prohibition in the conflicts of interest code.

²³ See generally Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 NEW YORK LAW SCHOOL LAW REVIEW 177-188 (1995) (also reported in FEDERAL ETHICS REPORTS 15 (Dec. 1996) (CCH)).

Other admonitions apply in almost all countries. In particular, whenever possible, a conflicts of interest code (in contrast to the values-based ethical statements upon which the code is based) should contain “bright-line” (clearly defined) rules. Many public officials, particularly high-level officials, would rather have a “no” answer than an unclear answer. Furthermore, if the primary purpose of the conflicts of interest system lies in preventing conflicts of interest violations, then public servants must know exactly what it is that they may not do.

Exceptions to the conflicts of interest code (e.g., gifts that may be accepted, despite a code’s general prohibition on acceptance of gifts), should never be placed in the code itself. Rather, exceptions should be contained in a separate section. Again, the conflicts of interest code should present a clear and concise statement of what a public official may and may not do. Inclusion of exceptions just confuses the public official. The idea is this: if the public servant reads only the code itself (not the definitions and not the exceptions) and complies with the code, then he or she will never violate the conflicts of interest law. By reading only the code, the official may refrain from doing something that is in fact permitted but will not do something that is prohibited. In computer language: the “default” should also be compliance, not violation.

The conflicts of interest code must fulfill the purpose and comply with the principles outlined in section I above. If possible, the code should set a minimum, uniform standard for all government officers and employees, with perhaps some stricter standards for certain high level officials. Treating some officials differently than other officials – particularly treating high-level officials more leniently than lower-level officials – invariably undercuts the goal of a conflicts of interest system to promote the reality and perception of integrity in government because the lower-level officials, as well as the public, will regard the disparate treatment as an attempt to protect wrongdoing by elected or other senior officials. That said, in its conflicts of interest law the government may wish to permit individual agencies to set even higher standards. For example, a police department or prosecutor’s or finance office may wish to prohibit receipt of gifts of any size, even a free cup of coffee, from anyone the official deals with in his or her government job.

The goal is a conflicts of interest code that contains a simple and complete list of do’s and don’ts that a public official (without a lawyer) can understand, that can be posted on the wall of government offices, that government employees can point to when a co-worker or superior or private citizen or company asks them to violate the law, and that a high-level official unjustly accused of a conflict of interest can hold up to the accuser and show that in fact what the official did was not a conflict of interest. A clear and comprehensive conflicts of interest code can be a public official’s best friend because it tells the official what the rules are and keeps him or her out of trouble.

Finally, as noted above, the conflicts of interest law must place upon the public – that is, upon private citizens and those who deal with the government - some responsibility for public officials complying with conflicts of interest code. It is utterly unconscionable that a private citizen or firm can with complete impunity induce a public official to violate the conflicts of interest code. Yet it happens every day. Thus, the burden of complying with the code of ethics must not rest solely upon government officials. Private citizens, developers, contractors, applicants, and firms must have a stake in the conflicts of interest code. If, for example, the code would prohibit a

finance official from accepting a low-interest loan from a bank seeking to do business with the finance office, then the bank should not with impunity be able to offer that loan. Inducement of a conflicts of interest violation must itself be a violation, even if the inducer is not a government official.

A list of most significant provisions in a conflicts of interest code would include the following:²⁴

- Using one's government office for private gain for oneself, one's family, or one's private business associates (misuse of office)
- Recusing (disqualifying) oneself in order to avoid misuse of office²⁵
- Using government resources for non-governmental purposes (misuse of government resources)
- Soliciting gifts or accepting gifts from persons doing business with the government
- Seeking or accepting private compensation for doing one's government job (tips; gratuities)
- Soliciting political or charitable contributions or political activity from subordinates or from those with whom one deals as part of one's government job (except as expressly permitted by law)

²⁴ See Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, in Yassin El-Ayouty, Kevin Ford, & Mark Davies, *GLOBAL ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES*, pp. 101-105 (Praeger 2000); Mark Davies, *Considering Ethics at the Local Government Level*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR*, pp. 150-162 (American Bar Association, 2d ed., 2008). See also United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption*, p. 21 (2009) (stating that codes of conduct under Article 8 of the Convention should "state clearly the requirements relating to both financial conflicts of interest...and conflicts of interest based on non-financial concerns...[and] should include clear and unambiguous provisions on acceptance or rejection of gifts, hospitality, and other benefits, especially addressing restrictions on acceptance of gifts from persons or entities that have business with the organization, any outside employment...and the use of government resources (e.g., using Government resources only for Government purposes, or protecting non-public information) [and] ...should deal with post-resignation and post-employment restrictions (e.g., restrictions on former public officials representing a new employer before their former agency or taking confidential information to new employers)"); United Nations Convention Against Corruption, Art. 12(2)(e) (post-employment restrictions).

²⁵ Note that recusal by a conflicted member of a legislative body may disenfranchise those who elected that legislator because few governments provide for alternate legislators in the event of disqualification from voting. By contrast, when an elected non-legislator recuses himself or herself, in most instances some other person, elected or appointed, can step into the shoes of the recused official and act on his or her behalf – e.g., a vice-president may usually act on behalf of a conflicted and recused president. Therefore, the code of ethics may need to provide, at least in some instances, that a conflicted legislator may vote (though perhaps take no other action) after publicly disclosing the conflict. See, e.g., New York City Charter § 2604(b)(1)(a); New York City Conflicts of Interest Board Ad. Op. No. 2009-2.

- Disclosing confidential government information or using such information for a private purpose
- Appearing before government agencies on behalf of private interests or representing private interests in government matters
- Seeking a job from a private person or firm with which one is dealing in one's government job
- After leaving government service,
 - Appearing on behalf of a private employer before one's former government agency for some specified period of time (e.g., one year) or
 - Working on a matter on behalf of a private employer that one worked on while in government service
- Inducing other government officials to violate the conflicts of interest code.

A government may require other provisions to address specific concerns that have arisen, depending on the needs and ethical history of the particular jurisdiction. For example, if government officials are seen as mixing politics with official government business, then the government may wish to prohibit holding political positions or engaging in certain political activities. Such additional provisions might address:

- Holding a position with (e.g., being an officer or employee of) a private firm doing business with the government
- Having an ownership interest in a private firm doing business with the government
- Taking official action that benefits one's recent private employer (pre-employment restrictions)
- Acting as a lawyer or expert against the government's interests
- Paying money to anyone other than the government in order to obtain one's government position or in order to obtain a promotion or raise
- Using one's government position to coerce someone to make a political contribution or engage in political activity (except as expressly permitted by law)
- Soliciting political contributions from persons doing business with any agency of the government
- Holding both a government position and a political party position
- Engaging in political activity
- Having a financial or business relationship with a superior or subordinate
- Failing to avoid conflicts of interest
- Engaging in conduct that conflicts with one's official government duties.

Finally, the government may wish to consider imposing restrictions on private citizens or firms to ensure, as noted above, that they have a stake in public officials complying with the conflicts of interest code and to protect officials against coercion to violate the code. Specifically, the government may wish to include in the conflicts of interest law restrictions on private citizens, developers, applicants, contractors, applicants, and firms

- Seeking or causing an official to violate the conflicts of interest code or

- Appearing as a representative before a government agency one of whose employees works for the private citizen or firm. (The citizen or firm could appear on its own behalf – for example, seeking a license or permit for itself – but not as an attorney, consultant, or other representative of some third party.)

Appendix B contains a model conflicts of interest code, with alternative provisions and commentary.

B. Second Pillar: Disclosure

The second pillar upon which an effective conflicts of interest system rests is disclosure. Conflicts of interest systems typically include three kinds of disclosure, which should work together to provide an effective disclosure system:

- (1) Transactional disclosure;
- (2) Applicant disclosure;
- (3) Annual disclosure.

(1) Transactional disclosure. The most important kind of disclosure is transactional disclosure, which should occur whenever a potential conflict actually arises. Transactional disclosure is often accompanied by recusal, that is, disqualification of the disclosing official from dealing with the matter. For example, suppose that an official in the Bridge Division of the Ministry of Transportation who is responsible for evaluating proposals for bridges has a brother whose company is seeking a contract with the Ministry to construct a bridge. The official should be required to disclose the fact of her family relationship with the company and should also recuse herself from working on that project, absent permission from the agency that administers the conflicts of interest law. Section 2 of Appendix B provides a “model” transactional disclosure provision.

Rarely should a public official object to this kind of disclosure, although instances may occur where such disclosure may reveal highly personal information, for example, where a doctor who treats cancer and who also sits on a government commission would be required to disclose that a person appearing before her is also a patient. But such instances can be addressed as needed by the agency administering the conflicts of interest law.

A transactional disclosure thus discloses the name of the official and the nature of a conflict of interest when it actually arises. In a recusal, the official disqualifies himself or herself from discussing, acting on, receiving relevant documents relating to, or voting on the matter. Example: "This contractor, who is bidding on our agency's bridge contract, is my brother; and I recuse myself from this matter." Note that recusal requires no involvement at all in the matter – no participation in discussions or communications about it (no emails, telephone conversations, conference calls, meetings, or any other communication) and no receipt of relevant documents. A common practice in the United States, where an official at a meeting steps down into the audience to voice his views “not as an official but as a member of the public,” is improper. Indeed, the recused official should not even be in the room when the matter is discussed, as his or her mere presence may have a chilling effect on an open discussion and reasoned decision.

Transactional disclosure must be made to the official's supervisor. Some governments may wish to require that the disclosure also be made to the government agency that enforces the conflicts of interest system, particularly where the disclosure is not public, at least in certain instances (e.g., when the amount at issue exceeds some threshold amount). In a country seeking to promote transparency in government, the transactional disclosure should be public since transactional disclosure informs the public, other government officials, persons doing business with the government, and the media about the conflict of interest, thus enabling those groups to ensure that the disclosing official in fact recuses himself or herself and does not profit from the conflict of interest. Such recusal prevents a conflict of interest from becoming a conflict of interest violation.

Commonly, if the disclosure is made at a public meeting, an oral disclosure is sufficient if it is put in the public minutes of the meeting. If the disclosure is not made at a public meeting, the disclosure must be in writing and filed with the official's agency and, if required, with the enforcing agency. To ensure compliance with the transactional disclosure requirement, clear penalties should be provided for failure to disclose.

Since transactional disclosure involves an actual conflict of interest and alerts the government, the public, and affected parties to that actual conflict, such disclosure is the most important type of disclosure. In particular, transactional disclosure helps to reassure the public and the affected parties that the government is acting with honesty and integrity. Accompanied by recusal, transactional disclosure also removes, or at least ameliorates, the conflict of interest.

(2) *Applicant disclosure.* Transactional disclosure is made by government officials. Applicant disclosure is made by a private person or non-government entity that is bidding on government business or that is requesting a permit, license, funding, or benefit from the government. The purpose of this kind of disclosure lies in making government officials aware of their own possible conflicts of interest and in alerting other government officials, other bidders or applicants, and the public to possible conflicts of interest. Applicant disclosure therefore serves as a "check" on transactional disclosure. This type of disclosure also serves to give the public and private firms some stake in public officials complying with the conflicts of interest code.

The bidder or applicant must state in the bid or application the name of any official in the government who has an interest in the bidder or applicant or in the bid or application itself, to the extent the applicant knows. "Interest" should include the interest of family members of the official. Example: "Mr. Lee, an owner of our company, is the brother of Dr. Jho, the Ministry's Director of Purchasing." If the matter comes before Dr. Jho, then she must submit a transactional disclosure statement and recuse herself, as discussed above. Clear penalties for non-disclosure help ensure compliance. Section 7 of Appendix B provides a "model" applicant disclosure provision.

(3) *Annual disclosure.* Also known as financial disclosure or asset declaration, this third form of disclosure exists in governments throughout the world.²⁶ Such disclosure annually

²⁶ See United Nations Convention Against Corruption, Art. 8(5) ("Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities

reveals certain basic information about the filer, such as the location of his or her real property and the names of his or her private employer (if any). It is by far the most common form of disclosure, the most controversial, the most misunderstood, and the most abused. Yet *sensible* annual disclosure that complies with the purpose and principles outlined above remains critical to an effective conflicts of interest system.

In the observation of the author, many, many governments have adopted annual disclosure forms that do not meet these purposes and that, in particular, request far too much information, information that often is of little help in preventing conflicts of interest violations. Indeed, most annual disclosure forms tend to be excessively burdensome on officials, overly intrusive on their privacy, and largely irrelevant to revealing potential conflicts of interest. Two reasons appear to account for this tendency. First, when a government is under pressure to take some action to address public concerns about government integrity, creating a lengthy annual disclosure form seems an easy way out, something tangible to which the government can point and proclaim: “You see, we have addressed your concerns. We have required our high-level officials to disclose their private interests.” Often cited in the United States in support of this approach is the aphorism of U.S. Supreme Court Justice Louis Brandeis: “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”²⁷ Yet, too much sunlight causes cancer. Second, civil society often presses for such extensive disclosure, without quite appreciating either its purpose or its impact upon the public service. For example, when the State of New York enacted an extensive annual disclosure form in 1987, over 300 county officials resigned rather than complete it.

Annual disclosure forms do not catch crooks. They do not stop the corrupt. No one has ever reported on an annual disclosure form: “Bribes accepted, 5,000 dollars.” But that is not their purpose. As a key element of a comprehensive conflicts of interest system, annual disclosure forms seek to prevent conflicts of interest violations from occurring by:

- Focusing the attention of officials at least once each year on where their potential conflicts of interest lie. For example, if an official's brother is a builder, that official will have a possible conflict if his or her agency deals with the brother.
- Letting the government agency that enforces the conflicts of interest system, as well as, where appropriate, the public, the media, the government, and people who do business with the official's agency, know what the official's private interests are.
- Providing a check on "transactional" disclosure - that is, annual disclosure will reveal if the filer is making required transactional disclosures and recusals.

regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials”). See also United Nations Office on Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption*, pp. 25-27 (2009) (“Disclosure systems”).

²⁷ Louis Brandeis, *What Publicity Can Do*, OTHER PEOPLE’S MONEY, p. 92 (Frederick A. Stokes Co., N.Y. 1932), quoted in *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

Applying the purpose and principles of an effective conflicts of interest system, as outlined above, to annual disclosure, one infers the following guidelines for an annual disclosure form:

- Tie the questions in the form directly to the conflicts of interest code. The form should request *only* information that would reveal a conflict of interest under the code. For example, if it's not a conflict of interest for a public official to award a contract to a company when she owns only 1,000 dollars in the company's stock, then she should not have to report that stock on a disclosure form.
- Include only those questions in the form for which a need exists. Creating a form is an exercise in "zero-based drafting." One begins with a blank sheet of paper and asks only the relevant questions, that is, questions that are relevant to the conflicts of interest code.
- Do not let the perfect be the enemy of the good. A short form that reveals 95% of potential conflicts of interest is better than a long form that reveals 98%.
- Do not ask for amounts on the form or even ranges of amounts. Since the form is tied to the conflicts of interest code, amounts are irrelevant – whether a conflict is a 5,000-dollar conflict or a 50,000-dollar conflict, it is still a conflict and is still prohibited. Amounts are irrelevant.
- Limit the universe of those who should be required to file an annual disclosure form to those public servants at significant risk of conflicts of interest. In most governments, this group would include elected officials (if any), agency heads and deputy and assistant agency heads, members of policymaking boards and commissions, other policymakers, auditors, assessors, and those persons having discretionary authority with respect to purchases, bids, contracts, licenses, permits, and inspections. Some jurisdictions also require candidates for elective office and political party officials to file. Some other jurisdictions extend the filing requirement to union officials.
- In a government that seeks transparency, make the reports available to the media and the public because, again, it is the public, in particular the media, who most often ferret out conflicts of interest.
- Work toward electronic filing. Only when the reports are full-text searchable can the enforcing agency do meaningful reviews of the reports and compare them against other databases, such as vendor lists and no-bid contracts.
- Provide for late filing fines and significant penalties for failure to file, for failure to report required information, or for misstatements of information. In New York City, for example, the overall compliance rate for annual financial disclosure exceeds 98%, and for officials who are currently in City service it stands at 100% - but only because the New York City Conflicts of Interest Board imposes substantial fines for non-compliance.
- Remember to keep the form short and simple. It has been said that annual disclosure forms are like zucchini: more and bigger is not necessarily better.

Finally, since one of the purposes of annual disclosure lies in focusing the attention of officials at least once each year on where their potential conflicts of interest lie, the form may require filers to

read and certify that they have read the conflicts of interest code. Appendix C contains a possible short annual disclosure form.

Despite the fact that catching crooks is not the point of the conflicts of interest system, or of annual disclosure, criminal prosecutors will often insist on a longer annual disclosure form because of the assistance it provides them in criminal investigations and prosecutions. For that reason, some governments require certain high-level officials to file two forms. One is the public annual disclosure form. The other form is a confidential form to which only a handful of government security officials may have access. This second, confidential form contains the personal data desired by a prosecutor's office to detect and prosecute corruption.

C. Third Pillar: Administration

The third pillar of a conflicts of interest system is effective administration by an independent, adequately funded agency that provides quick answers to questions on the conflicts of interest code, that trains officials on that code, that regulates disclosure, and that enforces the code. If a conflicts of interest system is to be effective, the administering agency must exercise each of these four functions, as discussed below. One should emphasize that administration of a conflicts of interest system is relatively inexpensive. For example, the budget of the New York City Conflicts of Interest Board, as proposed by the Board, would be only 7/1,000 of one percent (.00007) of the City's net total expense budget.²⁸

(1) *Nature of the administering agency.* Two basic agency structures exist for administering a conflicts of interest system: an office, such as the United States Office of Government Ethics,²⁹ and a board or commission, such as the New York City Conflicts of Interest Board.³⁰ Hybrids also exist. For example, in the United Republic of Tanzania, if a preliminary investigation by the Ethics Secretariat, an extra ministerial department of the Government under the Office of the President, determines that any of certain high-level public officials may have violated the code of ethics, the Ethics Commissioner appoints a tribunal to investigate the allegation.³¹ In addition, in many countries, the administration of the conflicts of interest system is folded into administration of the larger anti-corruption system.

In the opinion of this author, regardless of the form of the government, a conflicts of interest board or commission (that is, a body of citizens) is preferable to a conflicts of interest office and, in particular, is preferable to folding conflicts of interest administration into administration of the much larger anti-corruption system, for several reasons. In regard to the preferability of a separate conflicts of interest administrative agency to a combined anti-corruption/conflicts of interest agency, too often in a combined agency the conflicts of interest portion "gets lost in the sauce," that is, the pressure of targeting corruption prevents sufficient attention to conflicts of interest matters. In addition, a conflicts of interest agency, which lacks

²⁸ See Proposed Amendments to Chapter 68 of the New York City Charter (Aug. 3, 2009), p. 12.

²⁹ 5 U.S.C. app. § 401.

³⁰ New York City Charter § 2602.

³¹ Law No. 13 of 1995, §§ 19, 23.

criminal jurisdiction, appears less threatening to those seeking advice or self-reporting misconduct. A conflicts of interest agency will also be seen as preventive, not punitive, likewise encouraging requests for advice and self-reports of violations. Establishing a conflicts of interest agency offers fewer challenges and requires fewer resources than an anti-corruption agency; even in the poorest countries, the capacity for creating a conflicts of interest agency already exists. Similarly, the small size and scope of such an agency enables it to be more easily tailored to the particular country and culture. Finally, establishment of such a separate agency addresses the “broken window syndrome,” that is, the phenomenon that one broken window in a house invites the breaking of more windows: addressing low level offenses, such as graffiti and turn-style jumping, discourages a disrespect for the law and greater offenses; effective administration of a conflicts of interest system helps inculcate a culture of integrity and a feeling that, at least in one area, the government is trustworthy and working well.³²

With respect to the preferability of a conflicts of interest board or commission over a conflicts of interest office, first, as discussed below, in order to be effective a conflicts of interest agency must be independent of other government agencies and officials. But employing an office rather than a board may threaten to vest too much power in a single individual, namely, the head of the office, resulting inevitably in a tendency to restrict the office’s independence.³³

Second, as recognized by Tanzania in the provision for appointing an investigatory tribunal, where the conflicts of interest agency is performing a quasi-judicial function, a panel, rather than a single official, provides a more judicial approach, both in reality and in the perception of officials who are accused of wrongdoing and of the public. In addition, a board can be comprised of part-time officials of national stature whose presence will lend gravitas to the board and will reassure both officials and citizens that the agency’s decisions are fair and just and uninfluenced by political pressure.

A board will also permit the government to ensure that voices it wishes to be heard in making conflicts of interest decisions – for example, the voice of the business community or of civil society – will in fact be heard; a conflicts of interest office, on the other hand, will be comprised of government bureaucrats and less susceptible to those voices. A board also thereby permits the government to make underrepresented segments of the society, such women or minorities, feel a part of the conflicts of interest system. Finally, such a board helps thwart the tendency of a government agency, over time, to become too close to those whom it regulates. Staff, subject to the direction of the board, will, to be sure, perform the day-to-day work of the agency; but the board will remain an overseeing presence, ensuring that the agency adheres to the standards set by the government and by law and does not become too close to those whom it regulates.

³² Article 6 of the United Nations Convention Against Corruption expressly contemplates more than one anti-corruption body.

³³ Even in countries where independence of the conflicts of interest agency is not possible, the other factors discussed herein will still necessitate a board rather than an office.

The single most important characteristic of a conflicts of interest agency, whether an office or a board, consists of its actual and perceived independence. An ethics agency that is controlled, in reality or in perception, by the government's chief executive officer or legislative body or a political party will garner little respect, either from those subject to its jurisdiction or from the public or media. Consequently, its advice and enforcement decisions will be viewed as suspect. As a result the agency will fail in its mission to promote both the reality and the perception of integrity in government. Thus, its independence lies at the heart of an ethics agency.

To be sure, in some countries independence may raise significant constitutional issues because of the nature of the government itself. For example, in a communist system, where no perceived need exists for separation of powers because all power resides in the people, the conflicts of interest agency may ultimately be subject to control by the party. That constitutionally mandated result will, however, significantly undercut the public perception of the agency's integrity and effectiveness.

But where a government purports to have adopted separation of powers, the conflicts of interest system must be administered, interpreted, and enforced by an *independent* conflicts of interest agency, independent from the political process and political pressures and from outside influences, both in reality and in appearance.³⁴ Without independence, few persons, either inside or outside of government, will believe the agency's actions are fair and impartial (particularly when the agency rules in favor of a public official), which undercuts the agency's effectiveness.

A conflicts of interest agency's independence derives from four touchstones:

- An appointment process that helps ensure an independent office or board;
- Qualified and independent board members, in the case of a board;
- The absence of control of the conflicts of interest agency or its members by any other government agency, including budget protection and a staff accountable solely to the agency head or board;
- Full power of the agency to administer the conflicts of interest law through training, advice, enforcement, and regulation of disclosure and the agency's unique power to interpret the conflicts of interest code.

Each of these touchstones is discussed below.

The first touchstone lies in the appointment process. The head of a conflicts of interest office or the members of a conflicts of interest board, as the case may be, must be appointed for fixed terms (staggered for continuity, in the case of a board), preferably overlapping the term of the appointing authority where applicable, term limited, and removable only for cause after a public hearing. In particular, they should not serve at the pleasure of the appointing authority. A

³⁴ See United Nations Convention Against Corruption, Art. 6(2) ("Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence").

conflicts of interest office head or board member who may be fired whenever he or she acts counter to the desires of the appointing authority will be perceived as a mere puppet of that authority. Although the appointment process will vary according to the type of government, some mechanism needs to be in place to ensure that the office head or board members are not political cronies or friends of – that is, are independent of – the appointing authority. For example, if a separation of powers exists between the executive and legislative authority, then the executive might make the appointment with the advice and consent of the legislative body. Where such a separation does not exist both in law and practice, then some third-party nominating panel may be employed. For example, if the judiciary is independent and well-regarded, then the justices of the High Court might make the appointments. Alternatively, a nominating body might be appointed by persons holding certain highly regarded, independent positions, such as deans of law schools, presidents of universities, chairs of media associations and civil society, and religious personages.³⁵

Second, the quality and independence of office head or board members, as the case may be, is critical. Board members must be persons of substance, whose integrity is beyond reproach. Often the statute contains language such as “members of the conflicts of interest board shall be chosen for their independence, integrity, civic commitment, and high ethical standards.”³⁶ While on the board, no board member should hold any other public office; in particular, no board member should otherwise be an officer or employee of the government. That is crucial. Service by insiders will seriously compromise the board’s independence, if not in practice then certainly in the perception of the public and public servants, thus undermining its reputation for integrity. Public servants and the public may well fear that such board members will follow the dictates of their government superiors, not the dictates of the conflicts of interest law. In addition, government employees may hesitate to seek advice or file complaints with such a board on which any government official serves, fearing that their request or complaint may be reported to their superior, resulting in retaliation; and many may question whether the board’s actions are truly objective.

While on the board, board members should not be permitted to lobby or appear before any agency of the government on behalf of any private customer or client or do business with the government or hold an interest in any contract with the government. They should not hold or run

³⁵ “Split-appointments,” that is, appointments by multiple officials, have raised problems for conflicts of interest (ethics) boards in the United States because such an approach has often undermined the board’s accountability, politicized the appointment process, created constituencies and factions among board members, and thus also generated leaks of board documents and proceedings. Also in the United States, tying conflicts of interest board membership to certain private sector positions, such as the president of a specified university, while taking politics out of the appointment process, has sometimes prevented the government from appointing the most qualified and most interested men and women to its conflicts of interest board. Similarly, requiring a diversity of political party representation on the board risks politicizing the board and may also hinder the selection of the most qualified board members, as may requirements that certain professions, such as clergy, lawyers, or educators, be included on the board.

³⁶ See, e.g., New York City Charter § 2602(b).

for any public office and should be prohibited from engaging in any political activities or being involved in any election campaign (apart from voting). They should receive only minimal compensation, if any, for service on the board, which helps to preserve both the reality and perception of their independence. Being on a board requires a lot of hard work, intelligence, and common sense – and sometimes the ability to take abuse in silence.

The third touchstone to ensure the conflicts of interest agency's independence lies in the absence of control of the agency or its members by any other government agency. Budget protection is critical. Lack of that protection has been a major problem for the New York City Conflicts of Interest Board, which in certain years suffered repeated budget cuts, despite the commitment of the mayor and City Council speaker to an ethical government. A conflicts of interest agency's budget must be either guaranteed, e.g., as a percentage of the government's net total expense budget (that approach is preferable), or set by the agency itself and alterable only upon agreement of the chief executive and the legislative body. Absent such protection, the agency operates at the budgetary whim of the chief executive or the legislative body. Furthermore, to require a conflicts of interest agency to seek funding from the very officials who are subject to the agency's decisions, sometimes at the very same time the board is deciding a matter involving those officials, presents an unseemly conflict of interest in itself. Decisions by the agency that favor an official who has some power over the agency's budget will trigger accusations that the agency reached that decision in order to curry favor on its budget. One should note that, in contrast to anti-corruption agencies such as departments of investigation, inspectors general, and corruption commissions, conflicts of interest agencies are relatively cheap. For example, as noted above, the budget of the New York City Conflicts of Interest Board, as proposed by the Board, would be only 7/1,000 of one percent (.00007) of the City's net total expense budget.³⁷ So little excuse exists for underfunding a conflicts of interest agency.

So, too, conflicts agency staff must be hired and fired by, and accountable *solely* to, the agency – no one else. Where for budgetary reasons the board must rely on the staff of other government agencies for administration, the conflicts of interest system must put in place a mechanism to ensure the independence of that staff and the confidentiality of their work; otherwise, the public and public servants will question the integrity of the agency and will hesitate to ask it for advice or to make complaints about ethics violations. At the very least, the conflicts of interest law should include a prohibition on any staff assigned to or assisting the conflicts of interest agency from revealing anything about the agency, its work, or its communications to anyone else, even to their superiors at their employing agency, upon penalty of criminal prosecution and prosecution by the conflicts agency itself. Also, staff assigned to the agency should, if possible, come from a relatively non-political and independent office. How these requirements are enshrined in the conflicts of interest law will vary from government to government.

³⁷ See Proposed Amendments to Chapter 68 of the New York City Charter (Aug. 3, 2009), p. 12, at http://www.nyc.gov/html/conflicts/downloads/pdf2/charter_revision/chap_68_revisions_8_3_2009.pdf (last viewed June 21, 2012). The Board's current budget (fiscal year 2013) of US\$2.1 million is only 3/1,0000 of one percent (.00003) of the City's net total expense budget of US\$68.7 billion. The Board's budget is unprotected and may be cut at any time.

Finally, the fourth touchstone: The conflicts of interest agency must be the sole government agency authorized to interpret the conflicts of interest code, subject only to court review, and the sole government agency empowered to grant waivers of the conflicts of interest law, as discussed below. The law must also grant the conflicts of interest agency full power to administer the conflicts of interest law through advice, training, enforcement, and regulation of disclosure.

(2) *First function of the conflicts of interest board/office: conflicts of interest advice.* If the conflicts of interest code is to succeed in preventing conflicts of interest violations from occurring, then the conflicts of interest board or office must provide quick, clear, and confidential answers to questions arising under the conflicts of interest code and easy access to such advice. In this author's experience, most public servants do not want analysis; they want answers. And, whenever possible, they want those answers not next month or next year but immediately, or at least within a few days. Advice delayed is often advice denied. Being informed that one may take a job three months after the job offer has expired can only create contempt for the conflicts of interest agency. Once the agency gains a reputation for tardiness, officials may well risk a violation rather than pass up an opportunity for employment.

One of the most important functions of the board or office is to provide cover for officials unjustly accused of wrongdoing, so that when someone suggests to the official, "Isn't this a conflict of interest," the answer is, "Well, as a matter of fact, here is a letter from the conflicts of interest agency that says it is not." End of story.

Advice on the conflicts of interest code can take many forms. Many conflicts of interest boards/offices permit officials to call and receive telephone advice. Some boards/offices even permit officials to call anonymously. Where a question is too complicated – or too novel – for telephone advice, a written request, either by letter or email, will be required, to which a written response will be given. In many conflicts of interest systems having a board or commission, novel questions must be answered by the board or commission itself, not by staff. Where the response has broad application and addresses a novel question under the code, some conflicts of interest agencies formalize the advice in a publicly available advisory opinion to guide other public officials. Ordinarily, however, that opinion will be written in such a way as to protect the identity of the individual requester, in order not to discourage other public servants from seeking advice.³⁸ Some governments, to facilitate the advice function, require that each government agency have a conflicts of interest officer or liaison to work with the central conflicts of interest board or office, although usually a public official can contact the board/office directly.

³⁸ By way of illustration, in 2011, the New York Conflict Conflicts of Interest Board answered 3,310 telephone requests for advice, received 582 written requests for advice (including e-mail), and issued 523 opinions, consisting of 188 letters by staff attorneys, 250 waivers by the Board, and 85 letters by the Board; of the 85 letters, two were transformed into formal advisory opinions. New York City Conflicts of Interest Board, 2011 Annual Report, pp. 39-41, at http://www.nyc.gov/html/conflicts/downloads/pdf2/annual_reports/final_report_2011.pdf (last viewed June 21, 2012).

It is also critical that the documents and work of the board or office be confidential to the fullest extent permitted by law. Without a guarantee of confidentiality, persons will hesitate to come to the board, either to request advice or to file complaints. The extent of confidentiality will, to be sure, vary from country to country. In some countries, where an individual right to privacy is highly prized, the confidentiality protections may prohibit disclosure of advice requests and complaints even to state prosecutors. In other countries, where societal needs are seen as paramount, confidentiality will be more limited; but even then it should be as extensive as the confidentiality extended to communications between attorneys and clients. One should note, however, that questions relating to past conduct become a matter for enforcement for which no confidentiality would ordinarily attach; officials should be apprised of that fact.

As a related matter, a conflicts of interest agency should have the authority to grant waivers of the conflicts of interest code when a provision of the code just does not make sense in the particular situation. For example, a waiver may be appropriate when the government wishes to place one of its employees as the head of a non-governmental agency that is having serious problems but where required communications between the employee and his or her former agency would violate the code's post-employment restrictions. Waivers also provide a needed escape valve where a provision of the conflicts code prohibits an interest or an action that, in the context of the particular case, ought in fairness to be permitted and that does not constitute a conflict of interest in any meaningful sense.

The law should specify the standard for granting the waiver, such as "where granting the waiver will not be in conflict with the purposes or interests of the government." Requiring that the head of the requester's agency approve the waiver request before its submission to the conflicts of interest agency will provide some assurance that the waiver will not hurt the government. Often waivers will impose conditions to ensure that no substantial conflict of interest occurs, such as prohibiting a moonlighting employee from having any involvement, either on behalf of the private employer or on behalf of the government, with any business dealings the private employer has with the government. Such conditions, together with the waiver power itself, permit a conflicts of interest agency to say yes instead of no and also help the agency avoid ruling on close questions of law under the conflicts of interest code. Waivers also ensure that some independent agency – namely the conflicts of interest office or board – rules upon such matters.³⁹

Since waivers permit otherwise impermissible conduct or interests, they must be public to the same extent that, for example, the disclosure forms are public, to enable those persons having access to the waivers – whether only superiors or also the media and the public – to ensure that the facts upon which the waiver is based are accurate and complete.⁴⁰ For the same reasons that a conflicts of interest board is usually preferable to a conflicts of interest office, permitting an office to grant waivers, without oversight by a board, is probably inadvisable;

³⁹ For that reason, waiver power should never be vested in a legislative body or in any political office. Doing so will invite charges of favoritism, cronyism, payoffs, and paybacks.

⁴⁰ Concomitantly, waiver requests and waiver denials would ordinarily remain confidential, for the same reason that advice and requests for advice remain confidential: to encourage public officials to contact the conflicts of interest agency with questions.

authorizing a conflicts of interest office to grant waivers will invite political pressure from high-level officials who wish to circumvent the conflicts of interest code.

(3) *Second function of the board/office: training and education.* If the primary purpose of a conflicts of interest system lies in preventing conflicts of interest violations from occurring, then training government officials in the requirements of the conflicts of interest code constitutes the single most important duty of the conflicts of interest board/office and its highest priority. Officials cannot obey a law of which they have no knowledge and understanding.⁴¹ Although some efforts have been made to evaluate the success of conflicts of interest systems, ultimately one cannot really measure whether such a system has been successful or not. One can count the number of disclosure forms filed, the number of requests for advice received and opinions given, and the number of enforcement proceedings brought and fines collected; but one cannot count the number of conflicts of interest that conflicts training has avoided. For that reason, the tendency exists in most jurisdictions to skimp on conflicts of interest training and education. That tendency is a tragic mistake because public servants must know what the conflicts of interest code requires in order to comply with it. This problem is particularly acute for new public servants and for public servants who are recruited from outside the public service, where in all likelihood less stringent conflicts rules apply, if any exist at all.

Training in the conflicts of interest code should therefore be mandatory for all public servants, starting with those public officials most susceptible to conflicts of interest – elected officials, department heads and their deputies and assistants, policymakers, and those involved in purchasing, government contracting, issuance of permits, auditing, assessments, and inspections – and with those who give conflicts advice within government agencies, such as attorneys or personnel officers.⁴² But eventually even low-level public servants with little risk of conflicts of interest should receive conflicts of interest training. Training *all* public servants helps foster a culture of conflicts-free government, and low-level officials may spot conflicts by their superiors.

In addition, conflicts of interest training should be provided to those who regularly deal with the government, namely, government contractors, vendors, and permittees. Indeed, some governments even write certain minimal conflicts of interest provisions into government contracts - for example, provisions prohibiting such contractors from offering gifts to government officials - and require basic conflicts of interest training as a condition for contracting with the government.

⁴¹ Many conflicts of interest agencies also provide training on the code of ethics, often beginning with the code of ethics and then, during the course of the class, drawing from that code the conflicts of interest rules.

⁴² The City of Chicago subjects high-level officials to a US\$500 fine if, within 120 days after entering city service and every four years thereafter, they fail to attend an ethics education seminar offered by the Chicago Ethics Board. *See also* Palm Beach County (FL) Code § 2-446 (mandating ethics training); City of Long Beach (CA) Municipal Code § 2.07.020 (providing for automatic removal from office of any member of Charter commission or advisory body who fails to complete required ethics training).

Conflicts of interest training thus guides honest public officials, and those who deal with them, and reassures the public of the seriousness with which the government views conflicts of interest and corruption. The content of the training can be tailored not only to the particular society and culture but also to the individual agency and type of employee. Training for public officials who deal extensively with government contractors may differ from training for public servants who perform law enforcement functions. Firefighters, police, elected officials, and bridge inspectors, for example, face different conflicts of interest issues; and their training should be tailored to reflect those differences.

The methods of training can likewise be tailored to the audience. Live training, in the form of workshops, seminars, briefings, and conferences, while labor-intensive, remains critical for those public officials most at risk of conflicts of interest, for several reasons. First, such officials, including elected and high-level appointed officials and those public servants involved in procurement, contracting, auditing, assessments, inspections, and issuance of permits, require the attention that only face-to-face training can give. Live training also provides interaction that DVD's, printed materials, and even interactive computer programs cannot. In live training, attendees can ask questions, clear up misconceptions, and raise actual problems.

In addition, in live training the trainers can spot actual problems and thereby head off conflicts of interest violations before they occur or at least stop them in their tracks. Furthermore, systemic conflicts of interest issues change. For example, in the United States at the moment, the critical conflicts of interest issue is so-called pay to play (e.g., giving campaign contributions in order to obtain a government contract). A year from now, the critical system issue could be moonlighting. If the conflicts of interest board/office is to be effective in heading off potential conflicts of interest issues, particularly systemic issues, then the board/office must keep its finger on the pulse of developing conflicts of interest problems. Only the interaction available in live training can provide that constantly changing information.

Live training can also send a powerful message that the government takes the conflicts of interest code and conflicts of interest training seriously. When the head of the government requires his or her top deputies to attend conflicts of interest training and when he or she actively participates in such a training session and at that session stresses the importance of the code, the message is clear and unequivocal: every public official must obey the code. Finally, live training guarantees that an official actually receives training.

That said, live (that is, in-person) conflicts of interest training by the conflicts of interest agency, while highly effective, remains highly inefficient. For example, in New York City, the Conflicts of Interest Board's two trainers conducted 318 live training sessions in 2011, training 10,544 public servants, an impressive effort but one that reached only 3% of the City's 325,000 officers and employees. Thus, alternatives to such training must be sought.

Live conflicts of interest training need not be performed only by the conflicts of interest office or board. That duty may also be assumed by trainers within individual agencies, provided that they themselves are properly trained and monitored by the conflicts board/office, which also must provide adequate training manuals and materials. Such a "train-the-trainer" program can prove highly effective in reaching a large percentage of public officials. Establishing conflicts of

interest liaisons or officers in each government agency can also facilitate conflicts of interest training and the distribution of conflicts of interest materials and information. Such agency officers or liaisons can ensure that conflicts of interest training is in fact given in the agency and can act as a point of contact between the central conflicts of interest board/office and each individual agency. A conflicts of interest compliance program in each agency ensures that the agency employees know and understand the conflicts of interest code. The major problem with such “train the trainer” programs lies in quality control, that is, in ensuring that the training by trainers in other agencies is accurate and complete. Teaching manuals and teaching materials, such as PowerPoint presentations, DVD’s, and game shows, can help ensure accurate and complete training. But ultimately the conflicts of interest agency must conduct randomly monitor on a regular basis conflicts of interest training by other agencies.

Live conflicts of interest training must be interesting and fun. Few officials will learn much from a presentation they sleep through. Many off-the-shelf game software applications exist that can be easily and inexpensively tailored to conflicts of interest training. A simple “test” at the end of the training session, a “test” that the public servant keeps, can also encourage attention. But, in any event, the goal of training lies not in making officials experts in the conflicts of interest law but rather in alerting them to possible dangers. Regardless of the training method employed (e.g., live training, DVD’s, web-based training), the mantra should always be: ask before you act.

Because of the time and expense of live training, the conflicts of interest board/office must provide other methods of conflicts of interest training for most public servants. Popular culture often points the way. Creativity should be the hallmark. Conflicts of interest training should be not only accurate and in good taste. As with live training, other forms of training, in order to be effective, must also be fun, or at least engaging. For example, one conflicts of interest office used clips from classic movies to illustrate conflicts of interest situations.

DVD’s offer an inexpensive means of providing basic conflicts of interest training to the majority of public servants. In particular, those joining public service can be required to view such a DVD as part of their orientation. The “talking heads” approach on a DVD is best avoided because it tends to be terminally boring. Little stories can be portrayed to illustrate common conflicts of interest situations, followed by a brief discussion of the issues. Creativity and humor outweigh high production values in importance; a funny and engaging amateur DVD (perhaps employing public servants in the acting roles) often proves far more effective than a professional quality talking heads production.⁴³ For example, cops will more likely pay attention to a DVD starring their fellow officers than to one starring men in suits.

Agencies can be required to hang in every facility a conflicts of interest poster featuring popular characters or classic paintings and a brief summary of the conflicts of interest code and an explanation of how to file a complaint or seek advice. In countries where anime or graphic (picture) novels are popular, those art forms can be adapted to teaching conflicts of interest rules. Printed materials include plain language versions of the conflicts of interest law and short leaflets

⁴³ For examples from the New York City Conflicts of Interest Board, *see* <http://www.nyc.gov/html/conflicts/html/law/supplementary.shtml> (last viewed June 21, 2012).

(FAQ's) on various conflicts of interest topics (e.g., gifts, moonlighting, post-employment, enforcement, waivers). A bookmark summarizing the conflicts of interest code can be distributed with paychecks. Short radio or television commercials (public service announcements) can be highly effective in educating not only public servants but also the public and those who deal with the government about the requirements of the conflicts of interest law. As noted above, the annual disclosure form may require that the filer, in signing the form, also certify that he or she has without the past week read the conflicts of interest code or an attached summary of it.

Wherever technology permits, the conflicts of interest agency should develop a robust web site that includes the text and summaries of advisory opinions and enforcement decisions, training materials, and links for reporting violations and requesting advice. In governments possessing widespread technology, the conflicts of interest board/office can develop a web-based interactive conflicts of interest computer training program. Such programs can track which employees have completed it and even offer a printed certification to each employee upon completion. So, too, where technology permits, summaries of significant enforcement decisions and advisory opinions can be emailed to agency attorneys and agency heads.

As noted, one should recognize, and emphasize, that conflicts of interest training and materials cannot be expected to make experts of public servants. One aims not at creating experts but at alerting officials to potential problems and thus preventing conflicts of interest violations before they occur. New York City's Conflicts of Interest Board, for example, distributes a one-page cautionary guide that reads as follows:

The City's Conflicts of Interest Law prohibits public servants from using or appearing to use their City positions for their own personal benefit. To comply with the law, you cannot:

- Use your City position to gain any private advantage for yourself, a close family member, or anyone with whom you have a financial relationship.
- Use City resources for any non-City purpose, or disclose confidential City information to any private person or firm.
- Accept any valuable gift from someone doing business with any City agency, or *anything* from anyone for performing your City job.
- Take a second job with a firm, or own all or part of a firm, that has business with any City agency, unless you receive approval from the Board and your agency.
- Enter into any kind of private financial relationship with a superior or subordinate.
- Ask a subordinate to work on a political campaign or make a political contribution.
- Take part in a not-for-profit organization's business dealings with any City agency.
- Discuss possible future employment with a firm you are currently dealing with in your City job.
- Communicate with your former agency on behalf of a private firm for one year after you leave City service, or ever work on a matter you personally and substantially worked on while with the City.

This guide has proven effective in alerting employees to conflicts of interest and encouraging them to ask before they act, as demonstrated by the surge in requests for conflicts of advice that follow the distribution of the guide at City agencies.

International organizations comprised of government conflicts of interest offices and boards, such as the Council on Government Ethics Laws (COGEL, at <http://www.cogel.org>), offer extensive resources on conflicts of interest training. Participation in such organizations also provides an opportunity to exchange ideas on training methods.

(4) *Third function of the board/office: regulating disclosure.* A key component of transparency in government, disclosure constitutes the third function of the conflicts of interest board/office, which must:

- Obtain the transactional, applicant, and annual disclosure statements;
- Review the statements for possible conflicts of interest and take appropriate action;
- Maintain the statements on file; and
- Impose penalties on those persons who fail to file a required statement or who file late, incomplete, or inaccurate statements.

Where authorized by law, the conflicts of interest board/office must also make the forms available to the public and to the media. Although intended to prevent conflicts of interest violations, these forms often prove of great use to prosecutors in official corruption cases.

Transactional disclosure and applicant disclosure forms should place little burden on the conflicts of interest board/office since those forms are simply filed by the discloser when required. Annual disclosure, however, can require the board/office to expend enormous resources, depending on the number of forms filed. One country, for example, has required the filing of tens of thousands of forms, creating an administrative burden so overwhelming for the ethics office that compliance remains low and review virtually nonexistent, thus significantly undercutting respect for the conflicts of interest law. Again, annual disclosure should be required only from those public officials who run a significant risk of conflicts of interest.

Governments having more than a thousand filers and possessing the requisite technological capability should consider developing a system for electronically filing annual disclosure forms. An electronic financial disclosure system (“EFD”) offers enormous advantages over a paper-based system, not only for the conflicts of interest board/office but also for other agencies and particularly for the filers themselves. EFD eliminates the need for the printing, distribution, and collection of thousands of forms and, where forms are available for public inspection, eliminates the need to photocopy forms provided to the public. By use of off-the-shelf encryption software, e-forms can be made far more secure than paper forms. Of particular advantage to the filer, in the second year, a filer need only spend a few minutes updating the previous year’s form, rather than completing an entirely new form. An electronic filing system can eliminate incomplete filings (the program can be made to reject incomplete forms), the bane of conflicts boards/offices. If the government requires certain officials to file a separate confidential report with the inspector general or auditor general, that separate form can

be electronically combined with the conflicts form in such a way that the official completes one form but the program then separates the data for transmission to each agency.

From an administrative perspective, EFD automates most manual data entry (such as recording the fact and date of filing), resulting in a significant reduction in administrative work for the conflicts board/office. Most importantly, from a compliance and anti-corruption perspective, EFD creates a fully searchable database of all data in the annual disclosure reports, thereby enabling the conflicts of interest board/office to notify filers of potential conflicts of interest and thus prevent those potential conflicts from becoming actual conflicts. So, too, the inspector general or auditor general's office or state prosecutor can compare annual disclosure data from one year to the next (a sudden unexplained increase in assets, for example, could trigger an investigation) and also electronically compare the data in the disclosure form to data in other databases (ownership of stock in a company doing business with the filer's agency may raise corruption concerns).

Where the development of a full-blown EFD application appears infeasible, the annual disclosure form may be converted, at virtually no cost, into an Adobe Acrobat template, posted on the conflicts of interest agency's website (or emailed to individual agencies or filers), completed either online or on the filer's individual computer, and then emailed to the conflicts office/board. Such a system offers some, though admittedly not all, of the advantages of an EFD system. Care must, however, be taken to ensure confidentiality if the form contains any confidential information.

Review of individual hard-copy annual disclosure forms for potential or actual violations of the conflicts of interest code requires substantial resources – another reason for employing an electronic form whenever possible. Such reviews may, for example, compare moonlighting positions (private employment) of filers and their spouses and children against the database or list of firms that contract with the government. Making transactional, applicant, and annual disclosure forms available for public inspection enlists the assistance of the public, and in particular the media, in ferreting out possible violations of the conflicts of interest code. Indeed, the public availability of such forms can form one of the cornerstones of government transparency.

As discussed above, significant penalties must exist for failure to file a disclosure form or for filing a late, incomplete, or false form. Lack of such penalties, or failure to enforce them, will seriously undermine the disclosure system and the public's respect for the conflicts of interest law.

Finally, many conflicts of interest laws specify a retention period, after which disclosure forms are destroyed. In setting that period, the government may wish to consider such factors as the limitations period for bringing criminal misconduct in office charges and public officials' concern that their financial information not be available indefinitely.

(5) ***Fourth function of the board/office: enforcement.*** As repeatedly emphasized in this article, the primary purpose of a conflicts of interest system lies in preventing conflicts of interest violations from ever occurring. Enforcement serves that same purpose. In addition,

enforcement demonstrates that the government takes the conflicts of interest law seriously and deters future violations.

Lack of effective enforcement authority renders a conflicts of interest board a toothless tiger that raises expectations it cannot meet, undermines public confidence in government, and increases public cynicism. No one takes a conflicts board seriously unless it possesses real enforcement power. Time and again, it has been shown that a conflicts of interest board without enforcement power will fail, or at least it will be marginalized and ignored. (As noted above, granting a conflicts of interest office, rather than a conflicts of interest board, enforcement power raises significant concerns, another reason for establishing a board rather than an office.) Thus, structurally the U.S. Office of Government Ethics, which many would agree is one of the world's premier conflicts of interest agencies, is deeply flawed because it lacks such enforcement power.

The purpose of conflicts of interest enforcement is thus three-fold:

- To educate officials about the requirements of the conflicts of interest code;
- To show officials that the government is serious about the conflicts of interest law;
- To punish conflicts of interest violations and discourage other officials from committing them (deterrence).

One may identify ten principles of effective enforcement for a conflicts of interest system:

1. Since a conflicts of interest system aims at prevention, not punishment, enforcement must be viewed as educational, not punitive.

Enforcement provides the single most effective educational tool. It is one thing to say at a training session, "You cannot negotiate for a job with a firm you are involved with in your government job." It is another thing to say, "And do not forget, we fined Mr. Matos US\$1,000 for sending his resume to a firm he was dealing with at his government agency." Enforcement is a very powerful educational tool.

2. Since no conflicts of interest office or board is likely to possess sufficient resources to ferret out and prosecute every conflicts of interest violation, a conflicts of interest system must be largely self-enforcing.

Absent an army of investigators, a conflicts of interest board/office must rely for enforcement primarily upon self-interest, peer pressure, whistle blowers, co-workers, concerned citizens, and, where applicable, the media.

3. Enforcement must be not only fair and equitable, both in reality and perception, but also sensible.

Time should not be wasted on unimportant issues. For example, devoting 20 hours to investigating whether a government employee made a few personal phone calls on a government phone, and then prosecuting that violation, squanders precious resources and exposes the conflicts of interest board/office to accusations of zealotry.

4. The conflicts of interest board/office must have enforcement power over every public official subject to its jurisdiction.

Granting the board/office the power to give advice to certain high-ranking officials but not the power to enforce violations of the conflicts of interest code against them will inevitably raise charges of favoritism.

5. The conflicts of interest agency must control all aspects of its investigations and prosecutions. The agency requires the authority, staff, and budget to:

- Investigate possible violations of the conflicts of interest code,
- Initiate such investigations without waiting for a referral or a complaint,
- Issue subpoenas or the equivalent document to compel attendance and production of documents,
- Prosecute violations before the appropriate administrative, judicial, or quasi-judicial tribunal,
- Settle cases at any stage of the proceedings, and
- In the case of a conflicts of interest board, impose civil fines and other civil penalties.

6. A range of penalties must be available “to let the punishment fit the crime.”⁴⁴ Reliance upon criminal prosecutions to handle violations that do not involve real corruption squanders precious law enforcement resources and thus risks the prosecutor simply ignoring such violations, thereby significantly undermining the conflicts of interest law. So, too, reliance upon agency discipline often proves ill-founded because of strong civil service or union protections, political pressure, or connections. Possible penalties therefore include:⁴⁵

⁴⁴ Gilbert & Sullivan, *Mikado*, Art. II.

⁴⁵ Although the United Nations *Technical Guide* to the United Nations Convention Against Corruption contemplates only disciplinary action for conflicts of interest that do not rise to the level of bribery and the like (*see* Office on Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption*, pp. 23, 27 (2009)), discipline alone, for the reasons stated above, provides an insufficient remedy in many instances. Indeed, Article 8(6) of the Convention itself contemplates “other measures,” besides disciplinary measures, “against public officials who violate the codes or standards established in accordance with this article [on codes of conduct for public officials]”).

- Significant civil fines (not a criminal penalty);
- Disciplinary action (suspension, removal from office);
- Private and public letters of censure;
- Damages (for harm to the government - for example, because the contract with the official's brother cost more than it should have);
- Disgorgement of ill-gotten gains (the official or some third party must give up any gains received from the conflicts of interest violation, even if the government was not hurt) or even civil forfeiture of such gains doubled or trebled;
- Debarment (prohibiting the violating official or firm from doing any business with the government for, say, three years);
- Injunctions against actions that violate the conflicts of interest law;
- Nullification of government contracts obtained as a result of the conflicts of interest violation.
- Criminal penalties (jail, fines), where the official was corrupt (for example, where he or she took a kickback to award a contract) - but usually these cases fall under other criminal laws and are handled by the prosecutors, not by the conflicts of interest board/office;

All of these penalties, except criminal penalties, can conceivably be imposed by an ethics board.

7. Private citizens must take responsibility for officials' compliance with the conflicts of interest code.

The law must require applicant disclosure, prohibit inducing a public servant to violate the code, and provide appropriate penalties, including debarment, for violations.

8. In decentralized governments, enforcement may be conducted at the local level, with national oversight.

For example, the central government may be authorized to intervene upon request of a local conflicts of interest board/office; where a local board cannot act because of vacancies or absence of a quorum; where a complaint lies against a member of the board/office itself; or where the local government lacks a conflicts of interest board/office.

9. The conflicts of interest board/office must be funded sufficiently to permit adequate investigation and enforcement.

The very nature of their business requires that these boards/offices be lean and mean, but not cadaverous. Inadequate resources invite public censure and cynicism.

10. Confidentiality rules must protect officials from unfounded accusations while reassuring other officials, complainants, and the public that the conflicts of interest board/office will pursue and address accusations of conflicts of interest quickly, aggressively, and fairly.

To permit the board/office to weed out unsubstantiated or unfair accusations, the law may, for example, provide that all documents and proceedings prior to the issuance of the formal accusatory instrument are confidential and that all proceedings after such issuance are public. Such an approach also encourages settlement because the official has the greatest control (through negotiation of the settlement) over what becomes public if he or she settles before the accusatory instrument is issued. All findings of a violation, whether in the form of a settlement or a final determination on the merits, should be public to demonstrate that the government takes the conflicts of interest law seriously. Any breach of confidentiality constitutes a serious violation of the conflicts of interest code because a leak, even an inadvertent one, can destroy the reputation of the ethics agency.

The stages of a conflicts of interest enforcement proceeding may vary considerably from country to country, depending on the nature of the legal and judicial system. In general, however, such a proceeding will involve four stages:

- Investigation
- Accusatory notice and response
- Hearing
- Imposition of penalty.

More specifically:

1. Receipt of a complaint (oral or written; identified or anonymous) or other information showing a possible violation (for example, from a newspaper article);
2. Initial internal determination as to whether the facts alleged in the complaint or other source of information state a violation of the conflicts of interest code;
3. Investigation of the possible violation;
4. Determination, based on the investigation, whether a possible violation appears to have occurred;
5. Notification to the official that he or she may have violated the conflicts of interest code and receipt of the official's answer to the charges;
6. Determination whether, despite the official's answer, a violation still appears to have occurred and, if so, issuance of the accusatory instrument;

7. Hearing on the charges before the appropriate tribunal; and
8. Imposition of penalty by conflicts of interest agency (for example, a civil fine).

As noted, a public settlement may occur at any stage of the proceeding. Prosecutions must always be conducted with great sensitivity to the reputation of the official and, therefore, pursued only in clearly provable cases. Marginal cases should be handled by way of a confidential warning letter or even an oral warning.

III. A Step-by-Step Approach to Establishing a Conflicts of Interest System

The suggestions in this section, even more so than in the previous sections, must be tailored to the particular nation, culture, and society. For many governments, however, this section's six-step approach to establishing a conflicts of interest system should apply, or at least prove helpful. The six basic steps, discussed below, are these:

1. Determine the needs, desires, and concerns of the jurisdiction (country, province, municipality) for the conflicts of interest system and draft the code of ethics;
2. Draft the substantive provisions of that system (other than the annual disclosure requirements);
3. Draft the annual disclosure (asset declaration) provisions;
4. Draft the enforcement mechanism;
5. Draft the provisions regulating the other duties of the conflicts of interest board/office; and
6. Draft the provisions regulating the establishment and structure of the conflicts of interest board/office.

The idea behind this approach is this (working backwards): one cannot know how the conflicts of interest board/office should be structured until one knows what duties it will have (and the most complicated and controversial duty is enforcement); and one cannot know what the duties, for example enforcement, of the board/office will be until one knows what it will be enforcing, so the substantive provisions have to be drafted before the procedural provisions. Of those substantive provisions, the annual disclosure requirements must be tied to the conflicts of interest code, so the code must come first. In fact, the conflicts of interest code is the heart and soul of the conflicts of interest system. But the conflicts of interest code itself derives from the core values reflected in the code of ethics. All else – the entire conflicts of interest system – flows out of the code of ethics.⁴⁶

Step 1: Determine the needs, desires, and concerns of the jurisdiction (country, province, or municipality) for the conflicts of interest system and draft the code of ethics.

Before one can even begin the process of establishing an effective conflicts of interest system, one must teach those involved about the purpose, principles, and structure of such a

⁴⁶ See Mark Davies, *Addressing Municipal Ethics: Adopting Local Ethics Laws*, in *ETHICS IN GOVERNMENT – THE PUBLIC TRUST: A TWO-WAY STREET* (New York State Bar Association 2002).

system, as outlined above, especially since many officials and members of civil society, the public, and the media lack an accurate conception of those elements. That teaching will help ensure that those constituencies do not expect the conflicts of interest law to solve problems it is not meant to solve, will help avoid unrealistic expectations, and will help provide a common, basic understanding of a conflicts of interest system.

That done, one may wish to determine the needs, desires, and concerns of the officials and citizens with respect to a conflicts of interest law. The teaching will head off some confusion in this regard, but many concerns will remain, especially because a conflicts of interest law, unlike most other laws, regulates the actions of the officials themselves.

Recent events will also probably play a major role here. For example, if the country or municipality has had a recent scandal over the influence of partisan politics in government decision-making, that may generate cries for a two-hats provision (that is, restricting a public official from holding a political party position). Or if there have been complaints by government employees that they are regularly pressured into purchasing tickets to political or charitable events sponsored by their superiors, the government may want to include in the conflicts of interest code a prohibition on the solicitation of subordinates. Or if some members of the legislature fear a runaway or partisan conflicts of interest board/office, there may need to be special restrictions on the composition of the board/office or on the activities of its members or employees. The end result of this process should be a simple list of issues and concerns to be addressed in the conflicts of interest system.

Having candidly noted the problems, one can now turn to the solution, eliciting the core values to be reflected in the code of ethics and thus in the entire conflicts of interest system. (Some may wish to reverse this approach, beginning with the code of ethics and then turning to the issues and problems to be addressed. Culture, history, the type of government, and the level of frustration and concern among the public and public officials will dictate which approach seems best.) The code of ethics will mirror the ultimate responsibility of the government. In a non-theocratic society, that responsibility most likely is to the people. In a theocratic society, it is to God. Wherever else the government's responsibilities may lie, that ultimate responsibility will determine the core of the code of ethics.⁴⁷

Sometimes the task of drafting the code of ethics to reflect the nation's values proves daunting, particularly in a heterogeneous society. For that reason, governments often turn to their foundational documents to identify the core national values to be reflected in the ethics

⁴⁷ Establishing a conflicts of interest system for other entities requires a similar determination. Thus, the ultimate responsibility of an international organization is to the organization's members, although in some organizations the responsibility may extend beyond the members. *See, e.g.*, Charter of the United Nations, Chapter 1, § 1 ("To maintain international peace and security..."). In civil society, it is to those to whom civil society seeks to serve. In a religious organization, the ultimate responsibility is to God or the deity served. In a stock company, the shareholders; in a partnership, the partners; in an association, ordinarily the members.

code.⁴⁸ In any event, until one has drafted the code of ethics, one cannot derive the provisions of the conflicts of interest code, for they must proceed out of the code of ethics.

Throughout this first step, one should be careful to consult those groups whose views one generally claims to consult (whether one usually does so in fact); because of the role that perception plays in a conflicts of interest system and because that system focuses on guidance and prevention and seeks first and foremost to promote both the reality and perception of integrity in government, the perception of having had input into the establishment of that system becomes critical, unlike in the case of anti-corruption criminal laws, such as anti-kickback statutes. Therefore, in creating a conflicts of interest system, process is just as important as product. Thus, for example, in states, such as in the United States, that purport to have a broad-based populist tradition, whether that claim is true or not, unions, civil society, and associations of public officials should be consulted in this process.

Step 2: Draft the substantive provisions of the conflicts of interest law (other than the annual disclosure requirements).

As discussed above, the conflicts of interest code, which forms the heart and soul of the conflicts of interest system, must be comprehensive but short, simple, and to the point, understandable to the lay public official without a lawyer, containing no definitions or exceptions and setting forth, whenever possible, bright-line rules. The specific content of a conflicts of interest code is discussed in section II(A).

Starting with a simple list of the conflicts of interest code provisions one wishes to include may prove helpful. Not the text – just a list. Only after all involved parties have agreed to that list, should the code itself be drafted. At least in the experience of the author, this approach helps significantly in “getting to Yes,” that is, in ensuring that all parties whom the government wishes to agree to the conflicts of interest code do in fact agree.

Before drafting the conflicts of interest code, however, one must turn back to the code of ethics. With the list of conflicts provisions in hand, one should seek to tie those provisions to the code of ethics, and perhaps out of the code of ethics derive other provisions. The process of thus tying the conflicts of interest code to the code of ethics will serve to underscore the national values inherent in the conflicts code and will point the public servant to aspirational conduct that exceeds the minimum standards set forth in the conflicts of interest code.

Conflicts of interest codes from other jurisdictions may prove useful, both as a checklist of possible provisions and as a source for text. But one should resist the temptation to import such provisions wholesale into one’s own conflicts of interest code, as they may be highly

⁴⁸ For example, Abraham Lincoln, in his Gettysburg Address, looked not to the U.S. Constitution but to the Declaration of Independence as setting forth the core values of his country (“Four score and seven years ago [i.e., 1776, when the Declaration of Independence was signed] our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal...that government of the people, by the people, for the people shall not perish from the earth”).

inappropriate. For example, employing New York City's conflicts of interest law in a dramatically different culture may prove disastrous.

Drafting a conflicts of interest code, therefore, involves a process of accretion, not deletion, and indeed should be a zero-based drafting exercise. One should start with a blank page and include only those provisions that are needed; and some provisions every government will need, such as misuse of office, gifts, moonlighting (second, non-government jobs), and revolving door. But whether one includes other ones – such as a two-hats restriction – will vary from government to government.

This last point bears particular emphasis. One *must* tailor the conflicts of interest code to the specific country, culture, society, and type of government. Some international organizations have been criticized for having foisted upon certain countries, sometimes as a condition for funding or loans, conflicts of interest standards that are inappropriate to that nation, an approach that fails to improve and sometimes worsens the conflicts of interest situation in the country. Certainly such organizations have a right to insist that their funds are well-spent, but efficacy alone dictates that the conflicts of interest rules must be appropriate to the culture.

Thus, for example, if, after reviewing the national values and developing the code of ethics, the drafters decide that acceptance of certain gratuities by public officials is acceptable, then the conflicts of interest code will not prohibit such gratuities but will instead regulate them, to ensure that they are consistent with the code of ethics, neither exceeding what the official action warrants nor what the citizen can pay, and that procedures are in place to ensure that gratuities are neither offered nor accepted in violation of those restrictions. Those governments and organizations that choke upon such a provision because they prohibit all gratuities to officials should be reminded that many of those same governments permit gifts to public officials under certain circumstances and often, worse yet, permit campaign contributions to officials from persons and firms over whom the official exercises some power, such as regulatory authority or the power to approve purchases or contracts (so-called “pay to play”).

The substantive provisions of the conflicts of interest law should also impose, as appropriate and desired, restrictions upon private citizens, developers, applicants, contractors, applicants, and firms seeking or causing an official to violate the conflicts of interest code or appearing as a representative before a government agency having an employee who works for the private citizen or firm.

Drafting the conflicts code leads naturally to the transactional disclosure, recusal, and applicant disclosure provisions and thence to the exclusions (from the conflicts of interest code, from transactional disclosure, and from recusal) and then to the definitions section.

The substantive provisions of the conflicts of interest law are now complete, except for annual (financial) disclosure.

Step 3: Draft the annual disclosure (asset declaration) provisions.

Annual disclosure, as discussed above, is of critical importance to a conflicts of interest system because it forces the public official to focus at least once a year on the provisions of the conflicts of interest code; it alerts the official and, in those countries where the disclosure form is public, the public, supervisors, vendors, and the media to the official's possible conflicts of interest and thus helps avoid them; and it provides a check on transactional disclosure and recusal when a potential conflict of interest revealed on the annual form actually arises. The problem is this: many governments have adopted annual disclosure forms that fail to address those purposes. Instead, many annual disclosure forms remain far too invasive, yet underinclusive because they fail to request the precise information that reveals potential conflicts of interest under the conflicts of interest code. So, too, many annual disclosure systems require too many officials to file, imposing unnecessary burdens on officials and overwhelming the conflicts of interest agency with irrelevant forms. One must resist the urge to impose disclosure on officials at little risk of significant conflicts of interest or to include irrelevant information. See discussion in section II(B)(3) above.

Therefore, three main issues arise in drafting the annual disclosure provisions:

- who has to file;
- what they have to file (*i.e.*, the scope of the disclosure form); and
- what information (if any) is subject to public disclosure.

What information is subject to public disclosure. Starting with the third issue first: what information should be subject to public disclosure? In a government promoting transparency, *all* of the annual disclosure form should be available to the public because it is the public (private citizens, civil society, the media, vendors, and other municipal officials) who police the conflicts of interest system; they are the ones who will ferret out the conflicts of interest: "Mr. Secretary, your disclosure report says that you own ten hectares right where you are proposing to put this new road. Shouldn't you recuse yourself?"

Concern about the public release of annual disclosure reports may indicate that the annual disclosure form has been made too intrusive. Concerns that release of an individual official's report may imperil his or her safety or security can be addressed by withholding, upon request of the official, specific information that raises the safety or security concerns.

The scope (contents) of the disclosure form. In any event, if the entire form will be public, that fact will have a major impact on what one wishes the form to disclose. What should it disclose? First, *only information that would reveal a conflict of interest under the conflicts of interest code should be requested in the annual financial disclosure form.* For example, if the code (that has now been drafted) would allow an official to take an action benefiting ABC Corp., even if she owns \$1,000 of ABC stock, then the disclosure form should not require disclosure of that stock because ownership of the stock can never be a conflict of interest. Second, one should not attempt to include in the disclosure form questions that might reveal every conceivable conflict of interest under the conflicts code. Rather, one should include only questions for which a clear need exists. Here, zero-based drafting is absolutely imperative.

Following these guidelines in drafting an annual disclosure form should alleviate officials' three most common objections to annual disclosure: lack of relevance; disclosure of amounts (for example, how much stock one owns), even within broad categories; and disclosure of information about the official's family. First, tying the questions directly to the conflicts of interest code will eliminate the relevancy argument. Second, tying the questions directly to the conflicts of interest code will also eliminate the need for disclosure of amounts. For example, if the code prohibits an official from taking an action that may benefit a company in which the official owns \$1,000 in stock and the disclosure form requires disclosure of stock only if it is worth at least \$1,000, then no need exists for disclosing the amount of stock owned – whether the conflict of interest is a \$1,000 conflict or a \$100,000 conflict, it is still a conflict and still prohibited. To be sure, if an enforcement action arises, then the exact amounts will have to be disclosed to the enforcing agency.

Third, disclosure of information about one's family presents more difficult issues because family interests can raise significant conflicts of interest, yet disclosure of such interests will appear intrusive to many public servants. Tying the annual disclosure form to the conflicts of interest code will, to some extent, blunt this criticism. In addition, the law may provide for the public release of the interests of family members but not the identity of the family members. In other words, the publicly released report would list the interests of the official and the relevant family members without identifying whose interests they are; a member of the public reviewing the official's report would know only that either the official alone or the official together with unspecified family members have the listed interests but would not know who has the interests.

One should note one final point with respect to the scope of the annual disclosure form. Some jurisdictions enact two or three levels of disclosure, depending on the level of the official and perhaps whether he or she is paid or unpaid. Some jurisdictions also require a detailed confidential annual disclosure form as an anti-corruption measure.

Appendix C sets forth a possible model annual disclosure form that is probably sufficient for all but the highest level officials in the largest governments – unless, of course, a specific problem exists that needs to be addressed. That model form contains only seven questions, addressing:

- outside employers and businesses;
- investments;
- real property;
- gifts;
- creditors;
- debtors; and
- relatives in government service.

In fact, for some employees, the first three questions on that form are probably sufficient.

Who has to file. Finally, who has to file. Basically, as noted above, it should only be those officers and employees who are at significant risk for a conflict of interest,⁴⁹ which is most governments will probably include:

- elected officials (if any);
- agency heads and deputy and assistant agency heads;
- members of policymaking boards and commissions;
- other policymakers;
- auditors;
- assessors; and
- public servants having discretionary authority with respect to purchases, bids, contracts, licenses, permits, and inspections.

Some annual disclosure laws also require candidates for elective office and certain political party officials to file. Some jurisdictions also require filing by union officials.

As discussed above, the annual disclosure law must also have penalties for non-filing, late filing, failure to include required information, and misstatement of information on the report. Without penalties, little incentive exists for officials to file on time or accurately complete the form.

Finally, as noted above, since one of the purposes of annual disclosure lies in focusing the attention of officials at least once each year on where their potential conflicts of interest lie, the form may require filers to read and certify that they have read the conflicts of interest code.

Step 4: Draft the enforcement mechanism.

A conflicts of interest system without effective enforcement will almost certainly incur the wrath of the public. Effective enforcement must include a range of significant civil penalties and an ethics agency with the power to investigate, prosecute, and, in the case of an ethics board, penalize violations of the conflicts of interest code by officials and members of the public. Section II(C)(5) discusses the requirements for the enforcement mechanism.

Step 5: Draft the provisions regulating the other duties of the conflicts of interest board/office.

A conflicts of interest agency's structure depends upon its duties, which, therefore, must next be determined. As discussed in section II(C), besides enforcing the conflicts of interest system, the conflicts of interest board/office must give legal advice, provide training and

⁴⁹ In New York City, for example, less than 4% of the City's 200,000 public servants file financial disclosure reports (excluding the Department of Education, where approximately 1% file). The smaller the government, however, the larger the percentage because the greater the proportion of higher-level officials. Indeed, in a small municipality having only 100 public servants subject to the conflicts of interest code, perhaps as many as 20% will file annual disclosure reports.

education, grant waivers, and regulate disclosure.⁵⁰ To some extent, a tension exists between the conflicts of interest system and other transparency rules. Specifically, the conflicts of interest law should protect the confidentiality of the documents and proceedings of the conflicts of interest board/office because, without a guarantee of confidentiality, few will come to the board/office, either to ask advice or to file complaints. As discussed above, waivers, annual disclosure forms, and final dispositions of complaints and enforcement proceedings may be public; but other matters are probably best cloaked with confidentiality.

One should not let a discussion of resources dictate the duties of the conflicts board/office. One should first determine the duties and then discuss resources. The fact is that conflicts boards/offices are quite inexpensive, especially if the board members themselves serve pro bono. As discussed above, properly staffed, the New York City Conflicts of Interest Board would have a budget that was less than 7/1000 of 1% of the City's total expense budget and only one staff member for each 10,000 employees. Conflicts boards/offices are a bargain. Thus, only after the duties are nailed down should one discuss the establishment and composition of the conflicts of interest board/office. In particular, one should not stint on training and education.

Step 6: Draft the provisions regulating the establishment and structure of the conflicts of interest board/office.

The structure of the conflicts of interest board/office will, of necessity, depend upon the structure and nature of the government of which it is a part. Section II(C)(1) discusses the structure of the board/office.

IV. Making a Conflicts of Interest Program Work

Establishment of the best conflicts of interest system in the world by a government deeply committed to complying with that system does not guarantee its ultimate success. Success also depends on an ongoing effort by the conflicts of interest board/office, and by the highest echelons of the government, to educate public officials, the public, civil society, and the media (even in countries where the media are an instrument of the state) about what the conflicts of interest system and the conflicts of interest board/office are and are not and what they do and do not do. That is, the educational process outlined in Step 1 above must be a never-ending one. In addition, the board/office must develop a relationship with government officials at the highest level:

- To sensitize the board/office to the political and real life implications of conflicts of interest issues;
- To sensitize the officials to the need to ask before acting;
- To convince them that the board/office focuses primarily on prevention not punishment and does not play “gotcha”; and

⁵⁰ A sample advisory opinion and a sample waiver, as well as a number of training materials, may be found on the website of the New York City Conflicts of Interest Board: <http://www.nyc.gov/ethics>.

- To give them a heads up on minor violations that can (and should) be corrected administratively.

In addition, where the public, the media, and civil society play a significant and independent role in pressing for anti-corruption reform, the board/office must cultivate them:

- By educating them about the purpose and principles of the conflicts of interest system and the need for confidentiality (to protect sources, to protect officials against unjustified accusations, and to encourage officials and witnesses to contact the board/office to obtain advice and file complaints);
- By understanding their role as the eyes, ears, and mouth of the board/office, which lacks the public's and the media's and, in some places, civil society's resources to ferret out conflicts of interest and get the word out about the conflicts of interest requirements;
- By providing background information on the conflicts of interest system, without commenting on pending or potential matters or cases;
- By ensuring that the findings of conflicts of interest violations are widely publicized; and
- By seeking a balance between confidentiality and openness.

Conclusion

A values-based conflicts of interest compliance system grounded upon a code of ethics and resting upon the three pillars of a comprehensive conflicts of interest code, sensible disclosure, and effective administration promotes both the reality and the perception of integrity in government by preventing conflicts of interest violations, guiding honest public servants, reassuring citizens, and reinforcing the core values upon which the government is founded. No magic exists in adopting such a system – just hard work, perseverance, and good will. Yet it remains critically important. When the public begins to question the integrity of their public officials, government just does not work. But an effective conflicts of interest system does promote, day-in and day-out, not only the reality but also the perception of government integrity, strengthening the government and undergirding the nation's values. Indeed, even in a government perceived to be desert of corruption, such a system can provide an oasis of stability, integrity, efficiency, and hope.

As difficult as it may be, adopting an effective values-based conflicts of interest system invariably proves worth all the effort.

APPENDIX A

A SUMMARY OF ETHICS REFORM

Purpose of government conflicts of interest system:

To promote both the reality *and the perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur.

Underlying principles: Government conflicts of interest (ethics) laws

- Promote both the reality *and the perception* of integrity in government
- Focus on *prevention*, not punishment
- Are not intended to (and will not) catch crooks, which is the province of penal laws, law enforcement agencies (including inspectors general), and prosecutors
- Recognize the inherent honesty of public officials, whom these laws seek to guide
- Do not regulate morality in most cultures
- Require that the public have a stake in the ethics system

Values-based v. compliance-based laws

- Values-based (ethics) laws promote positive conduct but lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action)
E.g.: “public officials shall place the interest of the public before themselves.”
- Compliance-based (conflicts of interest) laws provide bright-line, civilly and criminally enforceable rules but focus on negative conduct and interests
E.g.: “a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official.”
- Best practice:
 - Develop a code of ethics (ethical precepts) and from those precepts
 - Draw out compliance-based rules (conflicts of interest code)

Definition of conflict of interest

“Conflict of Interest” = Divided loyalty

That is, a conflict, usually (though not always) a financial conflict, between one’s private interests and public duty

Three pillars. An effective government conflicts of interest law must rest upon three pillars, removal of *any* of which causes the entire structure to collapse:

- (1) A simple, comprehensive, and comprehensible **conflicts of interest code**

Common provisions include:

- Using one’s government office for private gain
- Using government resources for private purposes
- Soliciting gifts or accepting gifts from persons doing business with the government
- Seeking or accepting private compensation for doing one’s government job (tips; gratuities)

- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job (except as expressly permitted by law)
- Disclosing confidential government information or using that information for a private purpose
- Appearing before government agencies on behalf of private interests or representing private interests in government matters
- Seeking a job from a private person or firm with which one is dealing in one's government job
- After leaving government service,
 - Appearing on behalf of a private employer before one's former government agency for a specified period (e.g., one year)
 - Working on behalf of a private employer on a matter that one worked on personally and substantially while in government service
 - Revealing or using confidential government information
- Inducing government officials to violate the conflicts of interest code

(2) Sensible **disclosure**

- **Transactional disclosure** and recusal when a potential conflict actually arises ("My brother's company is bidding on this contract, so I recuse myself") – most important type of disclosure
- **Applicant disclosure** by private citizens or firms seeking government business or funding or a government license or benefit, disclosing interests of officials in the applicant or application – provides a check on transactional disclosure
- **Annual financial disclosure** (asset declaration) – provides a check on transactional disclosure

(3) **Administration** by an independent ethics body (preferably a board)

Touchstones of **independence**: qualified, volunteer board members of high integrity, with fixed terms, no other government positions, no government contracts, lobbying, or appearances, appointed by chief executive with advice and consent of legislative body (to avoid factions and leaks), removable only for cause; protected budget; staff accountable solely to board; vested with sole authority to interpret the conflicts of interest law (subject to court review)

Four duties of an ethics board:

- Provide timely and confidential advice on the legality of *future* conduct and interests under the conflicts of interest code (and perhaps grant waivers of the code)
- Train all officials in the requirements of the conflicts of interest code
- Administer the disclosure system (collect, review, make public disclosure forms)
- Enforce the conflicts of interest code when violations occur - to educate, deter, and emphasize how seriously the government takes the code
 - Absence of enforcement power over all officials subject to code makes the ethics board a toothless tiger

- Enforcement power includes complete control of investigations and prosecution; ability to commence investigations on own; subpoena power; broad range of penalties (civil fines, discipline, censure, damages, disgorgement, debarment); confidentiality

APPENDIX B

MODEL CONFLICTS OF INTEREST SYSTEM

Introduction

The following Model Conflicts of Interest System is intended to serve as a model for a medium-sized Western-style government, although it should prove easily adaptable for other governments as well. It is divided into three parts: the Code of Ethics (set forth in the Preamble), the substantive provisions of the conflicts of interest law, and the procedural provisions of that law. Most public officials need concern themselves only with the Code of Ethics and the substantive provisions of the conflicts of interest law, leaving the procedural provisions to lawyers, employee representatives, and the conflicts of interest agency. Commentary appears after the Preamble, Conflicts of Interest Code, and related sections. The reader is referred to the text of the article for commentary on the other provisions.

Preamble and Code of Ethics

The Preamble seeks to set forth the purpose and intent of the Conflicts of Interest System. It also contains aspirational principles for public officials as set forth in the Code of Ethics, which, together with the Conflicts of Interest Code, form the heart and soul of the Conflicts of Interest System.

Conflicts of Interest Code and Related Provisions

This model Conflicts of Interest Code presents a model provision followed by more restrictive and less restrictive alternatives, as well as different formulations of the provision, which may prove more suitable for larger or smaller jurisdictions. Following the Code appears the recusal provision, exclusions, restrictions on private citizens and entities, and definitions. The Code, rather than the definitions, appears first in order to emphasize its primary importance in the Conflicts of Interest Law.

Drafting the model Code has proceeded on two assumptions. First, public officials cannot obey a conflicts of interest law they do not understand. The Code must, therefore, be understandable by laypersons without resort to lawyers or plain language guides and should not set traps for unsuspecting officials. Thus, for example, definitions and exceptions for the Code should not be in the Code itself (because they make it too complex and too confusing) but rather in separate sections; and definitions should be kept to a minimum and should limit but never expand the duties set forth in the Code, so that a public servant who reads and complies only with the Code may refrain from doing a permitted act but will never commit a prohibited act. Second, public officials will not obey, or will obey only grudgingly, a law that does not make sense to them. The Code must therefore be sensible.

In order to make them as understandable as possible, the Conflicts of Interest Code and the Transactional Disclosure and Recusal provision, as well as the aspirational principles in the

Preamble's Code of Ethics, are written in the second person. If desired, "government officer or employee" or another appropriate phrase may be substituted for "you." Note that the word "government," as used in this Model, refers not to the administration or political party in power but rather to the government itself.

PREAMBLE AND CODE OF ETHICS

- SECTION 1. CONFLICTS OF INTEREST CODE**
- SECTION 2. TRANSACTIONAL DISCLOSURE AND RECUSAL**
- SECTION 3. EXCLUSIONS FROM THE CONFLICTS OF INTEREST CODE**
- SECTION 4. PRIVATE PERSONS AND ENTITIES**
- SECTION 5. DEFINITIONS**
- SECTION 6. ANNUAL DISCLOSURE**
- SECTION 7. APPLICANT DISCLOSURE**
- SECTION 8. VOID CONTRACTS**
- SECTION 9. PENALTIES**
- SECTION 10. DEBARMENT**
- SECTION 11. INJUNCTIVE RELIEF**
- SECTION 12. DESIGNATION OF OFFICERS AND EMPLOYEES REQUIRED TO FILE ANNUAL DISCLOSURE STATEMENTS**
- SECTION 13. MAINTENANCE OF DISCLOSURE STATEMENTS**
- SECTION 14. CONFLICTS OF INTEREST BOARD: ESTABLISHMENT; INDEPENDENCE; BUDGET; MEMBERS; MEETINGS**
- SECTION 15. CONFLICTS OF INTEREST BOARD: JURISDICTION; POWERS; DUTIES**
- SECTION 16. REVIEW OF LISTS AND DISCLOSURE STATEMENTS**
- SECTION 17. INVESTIGATIONS**
- SECTION 18. HEARINGS; ASSESSMENT OF PENALTIES**
- SECTION 19. WAIVERS**
- SECTION 20. ADVISORY OPINIONS**
- SECTION 21. JUDICIAL REVIEW**
- SECTION 22. TRAINING AND EDUCATION**
- SECTION 23. ANNUAL REPORTS**
- SECTION 24. TRANSPARENCY**
- SECTION 25. MISCELLANEOUS PROVISIONS**

PREAMBLE AND CODE OF ETHICS

As its purpose, this law seeks to establish minimum standards of ethical conduct for all officers and employees of the government to help ensure that they conduct the business of government free from improper influence and conflicts of interest, whether actual or perceived. At the same time, one must recognize that public service cannot require a complete divesting of all proprietary interests by public servants, or impose overly burdensome disclosure requirements, if the government is to attract and hold highly competent officers and employees. Although the assurance of ethical, conflict-free conduct will continue to rest primarily on the

personal integrity of the officers and employees themselves, on their commitment to the public good, and on the vigilance of the citizenry, the establishment of, and adherence to, the standards and procedures set forth in this law will serve to provide the highest caliber of public administration and increased confidence in public officials. By requiring public annual disclosure of interests that may influence or be perceived to influence the actions of government officials, by mandating ethics training for all government officials, and by assuring the availability of legal advice about the propriety of proposed actions by government officers and employees, this law intends to facilitate the consideration of potential problems before they arise, to minimize unwarranted suspicion, and to enhance the accountability of the government to the people. This law seeks not so much to catch the corrupt public official as to guide the honest one. Recognizing that the overwhelming majority of public servants are honest, this law focuses primarily on prevention, not punishment, and thereby seeks to promote both the reality and the perception of integrity and transparency in government.

Consistent with the foregoing, government officers and employees should strive to conduct themselves in accordance with the ethical principles set forth in the following Code of Ethics. In all actions, as a government officer or employee:

1. You shall serve the people and uphold the rule of law, always seeking to promote effective and democratic government.
2. You shall demonstrate a dedication to the highest ideals of honor, honesty, and integrity, thereby promoting public confidence in the honor, honesty, and integrity of the government.
3. You shall make decisions and act solely on the basis of merit, with fairness and impartiality and in conformity with the law, and, except as provided by law, shall give no preference to anyone because of their wealth, position, or status or because of their personal relationship to you.
4. You shall impress upon all with whom you deal that you perform your duties free of improper influence.
5. You shall show respect to the public, to your superiors, subordinates, and co-workers, and to all with whom you deal.
6. You shall give a full day's work for a full day's pay.
7. You shall maintain confidential information to which you are privy as a result of your government position and shall never use or disclose that information for personal gain or private purposes.
8. You shall conserve public resources.
9. You shall make no private promises in carrying out your official duties, as your position is a public one.
10. You shall never solicit any gifts or favors and shall accept no gifts or favors that might compromise, or appear to compromise, your independence as a public servant.
11. You shall refrain from any personal, private, financial, business, or political activities that might undermine the public's confidence in the government and shall never use your official position for private gain.
12. You shall so conduct your private investments, private employment, and personal relationships and actions that they will never be in conflict with your official duties.

13. You shall resist any attempts by anyone to undermine the professionalism, honesty, and integrity of the public service.
14. You shall promptly inform the appropriate authority of any interests or actions by anyone that violate these principles.

***Commentary:** In setting forth the purpose and intent of the Conflicts of Interest System, the Preamble should summarize the basic principles upon which the law is based – namely, that it seeks to promote both the reality and perception of integrity in government by preventing conflicts of interest violations before they occur. It also sets forth certain assumptions underlying that law, such as the honesty of the vast majority of public servants, and the need for disclosure, training, and availability of legal advice. A set of principles reflecting national values to which all public servants should aspire – but which, in their generality, may provide an insufficient basis for enforcement should they be violated – is also set forth in the Preamble’s Code of Ethics. The Preamble, including the Code of Ethics, must, of course, be modified to draw upon, reflect, and undergird the essential values of the particular jurisdiction.*

SECTION 1. CONFLICTS OF INTEREST CODE

All government officers and employees shall comply with the following Conflicts of Interest Code.

[Minimum Requirements]

1. **Misuse of office.** You may not use your official position, or take an action or fail to take an action as a government officer or employee, if doing so might financially benefit
 - (a) you;
 - (b) a relative;
 - (c) any person or entity for which you are an attorney, agent, broker, employee, officer, director, trustee, or consultant;
 - (d) any person or entity with which you have a financial relationship;
 - (e) any person or entity with which you had a financial relationship during the previous twelve months;
 - (f) any person or entity from which you received a gift, or any goods or services for less than fair market value, during the previous twelve months; or
 - (g) any person or entity that was a major campaign contributor during the previous twenty-four months.

Alternative. You may not take an action or fail to take an action as a government officer or employee if doing so might financially benefit you or a member of your family or your non-government employer or business.
2. **Misuse of government resources.** You may not use government letterhead, personnel, equipment, supplies, or resources for a non-governmental purpose nor may you do personal or private activities during times when you are required to work for the government.

3. **Gifts.** You may not request or accept a gift from any person or entity

(a) that you know, or could reasonably learn, is doing business with the government or intends to do business with the government or has done business with the government during the previous twelve months or

(b) that you know, or could reasonably learn, has or is seeking a license, permit, grant, or benefit from the government.

You also may not buy goods or services for less than fair market value from any of these persons or entities.

Alternative 1. You may not request or accept a gift from anyone that you know or should know is seeking or receiving anything of value from your government agency.

Alternative 2. You may not request or accept a gift from anyone that you know or should know is doing business with the government.

Additional provision (high-level officials). If you are an elected government official or [specify positions of other high-level government officers or employees], you may not request or accept a gift from anyone.

4. **Gratuities.** You may not request or accept anything from any person or entity other than the government for doing your government job.

5. **Solicitation of subordinates.** You may not knowingly ask, directly or indirectly, a subordinate to make contributions to any person, entity, or campaign or to do any political activity.

Alternative. You may not directly or indirectly ask a subordinate to make a political contribution or do any political activity.

6. **Confidential information.** You may not disclose confidential government information or use it for any non-government purpose, even after you leave government service.

Alternative. You may not disclose confidential government information, even after you leave government service.

7. **Appearances and representation.** You may not accept anything from any person or entity other than the government to communicate with any agency of the government or to represent any person or entity in a matter that involves the government.

Alternative 1 (unpaid appearances). You may not communicate with your government agency on behalf of a private person or entity nor may you represent a private person or entity in a matter that is before your government agency.

Alternative 2 (paid appearances before own agency). You may not accept anything to communicate with your government agency on behalf of a private person or entity

nor may you accept anything to represent a private person or entity in a matter that is before your government agency.

8. **Future employment.** You may not seek or obtain any non-government employment with any person or entity you are dealing with in your government job.

Alternative. You may not discuss possible future employment with anyone who is doing business with your government agency.

9. **Post-government employment.** For one year after leaving government service, you may not accept anything from any person or entity to communicate with your former government agency; you may never accept anything to work on any particular matter that you personally and substantially worked on while with the government.

Alternative 1 (unpaid appearances and work). For one year after leaving government service, you may not communicate with your former government agency; you may never work on any particular matter that you personally and substantially worked on while with the government.

Alternative 2 (paid appearances before other agencies). For one year after leaving government service, you may not accept anything from anyone to communicate with any agency of the government; you may never accept anything to work on any particular matter that you personally and substantially worked on while with the government.

10. **Inducement of others.** You may not knowingly cause, try to cause, or help another officer or employee of the government to do anything that would violate any provision of this Conflicts of Interest Code.

[Recommended Additional Provisions]

11. **Prohibited outside positions.** You may not be a paid attorney, agent, broker, employee, officer, director, trustee, or consultant for any person or entity that you know, or could reasonably learn, is doing business or seeking to do business with the government or that you know, or could reasonably learn, has or is seeking a license, permit, grant, or benefit from the government.

Alternative 1. You may not have a job with anyone that does business with your government agency.

Alternative 2 (paid and unpaid outside positions). You may not be an attorney, agent, broker, employee, officer, director, trustee, or consultant for anyone that you know or should know is doing business or seeking to do business with the government or that you know or should know has or is seeking a license, permit, grant, or benefit from the government.

12. **Prohibited ownership interests.** You may not own any part of a business or entity that you know, or could reasonably learn, is doing business or seeking to do business with the government or that you know, or could reasonably learn, has or is seeking a license, permit, grant, or benefit from the government nor may your spouse nor may any of your children who are less than 18 years old.

Alternative. You may not own any part of a business or entity that does business with your government agency nor may your spouse nor may any of your children who are less than 18 years old.

13. **Lawyers and experts.** You may not be a lawyer or expert against the government's interests in any lawsuit.

Alternative. You may not receive anything from anyone to act as a lawyer or expert against the government's interests in any lawsuit.

14. **Purchase of office.** You may not give or promise to give anything to any person or entity for being elected or appointed to government service or for receiving a promotion or raise.

15. **Coercive political solicitation.** You may not use your government position to make threats or promises for the purpose of trying to get anyone to do any political activity or make a political contribution.

Alternative. You may not force or try to force anyone to do any political activity and may not directly or indirectly threaten anyone or promise anything to anyone in order to obtain a political contribution.

16. **Political solicitation of vendors, contractors, and licensees.** You may not ask any person or entity that you know, or could reasonably learn, does or intends to do business with the government or has or is seeking a license, permit, grant, or benefit from the government or that you know, or could reasonably learn, has done business with the government during the previous twelve months to make any political contribution or do any political activity.

17. **Political party positions.** You may not hold a political party office.

Alternative: If you are a [specify positions of government officers or employees], you may not hold any of the following political party offices: [specify offices].

18. **Political activity by high-level officials.** If you are an elected government official or [specify other high-level government officials], you may not directly or indirectly ask anyone to contribute to the political campaign of a government officer or employee running for public office or to the political campaign of anyone running for elective government office.

19. **Superior-subordinate relationships.** You may not have any business or financial dealings with a subordinate or superior.

20. **Post-government employment for high-level officials.** If you are an elected official or [specify other high-level government officials], for one year after leaving government service, you may not accept anything from any person or entity to communicate with any agency of the government; you may never accept anything to work on any particular matter that you personally and substantially worked on while with the government.

21. **Avoidance of conflicts.** You may not knowingly request, negotiate for, or accept any interest, employment, or thing that would put you in violation of this Conflicts of Interest Code.

Alternative: You may not knowingly request, negotiate for, or accept any interest, employment, or thing that would result in a violation of this Conflicts of Interest Code.

22. **Improper conduct.** You may not take any action or have any position or interest that, as defined by rule of the Conflicts of Interest Board, conflicts with your government duties.

Commentary: Subdivision 1. This general prohibition strikes at the heart of conflicts of interest in government service and constitutes perhaps the single most important and most basic conflicts of interest restriction on public officials: misusing their public office for private gain. The provision addresses not only actions but inaction as well, such as ignoring a health code violation committed by the government official's brother. In the case of both prohibited actions and prohibited inaction, section 2 requires disclosure and recusal (disqualification). "Relative," "gift," and "major campaign contributor" are defined in section 5. Exceptions may be found in subdivision 4 of section 3. For example, a government employee could take an action that favored a gift-giver, where the gift, as determined by rule of the Conflicts of Interest Board, was de minimis and the employee's action was not otherwise prohibited by section 1(1).

Paragraph (c) includes not only paid positions but unpaid positions as well. Thus, for example, a government officer or employee could not take an action as a public servant that may financially benefit a not-for-profit organization on whose board of directors he or she sits. The official, however, would not be prohibited from sitting on the board under subdivision 11 if the position is unpaid.

Persons with whom one has a financial relationship, within the meaning of paragraphs (d) and (e), would include not only business partners but also roommates or companions with whom one shares expenses. Accordingly, one need not separately include such individuals. The United States government has a pre-employment restriction. See 5 C.F.R. § 2635.503. De minimis financial relationships are excluded pursuant to section 3(4)(d).

"Less than fair market value" in paragraph (f) would include, for example, a low interest loan not available to the general public. The phrase would not include goods or services obtained at a price generally available to the public or to a class of persons, unrelated to government service, to which the government official happens to belong, such as veterans.

Although the inclusion of major campaign contributors in paragraph (g) would not itself prevent so-called "soft money" contributions (that is contributions not to a candidate but to a

political party or political organization), it would discourage contributions that exceed the contribution limits of a campaign finance program and would concomitantly encourage participation in such a program, as the definition of such contributors is tied to that program. For example, a losing candidate for comptroller who had accepted a campaign contribution in excess of the contribution limits in the Campaign Finance Law from a company and who then became a commissioner in the new administration could not, for twenty-four months after receipt of the contribution, take any action as a commissioner that might financially benefit that company.

Subdivision 2. Although arguably incorporated within subdivision 1, which prohibits misuse of one's position, subdivision 2 specifically prohibits misuse of government resources, including misuse of government time.

Subdivision 3. The gifts provision ranks with the misuse of office prohibition and post-employment restriction as among the most important in any government conflicts of interest code and protects not only against divided loyalties but also against the appearance of corruption. In addition, such a provision levels the playing field among companies competing for government business, preventing a less qualified large corporation from winning a government contract over a more qualified small company merely because the large corporation could afford bigger "gifts" to the critical government officials. "Gift" is broadly defined in section 5(2). Exceptions are set out in section 3(1) and 3(4). As noted in the Commentary to subdivision 1, "less than fair market value" would include, for example, a low interest loan not available to the general public. The phrase would not include goods or services obtained at a price generally available to the public or to a class of persons, unrelated to government service, to which the government official happens to belong, such as veterans.

The gift provision establishes a bright-line rule and expressly adopts a "should have known" standard; an official cannot claim ignorance of the business dealings when he or she could have reasonably learned of those dealings, but neither will he or she be held liable for acceptance of the gift when he or she could not reasonably have learned of the business dealings. The terrible impression that acceptance of gifts presents to the public argues for a strict rule against gifts. The rule of thumb should be: do not accept gifts from anyone, except a close family member, if he or she does government business or receives government benefits. The exceptions ameliorate the harshness of that rule.

Subdivision 4. Tips for government officials may be a way of life in many jurisdictions and cultures, but they seriously erode respect for the integrity of government, create significant problems of divided loyalties, and place the poor at a substantial disadvantage in obtaining government services. Like the restriction on gifts, a prohibition on tips also serves to level the playing field among those dealing with the government. Tips should be forbidden.

Subdivision 5. Prohibiting superiors from soliciting subordinates not only protects subordinates against coercion by their superiors but also protects the public against conflicts of interest that result when a public official compels his or her subordinate to take an action that favors the superior, or his or her private associates, to the detriment of the public. This prohibition addresses all solicitation, including solicitations for charities, not just political solicitation. Both

direct and indirect solicitation is prohibited. Thus, for example, an elected official could not authorize a campaign worker to request government employees to contribute to the official's election campaign. The solicitation must, however, be "knowing." A mass mailing to all registered voters would not violate this provision; a targeted mailing to government employees would. Note that this provision does not prohibit political contributions that are truly voluntary.

Subdivision 6. *Trust in government will not long endure if the government does not protect the secrets of its citizens or of those with whom it does business. In addition, government cannot function properly if its legitimate secrets, such as litigation strategy, become known. "Confidential" is defined in section 5(1). Exceptions exist for disclosure authorized by law and for whistleblowing to a law enforcement agency. See section 3(4)(a), (k).*

Subdivision 7. *Such appearances and representation not only create divided loyalties but also risk misuse of office and improper use or disclosure of confidential information. The appearances provision addresses paid communications with the government; the representation provision addresses appearances anywhere (or even work "behind the scenes"), whether or not communications with the government are made, on a matter that involves the government. Exceptions exist for part-time public servants, appearances and representations otherwise authorized by law, and ministerial communications (e.g., picking up publicly available documents). See section 3(1), 3(4)(a), and 3(4) (b).*

Subdivision 8. *This prohibition addresses not only moonlighting – that is, a second, non-government job – but also post-government employment as well. For example, a government employee who is dealing with a lobbyist as part of the employee's official duties could not approach that lobbyist for a job. Like the appearances provision, this restriction protects against divided loyalties; it also protects against the danger that the government employee, in order to curry favor with a prospective employer, may not zealously perform his or her government duties*

Subdivision 9. *Together with the general prohibition on misuse of office and the gifts provision, the post-employment (revolving door) restriction forms the heart of the Conflicts of Interest Code. In addition to the prohibition on seeking employment with someone with whom one deals in one's government job (subdivision 8), the Conflicts of Interest Code, in subdivision 9, prohibits the former public servant from appearing before his or her former government agency for one year after leaving government service and from working, for compensation, on a matter he or she worked on for the government. These provisions help prevent former employees from receiving favored treatment, to the detriment of the government and the public, and also help level the playing field among competing companies seeking government business, preventing one company, particularly a large corporation, from obtaining favorable treatment merely because it has hired a former government employee, perhaps at an inflated salary that a smaller company could not afford. The particular matter ban also reduces the risk that a former government official will misuse or improperly reveal confidential government information, in violation of subdivision 6. One should emphasize that the provision restricts the former government official, not his or her new employer, which may appear before the former official's agency within the one-year period or even work on a particular matter the former official worked on for the government. Indeed, provided that former officials comply with the particular matter and confidential information restrictions, they may work on a matter behind the scenes involving their former agency during the one-year*

period. This approach strikes an appropriate and acceptable balance between, on the one hand, protecting the public and leveling the playing field, and, on the other hand, ensuring that public officials leaving government are not denied a livelihood, a result that may also significantly impede recruitment of highly qualified officials from the private sector. “Personally and substantially worked” would require the official to have actually worked on the matter, not merely to have supervised someone who worked on the matter, although granting approval, even if pro forma, would ordinarily constitute personal and substantial work. Since the particular matter bar is a lifetime ban, it should be construed narrowly. Relevant exceptions are set forth in section 3(4)(b) (ministerial act, defined in section 5(6)), section 3(4)(i) (receipt of government services available to all), and section 3(4)(l) (hiring back a former employee).

Subdivision 10. *To punish a public servant, particularly a lower level employee, for violating the Conflicts of Interest Code while, in effect, exonerating the public servant, particularly a higher level official, who caused the violation undermines confidence in the fairness of the Conflicts of Interest System and fails to address the root cause of the violation. Note that the violator need only know that he or she is causing or facilitating the interest or conduct at issue; the violator need not know that such conduct violates the law.*

[Recommended Additional Provisions]

These provisions, while significant, either do not rise to the level of importance of the first ten subdivisions or may raise problems for some jurisdictions, particularly rural jurisdictions, where, for example, a prohibited position or prohibited ownership interest provision may sharply reduce the pool of qualified public servants, especially for volunteer or minimally paid government positions.

Subdivision 11. *Restrictions on moonlighting not only reduce the possibility of divided loyalties but also protect government officials against pressure from their non-government employer to misuse their government position to assist the outside employer. This provision addresses only paid positions. Government officers or employees could hold an unpaid position with a firm or organization doing business with the government, provided that they do not use their position to favor that firm or organization and do not use City time or resources for the outside work. See section 1(1) and 1(2). An exception exists for part-time officials under section 3(1). In addition, section 3(2) authorizes the Conflicts of Interest Board to permit lower level employees to have a position with a person or firm doing business with any government agency other than their own. In appropriate cases, waivers are available from the Conflicts of Interest Board under section 19 to permit otherwise prohibited outside work. As with the gifts provision in subdivision 3, here, too, an official cannot claim ignorance of the business dealings when he or she could have reasonably learned of those dealings, but neither will he or she be held liable for holding a position with a firm when he or she could not reasonably have learned of the business dealings*

Subdivision 12. *The reasons for restrictions on ownership interests parallel the reasons for restrictions on positions in subdivision 11. The public servant is also, in effect, deemed to have an interest in a business owned by his or her spouse or unemancipated child because of the high probability of financial entanglement that an ownership interest, unlike a mere position, poses. Here, too, an exception exists for part-time officials under section 3(1), and section 3(2) authorizes*

the Conflicts of Interest Board to permit lower level employees to have an ownership interest with a person or firm doing business with any government agency other than their own. In addition, section 3(4)(h) permits the Conflicts of Interest Board to exempt small ownership interests or specified types of business dealings. Moreover, in appropriate cases, waivers are available from the Board under section 19. As with the gifts provision in subdivision 3 and the prohibited outside positions provision in subdivision 11, here, too, an official cannot claim ignorance of the business dealings when he or she could have reasonably learned of those dealings, but neither will he or she be held liable for having an ownership interest in a firm when he or she could not reasonably have learned of the business dealings

Subdivision 13. *For a government officer or employee to act as a lawyer or expert against the government's interests raises the specter of divided loyalty, even if the case involves a government agency different than the public official's own agency, presents a significant risk of use of position (and confidential information or insider knowledge of the government) for private gain, and confuses the public as to the consistency of the government's action and purpose. The government needs to speak – and be perceived as speaking – with a single voice. Those concerns exist whether the lawyer or expert is paid or unpaid. An exception exists for part-time officials. See section 3(1). In some instances, for example, in the case of a public defender, the government employee's job requires him or her to act against the interests of the government. Such actions are permitted by section 4(a).*

Subdivision 14. *This provision speaks for itself. A government position is not for sale.*

Subdivision 15. *This provision, in conjunction with subdivisions 5 (solicitation of subordinates) and 16-18, protects the public and public officials against the misuse of official power to obtain political advantage and helps prevent both the reality and the perception that political ends dictate government policy. Appointed government officers and employees in particular should be free from political coercion, lest the independence and integrity of public service be undermined and the appearance be created that government exists to serve only those in power. Subdivision 15 prohibits coercion not only of government officials but of the public as well.*

Subdivision 16. *Like subordinates, those who do business with the government or obtain benefits from the government, such as vendors, contractors, and licensees, have little choice but to make political contributions upon request by a government official or by someone acting on his or her behalf. Rich (and corrupt) vendors will prosper. Poor or honest vendors will not. This provision thus helps level the playing field for private citizens and firms that deal with the government. The "know or could reasonably learn" standard protects against trapping officials who unknowingly solicit government vendors, contractors, licensees, and the like. See commentary to sections 3, 11, and 15.*

Subdivision 17. *While this "two-hats" provision may not work in some smaller jurisdictions because of an insufficient pool of citizens to fill both political party and government positions, often the public has come to view the intersection of partisan politics and government business with such disdain that a strict separation of those functions may be required.*

Subdivision 18. *For the reasons stated in the commentary to subdivisions 15-17, high-level government officials, at least in many jurisdictions, should be prohibited from soliciting political contributions, except for their own campaign – and then not of subordinates or vendors or under threat or promise. See sections 1(5), 1(15), 1(16), and 3(3).*

Subdivision 19. *Such relationships undermine the chain of command, result in inherent coercion of the subordinate, and erode the subordinate’s independence in office, running the risk that he or she will take an action that benefits the superior to the detriment of the government and the public.*

Subdivision 20. *As a result of their power within the government, elected officials and certain high-level officials should have a governmentwide appearance ban during their first year after leaving government service. See also commentary to subdivision 9.*

Subdivision 21. *This provision acts as a backstop for the rest of the Conflicts of Interest Code and seeks to avoid conflicts of interest before they surface.*

Subdivision 22. *No Conflicts of Interest Code can cover every conceivable conflict of interest. This “catch-all” provision permits the Conflicts of Interest Board, in effect, to identify other conduct, not specifically addressed in the Code, that creates a conflict of interest. Such conduct will presumably be set forth in a rule of the Board. At least in the United States, a violation of subdivision 22, absent identification of the prohibited conduct with some specificity in a rule, would not support the imposition of sanctions.*

SECTION 2. TRANSACTIONAL DISCLOSURE AND RECUSAL

All government officers and employees shall comply with the following provisions on disclosure and recusal.

1. As soon as you face a possible conflict of interest under the Conflicts of Interest Code, you must recuse yourself from dealing with the matter.
2. Whenever you are required to recuse yourself under this section, you must
 - (a) Promptly inform your superior, if any, about your recusal; and
 - (b) Promptly file with the Conflicts of Interest Board a signed statement disclosing the nature and extent of the conflict of interest; and
 - (c) Immediately stop participating further in the matter.
3. If you are a member of the [*legislative body*] or of a board or commission, you shall also set forth your recusal on the official public record of the [*legislative body*] or of the board or commission.
4. No one shall retaliate against you or take any adverse personnel action against you for complying with this section.

***Commentary:** The purpose of transactional disclosure lies in identifying for superiors and, where applicable, the public and the media potential conflicts of interest and, through recusal, avoiding them. Transactional disclosure provides a mechanism for these groups to assess whether the official has acted in accordance with the Conflicts of Interest Code. The pinpoint nature of transactional disclosure – disclosure of a potential conflict of interest when it actually arises – makes such disclosure not only highly effective but also relatively uncontroversial. Apart from filing a disclosure form identifying the potential conflict of interest, the recusal must be complete. Discussing but not voting on the matter is not sufficient. The exclusions in section 3 apply to transactional disclosure and recusal as well as to the Conflicts of Interest Code. For example, under certain circumstances a legislator may vote on a matter financially benefiting one of the persons listed in section 1(1). See section 3(4)(c). The prohibition against retaliation is required to protect officials who recuse themselves when they reasonably believe that recusal is required. If the agency believes that the recusal is unnecessary – a sham to avoid undertaking the project producing the alleged conflict – the agency need only request the Conflicts of Interest Board for a ruling; if the Board determines that in fact no conflict of interest exists, then the agency can order the employee to perform the work.*

SECTION 3. EXCLUSIONS FROM THE CONFLICTS OF INTEREST CODE

1. For purposes of subdivisions 3, 7, 11, 12, and 13 of section 1, for part-time appointed government officers and employees, as defined by rule of the Conflicts of Interest Board, the “government” and “any agency of the government” shall be deemed to be (a) the agency served by the government officer or employee, (b) those agencies to which the officer or employee has the authority to appoint any officer or employee, and (c) those agencies any budget, bill, payment, or claim of which the officer or employee has the authority to review, approve, audit, or authorize.
2. For purposes of subdivisions 11 and 12 of section 1, the “government” shall be deemed to be the government agency served by the government officer or employee for those classes of government officers and employees defined by rule of the Conflicts of Interest Board upon a finding by the Board that no conflict of interest exists for them to have a position or ownership interest otherwise prohibited by those subdivisions.
3. For purposes of subdivision 18 of section 1, “political campaign” shall not include the government officer’s or employee’s own campaign, provided that he or she otherwise complies with the provisions of the Conflicts of Interest Code.
4. The Conflicts of Interest Code shall not prohibit, or require recusal as a result of:
 - a. An action specifically authorized by a [*specify types of legislative enactments*] of the government or by a statute, rule, or regulation of the [*specify superior governments the laws of which supercede those of the government, if any*] or lawfully undertaken pursuant to one’s official duties.

- b. A ministerial act.
- c. An action by a member of the [*legislative body*] in his or her official capacity that might financially benefit one of the persons or entities set forth in subdivision 1 of section 1, provided that the action and the relationship are not otherwise prohibited by the Conflicts of Interest Code and further provided that the member, prior to acting on the matter, discloses the interest to the Conflicts of Interest Board and, in the case of matters before the [*legislative body*], on the official public records of the [*legislative body*].
- d. An action by a government officer or employee in his or her official capacity that might financially benefit one of the persons or entities set forth in subdivision 1 of section 1 where the financial benefit, gift, or relationship is de minimis, as defined by rule of the Conflicts of Interest Board.
- e. Gifts accepted by the government officer or employee
 - (1) From his or her parent, grandparent, spouse, brother, sister, or child; or
 - (2) That have an aggregate value of ____ or less during any twelve-month period; or
 - (3) That are accepted on behalf of the government and transferred to the government in accordance with procedures established by the Conflicts of Interest Board.
- f. Gifts solicited or accepted by the government officer or employee in compliance with the rules of the Conflicts of Interest Board.
- g. Awards having a value of ____ or less, if they are publicly presented by a charitable organization in recognition of public service.
- h. An ownership interest otherwise prohibited by subdivision 12 of section 1 where, as determined by rule of the Conflicts of Interest Board, the ownership interest or the dealings with the government would not create a conflict of interest.
- i. Receipt of government services or benefits, or use of government facilities, personally and individually that are generally available on the same terms and conditions to citizens or residents, or classes of citizens or residents, under housing or other general welfare legislation.
- j. Representation of constituents by elected officials without compensation in matters of public advocacy.

- k. Disclosure to a law enforcement agency of confidential government information concerning conduct that may involve waste, fraud, corruption, criminal activity, or a violation of this conflicts of interest law.
- l. Communications by former government officers or employees with their former government agency during the first year following termination of their government service where the former government officer or employee is a consultant directly to the former agency.

Commentary: Subdivision 1. *Part-time appointed officials often fill critical roles, and exercise significant power, within government; yet they may be paid little, if anything, for their government service, which remains very much adjunct to their full-time non-government jobs. Although their importance within government dictates that part-time officials be subject to conflicts of interest rules, a Conflicts of Interest Code that deters good citizens from serving in these part-time positions runs counter to the public interest. Accordingly, part-time appointed officials should be exempted from some of the provisions of the Conflicts of Interest Code, at least as to those areas of government where they have no authority. (Elected officials, even if part-time, should not be exempted, as the scope of their duties ordinarily extends throughout the government.) Thus, with respect to gifts, appearances and representation, moonlighting, ownership interests, and practice as a lawyer or expert, subdivision 1 treats appointed part-time officials as if the government were only the official's agency and those agencies over which he or she exercises some power. For example, unlike a full-time employee or an elected official, a part-time officer or employee could work for a private company on matters that were before another government agency, provided that the official has no power over that agency and complies with the other provisions of the Conflicts of Interest Code, such as maintaining the confidentiality of government information and refraining from use of government resources in the private job.*

Subdivision 2. *The prohibitions in section 1(11) and 1(12) on having a paid position with, or ownership interest in, a business or firm that does business with any agency of the government sweeps in a number of lower level employees who clearly have no power to influence the decisions of another government agency. For example, the provision would prevent a janitor in the Department of Health from working as a receptionist on the weekends for a company that has a contract with the Department of Highways. The complex nature of most governments – and the need to make the Conflicts of Interest Code clear and understandable - prevents any general rule distinguishing among various types of employees or outside positions or interests. Instead, the Conflicts of Interest Board, based on its own experience and the needs of the particular government and its employees, should be empowered to carve out of these prohibitions needed exceptions.*

Subdivision 3. *Of necessity, an elected official, or a public official running for elective office, must be able to solicit contributions for his or her own campaign. The exemption does not, however, permit such an official to solicit a subordinate or a vendor or to engage in coercive political solicitation nor does it allow the official to use his or her office to favor a major campaign contributor. See section 1(1), 1(5), 1(15), and 1(16).*

Subdivision 4. (a) *Assuming that the Conflicts of Interest Code is found in a legislative enactment, its provisions may be superceded by other legislative enactments of the government. It should not, however, be superceded by a mere rule or regulation adopted by an agency, or even by the chief executive, of the government. If, on the other hand, the Conflicts of Interest Code appears in the jurisdiction's constitutional document, such as a federal or state constitution or a city charter, then its provisions should be superceded only by an amendment of that constitutional document. Statutes, rules, and regulations of superior governments may also presumably supercede a provision of the Conflicts of Interest Code. If such is not the case, then the provision should be changed accordingly. In addition, the conflicts of interest law itself permits the Conflicts of Interest Board to modify the Conflicts of Interest Code to some limited extent. Finally, this exemption makes explicit that a public servant does not violate the Conflicts of Interest Code when he or she lawfully takes an action pursuant to his or her official duties. For example, if a government employee's duties include representing private citizens against the interests of the government, then doing so does not violate section 1(7) or 1(13).*

(b) *Since ministerial acts, as defined in section 5(6), involve no exercise of discretion, they rarely create a substantial conflict of interest. Thus, for example, a clerk may issue a dog license to her son if issuance of the license requires no discretion, where one merely completes a form and pays the fee. If, however, she knows that her son has falsely stated on the form that his dog has been neutered but she nonetheless issues the license, then she has misused her position in violation of section 1(1), as overlooking the falsification was not a ministerial act.*

(c) *Unlike appointed officers and employees, and elected officials in the executive branch, members of a legislative body cannot authorize anyone else to act in their stead when they recuse themselves. Thus, when legislators recuse themselves, they disenfranchise their constituents. Furthermore, in those jurisdictions where a legislative body must act by a majority of its total members, a recusal is, in effect, a negative vote. For these reasons, this model law specifically permits a legislator to act on a matter that financially benefits the legislator or the legislator's family or associates, provided that the legislator **fully discloses** the conflict of interest to the Conflicts of Interest Board and the public **before** acting on the matter and further provided that the legislator's action and relationship do not otherwise violate the Conflicts of Interest Code – for example, a legislator could not rely upon this exemption to vote on a matter benefiting his or her own company if his or her ownership of the company were prohibited by subdivision 12 of the Conflicts of Interest Code. Political pressure and the ballot box will address unpalatable use of this exemption.*

(d) *Prohibiting a public official who owns three shares of stock in a multi-billion dollar corporation from ever taking any action that may financially benefit that corporation makes little sense. Where the stockholdings are greater – or where the official has a paid position with the corporation – then the case for recusal becomes far more compelling. Although, in determining whether a conflict of interest in fact exists, the size of the official's interest plays less of a role than the size of the financial impact upon that interest, taking an action that benefits a company, even insignificantly, in which the official has a substantial interest creates an appearance that the official is acting in his or her own self interest. For example, awarding a \$25,000 computer contract to IBM when one owns \$50,000 in IBM stock is unacceptable, even though that contract will have no effect whatsoever on the value of one's IBM shares. Making these various distinctions is best left to*

the Conflicts of Interest Board. Note that although acceptance of a gift may be permitted by paragraphs (e), (f), or (g), the official receiving the gift may not act to benefit the donor, unless the gift has been determined by the Conflicts of Interest Board to be de minimis. For example, immediately before entering government service a government official receives a free trip, worth \$5,000, from an acquaintance; although not prohibited by the gift rule (since it predates government service), that gift, under section 1(1)(f), would bar the official from taking an action financially benefiting the donor for one year.

(e) Gifts present perhaps the thorniest issue for conflicts of interest boards, in part because they are so pervasive, at least for elected officials and their staffs, in part because the issue quickly becomes incredibly complex, and in part because gifts create such a terrible appearance of impropriety. Yet to prohibit all gifts to all public servants either would require public servants to become monks or, more likely, would encourage subterfuge and fraud. Government officers and employees must be able to accept gifts from their immediate family, even if the family member does business with the official's own government agency. The prohibition on acting to benefit a relative mitigates any appearance of impropriety resulting from the gift. In addition, permitting small gifts will address free cups of coffee and sandwiches at a meeting, and the like. Some government agencies, particularly law enforcement or financial agencies, may, however, have stricter rules that prohibit even small gifts. Finally, the government should be able to accept gifts to the government, such as a free computer from a vendor or a paid trip to visit the factory of a potential bidder on a government contract.

(f) Except for awards, addressed in paragraph (g), gifts not falling within the bright-line exceptions of paragraph (e) should be exempted only by rule of the Conflicts of Interest Board, which must tailor the exceptions to the needs of the particular government and culture, in light of the Board's own experience in interpreting the Conflicts of Interest Code. Such rules would, for example, address gifts received on family or social occasions (e.g., wedding gifts from old friends who also do substantial business with the government).

(g) Awards for public service promote the reputation of the government and serve to remind the public of the dedication and competence of public servants. Such awards, unless excessive, should be encouraged. Awards that exceed the maximum permissible value, or that are given by profit-making firms, may be addressed by the Conflicts of Interest Board on a case-by-case basis in waiver requests.

(h) Where the aggregate ownership interest of the public official and his or her spouse and unemancipated children in the business or firm is relatively small and where they exercise no managerial control, any conflict of interest is ordinarily too diluted to require prohibition of the interest or to require the official to obtain a waiver from the Conflicts of Interest Board. So, too, where neither the official nor his or her family has any ability to influence the business or firm (e.g., where the ownership interest is in publicly traded stock or in a blind trust, pension plan, deferred compensation plan, or mutual fund the investments of which are not controlled by the official or by his or her family), then the ownership interest presents little possibility of a conflict of interest. Drafting of these somewhat complicated exceptions and tailoring them to the particular government should, however, be left to the Conflicts of Interest Board rather than included in the statutory law.

(i) As citizens, government officers and employees may receive government benefits or use government facilities on the same terms and conditions applicable to citizens generally. For example, if the Department of Parks rents out a park for wedding receptions, a government official may rent the park for a wedding reception; but he or she may not use his or her position to obtain a preference or a better deal in renting the facility. The phrase “personally and individually” makes explicit that the exception would not permit, for example, entering into a contract with the government to lease government-owned space for a private business.

(j) While included within paragraph (a), as the elected official’s action is taken pursuant to official duties, this exception makes it explicit that an elected official may take actions, as an elected official, on behalf of a constituent, for example, contacting a government agency to determine why a constituent has not received her welfare benefits.

(k) The potential for abuse precludes the extension of this exception to disclosure of such information to the media. If disclosure to law enforcement agencies is thought to be an inadequate protection against fraud and corruption, then public disclosure could be permitted where the information in fact involves a violation of law (“or disclosure to anyone where the information concerns conduct that in fact involves a violation of law”). One African country has adopted such an approach.

(l) This exception permits the government to hire back former officers and employees as consultants during their first year after leaving government service. The contract must, however, be directly between the government and the former official (“consultant directly to the former agency”), thereby preventing a company from hiring former government officials in order to obtain an advantage in seeking personal service contracts with the government. The exception is, however, fraught with danger, as it permits sweetheart deals between a government agency and a favored former employee. For that reason, many governments may wish to delete this exception and, instead, rely on the Conflicts of Interest Board to grant waivers of the one-year appearance ban in appropriate cases. The exemptions section does not include two common post-employment exceptions: (1) a government-to-government exception, permitting a former government officer or employee to leave government service for a position with another government and, in that new position, appear before his or her government agency within one year after leaving and even work on particular matters worked on for his or her former agency; and (2) an incidental communication exception, permitting a former government officer or employee to communicate with his or her former agency within the one-year period if the communication is incidental to a proceeding before another government agency or a court (for example, a former government employee could appear in court on a matter involving his or her former government agency and even communicate with his or her former government agency on that matter, at least if the matter was not pending before the former agency during his or her government service). Both of these exceptions appear ill advised in many jurisdictions, where inter-government rivalry may be at least as great as conflicts with the private sector and where revolving door problems are particularly acute. Some jurisdictions may, however, wish to consider an exception to the one-year ban and the particular matter bar for former government employees who, while in government service, exercised only ministerial responsibilities, as the potential for conflicts of interest in such situations will be minimal (e.g., “Communications by

former government employees with their former government agency during the first year following termination of their government service, and work by former government employees on a particular matter they personally and substantially worked on while in government service, where the former government employee performed only ministerial acts while in government service”).

SECTION 4. PRIVATE PERSONS AND ENTITIES

1. **Inducement of violations.** No one shall knowingly cause, attempt to cause, or help a government officer or employee to do anything that would violate any provision of the Conflicts of Interest Code.

2. **Appearances.**

a. Subject to paragraph c of this subdivision, a person or entity for whom or for which a government officer or employee serves as a paid attorney, agent, broker, employee, officer, director, trustee, or consultant shall not communicate with the officer's or employee's government agency nor shall any business or entity of which a government officer or employee owns [*specify the size of the ownership interest triggering the prohibition*].

b. Subject to paragraph c of this subdivision, a person or entity for whom or for which a government officer or employee serves as a paid attorney, agent, broker, employee, officer, director, trustee, or consultant shall not communicate with any other agency of the government if the officer or employee has the authority to appoint any officer or employee of the agency or to review, approve, audit, or authorize any budget, bill, payment, or claim of the agency nor shall any business or entity of which a government officer or employee owns [*specify the size of the ownership interest triggering the prohibition*].

c. Nothing in paragraphs a or b of this subdivision shall be construed to prohibit the person, business, or entity from

(1) Appearing on its own behalf, or on behalf of the government, before any agency of the government;

(2) Seeking or obtaining a ministerial act; or

(3) Receiving a government service or benefit, or using a government facility, that is generally available to the public.

Commentary: Subdivision 1. *Private citizens, vendors, developers, applicants, and the like should not with impunity be able to cause a public servant to violate the Conflicts of Interest Code, subjecting the public servant to serious sanctions but the private individual or firm to nothing, absent a bribe. Furthermore, the public should have some stake in the integrity of their public officials. By discouraging private companies from causing or abetting ethics violations by government officers and employees, this provision also reduces pressure by those in the private sector upon public servants to violate the Conflicts of Interest Code. Note that the violator need only*

know that he or she is causing or facilitating the interest or conduct at issue; the violator need not know that such conduct violates the law.

Subdivision 2. *Certainly if the jurisdiction does not adopt sections 1(11) (prohibited positions) and 1(12) (prohibited ownership interests), then appearances by government officials' outside employer and businesses before the official's agency should be restricted. Appearances of a government official's private employer before the official's government agency, or before an agency over which the official exercises power, raise significant risks of conflicts of interest, even when he or she fully complies with the disclosure and recusal mandates, especially where the official is a higher-level employee. Furthermore, such appearances almost always raise the specter of favoritism in the public's mind. Where, in a particular case, such a prohibition proves unworkable, the Conflicts of Interest Board may issue a waiver. In addition, the exceptions included in paragraph c, analogous to the exceptions found in section 3(4)(b) and 3(4)(i) for government officers and employees, will permit most of the benign dealings between a public servant's outside employer and his or her government agency or a government agency over which he or she has authority. The exception in section 4(2)(c)(1) in effect limits the scope of the prohibition in subdivision 2 to representational appearances – the firm may appear on its own behalf but not as an attorney or other representative for a third party. Note, however, that even where the appearance by the outside employer of the government officer or employee is not prohibited he or she must recuse himself or herself from dealing with the matter. The prohibition extends only to firms in which the government officer or employee has a position or a significant ownership interest, not to all firms in which he or she has any ownership interest, as such a prohibition would cast too wide a net and would in many instances be impossible of performance since a large firm could hardly be expected to know the government employers of all of its shareholders.*

SECTION 5. DEFINITIONS

1. “Confidential” means any record or other information that is protected by law from disclosure to the public and shall include, but not be limited to, such records in the possession of the government that contain proprietary information or trade secrets of firms.
2. “Gift” means anything of value sought or received for less than fair market value, whether in the form of money, a service, a loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance, promise, or tickets, or in any other form.
3. “Government” means the [jurisdiction adopting the conflicts of interest law] and includes all of its agencies, offices, departments, divisions, bureaus, boards, administrations, authorities, corporations, councils, commissions, and other units.
4. “Government officer or employee” means all officials, officers, and employees of the government, whether paid or unpaid.

5. “Major campaign contributor” means any individual or entity that has made contributions in excess of those permitted by section ___ of the Campaign Finance Law for a participating candidate for one of the offices set forth in that section, whether or not the government officer or employee was in fact a participating candidate, and, in the case of candidates for all other national, provincial, or local elective offices, the contribution limit specified for the [*specify the title of the chief executive officer*] in that section.
6. “Ministerial act” means an administrative act, including the issuance of a license, permit, or other permission by the government, that is carried out in a prescribed manner and that does not involve substantial personal discretion.
7. “Relative” means a spouse, child, grandchild, parent, sister, brother, or grandparent of the government officer or employee; a parent, child, sister, or brother of the spouse of the government officer or employee; and a spouse of a parent, child, brother, or sister of the government officer or employee.
8. “Subordinate” means a government officer or employee the work of whom one has the authority to directly or indirectly control or direct, or whose terms and conditions of government employment one has the power to affect, whether or not the two officers or employees stand in a direct reporting relationship to one another.

***Commentary:** As noted above, definitions should be kept to a minimum and should narrow, but never expand, the obligations set forth in the Conflicts of Interest Code. The tendency to define every word or phrase in the Conflicts of Interest Code should be resisted. Thus, for example, this model law includes no definition for “financial relationship,” “doing business,” or “particular matter.” Such definitions are best left to the Conflicts of Interest Board, which may, if necessary, include them in a rule based on the Board’s experience in interpreting the Conflicts of Interest Code. The Conflicts of Interest Board should also bear responsibility for determining those government officials, officers, and employees who are subject to the conflicts of interest law. For example, unpaid members of ad hoc advisory committees set up by an elected official to advise him or her on recommended changes in a particular government law or practice may or may not be “government officers or employees,” depending, among other things, on how the body is established (by statute, rule, proclamation, or press release), how its members are appointed, whether it is subject to the government’s open meetings and freedom of information laws, and whether it has the authority to restrict any government action. Similar issues arise in regard to temporary employees, particularly long-term temporary employees. If the government has not adopted a campaign finance law, then the specific amount should be specified in the statute or delegated to the Conflicts of Interest Board to determine.*

SECTION 6. ANNUAL DISCLOSURE

1. Officers and employees required to file. The following classes of officers and employees of the government shall be required to file a signed annual disclosure statement:

- (a) Elected officials;

- (b) The heads of any agency, department, division, council, board, commission, or bureau of the government and their deputies and other persons authorized to act on their behalf;
- (c) Officers and employees who hold policymaking positions, including members of boards and commissions of the government;
- (d) Officers and employees having discretionary authority with respect to:
 - (i) Contracts, leases, franchises, revocable consents, concessions, variances, special permits, or licenses;
 - (ii) The purchase, sale, rental, or lease of real property, personal property, or services, or a contract therefor;
 - (iii) The obtaining of grants of money or loans;
 - (iv) Inspections;
 - (v) Assessments of the value of real property;
 - (vi) Audits; or
 - (vii) The adoption or repeal of any rule or regulation having the force and effect of law.

2. Time and place for filing. Annual disclosure statements shall be filed with the Conflicts of Interest Board no later than *[specify date]* each year.

3. Contents of annual disclosure statement. The annual disclosure statement shall disclose:

- (a) With respect to each non-government employer or business from which during the preceding calendar year the government officer or employee received more than *[specify amount, tied to section 3(4)(d)]* for services performed or for goods sold or produced, or of which he or she was a paid or unpaid attorney, agent, broker, officer, director, trustee, consultant, or employee,
 - (i) The name of the employer or business;
 - (ii) The nature of its business;
 - (iii) The type of business, such as a partnership, corporation, or sole proprietorship; and
 - (iv) The officer's or employee's relationship to the employer or business, such as owner, partner, officer, director, member, employee, and/or shareholder;
- (b) With respect to the government officer's or employee's relatives, the information required by paragraph (a) of this subdivision for paid businesses or positions;
- (c) The name, nature of business, and type of business of any entity in which the government officer or employee during the preceding calendar year had an investment of at least *[set forth percentage, tied to section (3)(4)(d) and (h)]* of the stock or debt of the entity or *[specify value, tied to section (3)(4)(d) and (h)]*, whichever is less;
- (d) With respect to the government officer's or employee's spouse and children under the age of 18, the information required by paragraph (c) of this subdivision;

- (e) The location of any real property within the territory of the government, or within ____ km of the borders of that territory, in which the officer or employee, or his or her relative, has a financial interest, provided, however, that where the officer or employee or the relative lives at the address, only the province and city, town, or village in which the property is located shall be reported;
- (f) Each gift that the government officer or employee or his or her spouse or children under the age of 18 received worth [*specify amount in section 3(4)(e)(2)*] or more during the preceding calendar year, except gifts from relatives. Separate gifts from the same or affiliated donors during the year must be added together for purposes of this paragraph;
- (g) Each person or firm to which the government officer or employee or his or her spouse or children under the age of 18 owes [*specify amount, tied to section (3)(4)(d)*] or more and the type of obligation, except money owed to relatives and credit card debts owed for less than 60 days;
- (h) Each person or firm that owes the government officer or employee or his or her spouse or children under the age of 18 [*specify amount, tied to section (3)(4)(d)*] or more and the type of obligation, except money owed by relatives;
- (i) The name of each relative of the government officer or employee who is an officer or employee of the government, including the relative's name, relationship to the officer or employee, government title, and government department.

4. **Good faith efforts.** Failure to disclose the information required by subdivision 3 of this section with respect to an officer's or employee's relative shall not constitute a violation of that subdivision if the officer or employee has made a good faith effort to obtain the information and if he or she also sets forth those efforts in his or her disclosure statement.

SECTION 7. APPLICANT DISCLOSURE

1. Where a person requests a government officer or employee to take or refrain from taking any action (other than a ministerial act) that may result in a financial benefit both to the requestor and to either any officer or employee of the government or one of the other persons listed in subdivision 1 of section 1, the requestor shall disclose the names of any such persons, to the extent known to the requestor at the time of the request.

2. If the request is made in writing, the disclosure shall accompany the request; the officer or employee receiving the request shall promptly forward a copy of the disclosure to the Conflicts of Interest Board. If the request is oral and made at a meeting of a government body, the disclosure shall be set forth in the public record of the body and a copy of the disclosure promptly forwarded by the clerk of the body to the Conflicts of Interest Board. If the request is oral and not made at a meeting of a government body, the officer or employee receiving the request and disclosure shall set forth the disclosure in writing and promptly forward it to the Conflicts of Interest Board.

SECTION 8. VOID CONTRACTS

Any contract or agreement entered into by or with the government that results in or from a violation of any provision of sections 1 or 4 shall be void unless ratified by the [*legislative body of the government*]. Such ratification shall not affect the imposition of any criminal or civil penalties pursuant to this law or any other provision of law.

SECTION 9. PENALTIES

1. **Disciplinary action.** Any government officer or employee who engages in any action that violates any provision of this law may be warned or reprimanded or suspended or removed from office or employment, or be subject to any other sanction authorized by law, by the person or body authorized by law to impose such sanctions. A warning, reprimand, suspension, removal, or other authorized sanction may be imposed in addition to any other penalty contained in this law or in any other provision of law.

2. **Civil fine.** Any government officer or employee who violates any provision of this law may be subject to a civil fine of up to [*set forth amount*] for each violation. A civil fine may be imposed in addition to any other penalty contained in any other provision of law or in this law.

3. **Damages.** Any person, whether or not a government officer or employee, who violates any provision of this law shall be liable in damages to the government for any losses or increased costs incurred by the government as a result of the violation. Such damages may be imposed in addition to any other penalty contained in any other provision of law or in this law.

4. **Disgorgement.** Any entity or person, whether or not a government officer or employee, which or who receives an economic benefit knowing it to be the result of conduct that violates any provision of this law shall be liable for disgorgement to the government of the value of any gain or benefit obtained by the person as a result of the violation. Disgorgement may be imposed in addition to any other penalty contained in any other provision of law or in this law.

5. **Crime.** Any person, whether or not a government officer or employee, who intentionally or knowingly violates any provision of this law shall be guilty of [*specify level of crime*] and, upon conviction thereof, if a government officer or employee, shall forfeit his or her government office or employment.

SECTION 10. DEBARMENT

1. Any entity or person, whether or not a government officer or employee, which or who intentionally or knowingly violates any provision of this law shall be prohibited from entering into any contract with any agency of the government for a period not to exceed three years, as provided in subdivision 5 of section 18 of this article

2. Nothing in this section shall be construed to prohibit any person from receiving a service or

benefit, or from using a facility, which is generally available to the public.

3. Under this section, a corporation, partnership, or other entity shall not be held vicariously liable for the actions of an employee. A corporation, partnership, or other entity shall not be debarred because of the actions of an employee unless the employee acted in the execution of company policy or custom. A store, region, division, or other unit of an entity shall not be debarred because of the actions of an employee of that unit unless the employee acted at the direction, or with the actual knowledge or approval, of the manager of the unit.

SECTION 11. INJUNCTIVE RELIEF

Any citizen, officer, or employee of the [*territory of the government*] may bring an action for injunctive relief to enjoin an officer or employee of the government from violating this law or to compel an officer or employee of the government to comply with the provisions of this law.

SECTION 12. DESIGNATION OF OFFICERS AND EMPLOYEES REQUIRED TO FILE ANNUAL DISCLOSURE STATEMENTS

Within __ days after the effective date of this law, and during the month of _____ each year thereafter, the [*specify officials, such as the head of each government agency*] shall:

- (a) Cause to be filed with the Conflicts of Interest Board a list of the names and offices or positions of all government officers and employees required to file annual disclosure statements pursuant to section 6 of this law; and
- (b) Notify all such officers and employees of their obligation to file an annual disclosure statement.

SECTION 13. MAINTENANCE OF DISCLOSURE STATEMENTS

The Conflicts of Interest Board shall index and maintain on file for at least ____ years and make available for public inspection all transactional, applicant, and annual disclosure statements filed with the Board.

SECTION 14. CONFLICTS OF INTEREST BOARD: ESTABLISHMENT; INDEPENDENCE; BUDGET; MEMBERS; MEETINGS

1. There is established a Conflicts of Interest Board, which shall consist of _____ members and shall have and exercise the powers and duties set forth in this law.
2. The Board shall be independent of the [*legislative body and chief executive*]. The appropriations available to pay for the expenses of the Board during each fiscal year shall not be less than _____ of one percent of the net total expense budget of the government.

3. The members of the Board shall be appointed by the [*specify appointing authority and, if applicable, any advise and consent function*] for a term of [*specify length of term, which overlaps the term of the appointing authority, if applicable; establish staggered terms, if appropriate; and, if appropriate, provide for automatic reappointment of Board members for one year upon the expiration of their term if a successor is not timely appointed*]. Members of the Board shall be chosen for their independence, integrity, civic commitment, and high ethical standards.

4. No Conflicts of Interest Board member shall:

- (a) Hold office in a political party or be a candidate for such office;
- (b) Hold any elective office or be a candidate for such office;
- (c) Be an appointed officer or employee of the government;
- (d) Be employed or act as a lobbyist before the government;
- (e) Enter into any contract with the government, except a contract for the receipt of government services or benefits, or use of government facilities, on the same terms and conditions as are generally available to residents or a class of residents of the [*territory of the government*];
- (f) Appear before any agency of the government, except on his or her own behalf, or represent any person or entity in any matter before any agency of the government or represent any person or entity or any matter that involves the government; or
- (g) Participate in any election campaign, except a Board member may make campaign contributions.
- (h) [*Optional: Of the total membership of the Board, no more than the majority minus one shall be registered in the same political party.*]

5. The [*appointing authority*] shall designate the chair of the Board. The chair or any [*specify number*] members of the Board may call a meeting.

6. When a vacancy occurs in the membership of the Board, the vacancy shall, within 60 days, be filled by the [*appointing authority*] for the unexpired portion of the term in the same manner as the original appointment. Any person appointed to fill a vacancy on the Board shall meet the qualifications set forth in subdivision 4 of this section. A Board member shall serve until his or her successor has been appointed. Consecutive service on the Board shall not exceed two full terms.

7. [*Specify number*] of the Board shall constitute a quorum, and the Board shall have the power to act by vote of [*specify number*] members.

8. After written notice and opportunity for reply, members of the Board may be removed from office in the same manner as they were appointed to office for failure to meet the qualifications set forth in subdivision 4 of this section, substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office, or violation of this law.

9. The members of the Board shall not receive compensation but shall be reimbursed for reasonable expenses incurred in the performance of their official duties.

SECTION 15. CONFLICTS OF INTEREST BOARD: JURISDICTION; POWERS; DUTIES

The Conflicts of Interest Board shall:

1. Appoint a director, who shall act in accordance with the policies of the Board, and such other staff as are necessary to carry out the Board's duties under this law. The Board may delegate authority to the director to act in the name of the Board between meetings of the Board, provided that the delegation is in writing and the specific powers to be delegated are enumerated and further provided that the Board shall not delegate to the director [*set forth duties that may not be delegated to staff*].
2. Adopt, amend, and rescind rules and regulations to govern procedures of the Board.
3. Review, index, and maintain on file transactional disclosure statements, applicant disclosure statements, and annual disclosure statements filed with the Board and lists of officers and employees required to file annual disclosure statements.
4. Review, index, maintain on file, and dispose of complaints, make notifications and referrals, and conduct investigations.
5. Conduct hearings, recommend disciplinary action, assess penalties, and initiate appropriate actions and proceedings.
6. Render, index, maintain on file, and publish advisory opinions and waivers.
7. Provide training and education, including educational materials, on the requirements of this law.
8. Prepare an annual report and periodically review the requirements of this law and recommend changes.
9. Provide for public inspection of certain records of the Board.

The termination of an officer's or employee's term of office or employment with the government shall not affect the jurisdiction of the Board with respect to the requirements imposed by this law on the former officer or employee for his or her actions or interests while an officer or employee of the government.

SECTION 16. REVIEW OF LISTS AND DISCLOSURE STATEMENTS

1. The Conflicts of Interest Board shall review:

- (a) The lists of officers and employees, prepared pursuant section 12 of this law, to determine whether the lists are complete and accurate. The Board shall add the name of any other officer or employee who the Board determines should appear on the list and shall remove the name of any officer or employee who the board determines should not appear on the list.
- (b) All annual disclosure statements to determine whether any person required to file such a statement has failed to file it, has filed a deficient statement, or has filed a statement that reveals a possible or potential violation of this law.
- (c) All transactional disclosure statements to determine whether any such statement is deficient or reveals a possible or potential violation of this law.
- (d) All applicant disclosure statements to determine whether any such statement is deficient or reveals a possible or potential violation of this law.

2. If the Board determines that an annual disclosure statement, a transactional disclosure, or an applicant disclosure statement is deficient or reveals a possible or potential violation of this law, the Board shall notify the person in writing of the deficiency or possible or potential violation and of the penalties for failure to comply with this law.

SECTION 17. INVESTIGATIONS

1. Upon receipt of a sworn complaint by any person alleging a violation of this law, or upon determining on its own initiative that a violation of this law may exist, the Conflicts of Interest Board shall have the power and duty to conduct any investigation necessary to carry out the provisions of this law. In conducting any such investigation, the Board may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records that it may deem relevant and material.

2. Nothing in this section shall be construed to permit the Conflicts of Interest Board to conduct an investigation of itself or of any of its members or staff. If the Board receives a complaint alleging that the Board or any of its members or staff has violated any provision of this law, or any other law, the Board shall promptly transmit to [*specify agency*] a copy of the complaint.

3. The Conflicts of Interest Board shall state in writing the disposition of every sworn complaint it receives and of every investigation it conducts and shall set forth the reasons for the disposition. All such statements and all sworn complaints shall be indexed and maintained on file by the Board.

4. Any person filing a sworn complaint with the Conflicts of Interest Board shall be notified in writing of the disposition of the complaint.

SECTION 18. HEARINGS; ASSESSMENT OF PENALTIES

1. **Disciplinary action.** In its discretion, after a hearing providing for procedural protections [*due process procedural mechanisms*] and subject to any applicable provisions of law [*and collective*

bargaining agreements], the Conflicts of Interest Board may recommend appropriate disciplinary action pursuant to subdivision 1 of section 9 of this law. The recommendation of the Board shall be made to the person or body authorized by law to impose such sanctions. The Board shall conduct and complete the hearing with reasonable promptness, unless in its discretion the Board refers the matter to the authority or person or body authorized by law to impose disciplinary action or unless the Board refers the matter to the appropriate prosecutor. If such a referral is made, the Board may adjourn the matter pending determination by the authority, person, body, or prosecutor.

2. **Civil fine.** In its discretion and after a hearing providing for procedural protections [*due process procedural mechanisms*], the Conflicts of Interest Board may assess a civil fine, not to exceed [*maximum amount*] for each violation, upon any government officer or employee or other person found by the Board to have violated this law. The Board shall conduct and complete the hearing with reasonable promptness. The civil fine shall be payable to the government.

3. **Damages.** The Conflicts of Interest Board may initiate an action in [*appropriate court*] to obtain damages, as provided in subdivision 3 of section 9 of this law.

4. **Civil forfeiture.** The Conflicts of Interest Board may initiate an action to obtain disgorgement, as provided in subdivision 4 of section 9 of this law.

5. **Debarment.** The Conflicts of Interest Board on behalf of the government may initiate an action in [*appropriate court*] for an order of debarment, as provided in section 10 of this law.

6. **Injunctive relief.** The Conflicts of Interest Board on behalf of the government may bring an action in [*appropriate court*] to enjoin a violation of this law or to compel compliance with this law, as provided in section 11 of this law.

7. **Prosecutions.** The Conflicts of Interest Board may refer to the appropriate government prosecutor possible criminal violations of this law. Nothing contained in this law shall be construed to restrict the authority of any prosecutor to prosecute any violation of this law or of any other law.

8. Nothing contained in this section shall be construed to permit the Conflicts of Interest Board to take any action with respect to any alleged violation of this law or of any other law by the Board or by any member or staff member thereof, except to refer the matter, as provided in section 17 of this law.

SECTION 19. WAIVERS

1. Upon written application and upon a showing of compelling need by the applicant, the Conflicts of Interest Board may grant the applicant a waiver of any of the provisions of sections 1, 2, 4, 6, or 7 of this law.

2. Waivers may be granted only as to future interests or conduct and may be sought only by the person or firm whose interests or conduct is at issue or, in the case of an individual, by his or her superior. The Board may not consider a request for a waiver until the request has first been approved by the head of the government agency or agencies involved. The Board shall grant a waiver only upon a finding that the interest or conduct for which the waiver is sought shall not be in conflict with the purposes and interests of the government.
3. Waivers shall be in writing and shall state the grounds upon which they are granted. All applications, decisions, and other records and proceedings relating to waivers shall be indexed and maintained on file by the Board.

SECTION 20. ADVISORY OPINIONS

1. The Conflicts of Interest Board shall render advisory opinions with respect to all matters covered by this law upon the written request of a current, former, or prospective government officer or employee or any other person subject to this law. Advisory opinions shall relate only to the interests, conduct, or actions of the requester or of a subordinate of the requester.
2. A current, former, or prospective government officer or employee who acts in conformity with an advisory opinion shall not be subject to penalties or sanctions under this law for having so acted, unless the request for the advisory opinion omitted or misstated facts material to the opinion. The Board may amend or rescind an advisory opinion at any time upon notice to the officer or employee, provided, however, that the amended advisory opinion shall apply only to future actions of the officer or employee.
3. Advisory opinions and requests for advisory opinions shall be indexed and maintained on file by the Conflicts of Interest Board. The Board shall publish such of its advisory opinions as the Board deems beneficial for the guidance of government officers and employees and other persons subject to this law, those doing business with the government, and members of the public, provided, however, that before publishing such advisory opinions the Board shall first make such deletions as are necessary to prevent disclosure of the identity of the involved officers and employees.

SECTION 21. JUDICIAL REVIEW

Any person aggrieved by a decision of the Conflicts of Interest Board may seek judicial review and relief pursuant to [*set forth procedures for judicial review*].

SECTION 22. TRAINING AND EDUCATION

1. The Conflicts of Interest Board shall develop educational materials and an educational program on the provisions of this law and make information concerning this law available to all government officers and employees, to other persons subject to this law, to the public, and to

persons interested in doing business with the government and shall annually distribute to every government officer and employee a copy of the Code of Ethics and the Conflicts of Interest Code set forth in this law. Each government agency shall conspicuously post in each of its worksites a sign provided by the Board setting forth the Code of Ethics and the Conflicts of Interest Code.

2. Training as to the provisions of this law shall be mandatory for all government officers and employees. Each government agency shall provide such assistance to the Board as may be necessary and reasonable in conducting ongoing training programs on this law and in making information concerning this law available and known to all officers and employees of the agency. On or before the tenth day after an individual becomes a government officer or employee, he or she shall sign a written statement, which shall be maintained in his or her personnel file, that the government officer or employee has received and read and shall conform to the provisions of the Code of Ethics and the Conflicts of Interest Code. The failure of an officer or employee to receive such training or to sign such a statement or to receive a copy of the Code of Ethics or Conflicts of Interest Code or the failure to maintain the statement on file shall have no effect on the duty of compliance with this law or on the enforcement of the provisions thereof.

SECTION 23. ANNUAL REPORTS

The Conflicts of Interest Board shall prepare and submit an annual report to the [*specify recipient of annual report*] summarizing the activities of the Board during the preceding year. The report may also recommend changes to the text or administration of this law and shall also [*specify other items to be included in annual report, such as an index and summary of all advisory opinions and of those enforcement dispositions imposing sanctions*].

SECTION 24. TRANSPARENCY

1. Notwithstanding the provisions of [*specify the law regulating public access to government records*], the only records of the Conflicts of Interest Board that shall be available for public inspection are:

- (a) Transactional, annual, and applicant disclosure statements filed pursuant to sections 2, 6, and 7 of this law;
- (b) Lists filed pursuant to section 6;
- (c) Rules and regulations of the Board;
- (d) Delegation of powers to the director pursuant to section 15;
- (e) Final dispositions by the Board that find a person or entity to have violated any provision of this law pursuant to section 18;
- (f) Waivers granted pursuant to section 19;
- (g) Advisory opinions issued pursuant to section 20, provided that information identifying the involved person or persons is deleted from the copy made available for public inspection; and
- (h) Educational materials and annual reports issued pursuant to sections 22 and 23.

2. Notwithstanding the provisions of [*specify the law regulating public access to government meetings*],

(a) no meeting or proceeding of the Conflicts of Interest Board concerning misconduct, nonfeasance, or neglect in office by any person shall be open to the public, except upon the request of the affected person; and

(b) no other meeting or proceeding of the Board shall be open to the public unless expressly provided otherwise by the Board.

SECTION 25. MISCELLANEOUS PROVISIONS

[Insert such miscellaneous provisions as may be necessary or appropriate, such as the controlling effect of this law over inconsistent laws, severance provisions if any provision of this law is found unconstitutional, distribution and posting of the law, and effective date.]

APPENDIX C

MODEL ANNUAL DISCLOSURE (ASSET DECLARATION) FORM

ANNUAL DISCLOSURE STATEMENT FOR CALENDAR YEAR 20__

Last Name	First Name	Initial
<hr/>		
Title	Department or Agency	
<hr/>		
Work Address	Work Phone No.	Email Address
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If the answer to any of the following questions is “none,” please so state. Attach additional pages if necessary.

1. **Outside Employers and Businesses.** List the name of every employer or business, other than the Government, from which you received more than [*specify amount, tied to Conflicts of Interest Law § 3(4)(d)*] for services performed or for goods sold or produced, or of which you were a paid or unpaid attorney, agent, broker, officer, director, trustee, consultant, or employee during the year 20__. Do not list individual customers or clients of the business. Do not list businesses in which you were an investor only (they are listed in Question 2 below). Identify the nature of the business and the type of business, such as a partnership, corporation, or sole proprietorship, and list your relationship(s) to the employer or business (*e.g.*, owner, partner, officer, director, member, employee, and/or shareholder). Provide the same information for your relatives with respect to their paid businesses or positions. “Relative” means your spouse, child, grandchild, brother, sister, parent, or grandparent; a parent, child, sister, or brother of your spouse; and a spouse of your parent, child, brother, or sister.

Name of Family Member	Relationship to You	Name of Employer or Business	Nature of Business	Type of Business	Relationship to Business
[<i>E.g.: Minsun Cho</i>]	[<i>Wife</i>]	[<i>ABC Realty</i>]	[<i>Real Estate</i>]	[<i>Partnership</i>]	[<i>Partner</i>]
[<i>E.g.: Chang Cho</i>]	[<i>Self</i>]	[<i>IBM</i>]	[<i>Computers</i>]	[<i>Corp.</i>]	[<i>Employee</i>]
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2. **Investments.** List the name of any entity in which you have an investment of at least [*set forth %*, tied to *Conflicts of Interest Law § 3(4)(d) and (h)*] of the stock or debt of the entity or [*set forth value*, tied to *Conflicts of Interest Law § 3(4)(d) and (h)*], whichever is less. Do not list any entity listed in response to Question 1 above. Identify the nature of the business and the type of business (*e.g.*, corporation). Provide the same information for your spouse and any of your children who are under age 18.

Name of Family Member	Relationship to You	Name of Entity	Nature of Business	Type of Business
<i>[E.g.: Chang Cho</i>	<i>Self</i>	<i>Braun</i>	<i>Consumer Goods</i>	<i>Corp.]</i>

3. **Real Estate.** List the address of each piece of real estate that you or your relatives, as defined in Question 1, own or have a financial interest in. List only real estate that is located within the [*territory of the government*] or within _____ km of the [*territory of the government*]. If you or your relative lives at the address, list as the address only the province and the city, town, or village in which the property is located.

Name of Family Member	Relationship to You	Address of Real Estate	Type of Investment
<i>[E.g.: Kunsam Cho</i>	<i>Father</i>	<i>Oz City, MI</i>	<i>Rent]</i>

4. **Gifts.** List each gift that you or your spouse or any of your children who are under age 18 received worth [*specify amount in Conflicts of Interest Law § 3(4)(e)(2)*] or more during the year 20__, except gifts from relatives, as defined in Question 1. “Gift” means anything of value sought or received for less than fair market value, whether in the form of money, a service, a loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance, promise, or tickets, or in any other form. Separate gifts from the same or affiliated donors during the year must be added together for purposes of the [*amount*] rule.

Recipient of Gift	Donor of Gift	Relationship to Donor	Nature of Gift
[E.g.: Chang Cho	XYZ Corp.	Former employer	Free trip to Majorca]

5. **Money You Owe.** List each person or firm to which you or your spouse or any of your children who are under age 18 owes [*specify amount, tied to Conflicts of Interest Law § 3(4)(d)*] or more and the type of obligation. Do not list money owed to relatives, as defined in Question 1. Do not list credit card debts unless you have owed the money for at least 60 days.

Debtor	Creditor	Type of Obligation
[E.g.: Chang & Minsun Cho	TUV Bank	Mortgage loan]

6. **Money Owed to You.** List each person or firm that owes you or your spouse or any of your children who are under age 18 [*specify amount, tied to Conflicts of Interest Law § 3(4)(d)*] or more and the type of obligation. Do not list money owed by relatives, as defined in Question 1.

Creditor	Debtor	Type of Obligation
<i>[E.g.: Chang Cho</i>	<i>Manuel Garcia</i>	<i>Mortgage loan]</i>

7. **Relatives in Government Service.** List each relative, as defined in Question 1, who is an officer or employee of the Government, whether paid or unpaid, including the relative's name, relationship to you, title, and department.

Name of Family Member	Relationship to You	Title	Department
<i>[E.g.: Alex Jones</i>	<i>Sister's husband</i>	<i>Code Enf. Officer</i>	<i>Building]</i>

COMMENTS:

I certify that all of the above information is true, accurate, and complete to the best of my knowledge and that, within the past two weeks, I have read Code of Ethics and the Conflicts of Interest Code, a copy of which are attached to this form.

Signed: _____

Date Signed: _____