



PRINCIPLES OF GOVERNMENT ETHICS

Reporters' Memorandum No. 3

(November 23, 2011)

SUBJECTS COVERED

- I. Introduction: Scope of Project
- II. A Template of Government Ethics Standards: The Federal Executive Branch
- III. Implementation Mechanisms
- IV. Variations in Non-Federal Jurisdictions
- V. Principles Underlying Government Ethics Restrictions and Countervailing Concerns
- VI. Ethics in Public and Private Sector Organizations

APPENDIX Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor Personnel

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The Council approved the initiation of the project in October 2009.

This is the first draft of the material contained in this Memorandum.

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Principles of Government Ethics:

Reporter's Memorandum for December 2011 Meeting¹

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¹ Some passages in this memorandum are based on the author's previous publications, including *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, *Confidentiality Norms and Government Lawyers*, 85 WASH. U.L. REV. 1033 (2007), *Restrictions on Gifts and Outside Compensation for Executive Branch Employees*, in *THE LOBBYING MANUAL* (William V. Luneburg & Thomas M. Susman, eds.) (4th ed. 2009) (co-authored with Beth Nolan), and *ETHICS FOR AN OUTSOURCED GOVERNMENT* (Administrative Conference of the United States 2011).

1 VI. Ethics in Public and Private Sector Organizations
2 Appendix: Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor
3 Personnel
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5 **I. Introduction: Scope of Project**

6 Federal, state and local governments impose detailed ethics restrictions on their
7 employees. The federal government has over a hundred pages of ethics regulations applicable to
8 all executive branch employees, and dozens of federal agencies have adopted additional ethics
9 regulations for their employees. The federal Office of Government Ethics, which writes ethics
10 regulations and provides advice on ethics standards, has more than a hundred of employees.
11 More than a thousands additional employees in federal agencies devote all or part of their work
12 day to interpreting and applying federal ethics standards. Similarly, states and cities have also
13 adopted complex ethics standards and created ethics agencies to implement them.

14 The substantive ethics restrictions vary in their details across these federal, state and local
15 jurisdictions. Some place significant restrictions on the kinds of partisan political activities their
16 employees can engage in; others do not. The precise contours of gift restrictions vary
17 considerably, from how broadly the gift ban is defined to how many exceptions exist. While
18 most jurisdictions have anti-nepotism statutes, there is considerable variation regarding what
19 types of relatives are covered. These variations reflect the fact that ethics standards are generally
20 the result of legislative action, and legislatures often come up with different solutions to the same
21 problem.

22 This memorandum describes restrictions on the financial interests, associations and
23 activities of current and former government employees that fit under the rubric of “government
24 ethics.” It does not catalog every government ethics restriction adopted by all federal, state and
25 local jurisdictions. Instead, it uses as a template the standards that apply to the federal
26 government’s executive branch. The federal executive branch ethics standards may not be a
27 perfect model for other jurisdictions to emulate, but it is a mature system of government ethics
28 regulation, having been developed and implemented over several decades. It provides one
29 example of what a comprehensive system of ethics regulation looks like. Part II of this
30 memorandum describes in some detail the full range of ethics restrictions that apply to federal

1 executive branch employees, from conflicts of interest to restrictions on the types of work they
2 can perform after leaving the government.

3 In discussing government ethics, it is important to focus not just on substantive
4 restrictions but also on the mechanisms and structures that implement those restrictions. Ethics
5 laws are not self-executing, and a jurisdiction that has tough ethics standards but fails to
6 implement them leaves itself vulnerable to corruption and abuse. There are eight distinct
7 functions involved in implementing substantive ethics standards. The first four are aimed at
8 *preventing* ethics violations from occurring: training employees on the standards, giving them
9 advice in response to specific requests, requiring some employees to disclose their finances, and
10 then reviewing those disclosures for compliance with ethics standards. The final four respond to
11 ethics allegations: encouraging or requiring employees to report misconduct, investigating
12 allegations of misconduct, determining whether conduct was unethical, and sanctioning
13 misconduct where it occurs. While just about every government performs these eight functions,
14 they vary widely in where they place them. Some have created free-standing independent
15 commissions with responsibility for all of these functions. Others distribute responsibility for
16 these functions among different offices, some of which are politically independent while others
17 are not. The third part of this memorandum discusses these different designs for implementing
18 government ethics restrictions.

19 The fourth part memorandum then examines the degree to which other jurisdictions have
20 adopted variations of these restrictions. For example, with regard to financial interests, the
21 federal government imputes to the employee the financial interests of some – but not all family
22 members: the employee’s spouse and minor children. Other jurisdictions have taken a broader
23 approach, imputing the interests of domestic partners, adult children, siblings, parents, or
24 members of an employee’s household. While there is a consensus that governments should
25 regulate the financial interests of their employees, there is not a consensus about how broadly or
26 narrowly to define those interests.

27 This memorandum uses an inductive process to identify both the overarching principles
28 that explain most of the existing law and certain countervailing values that are in tension with
29 those principles. By looking in some depth at one example of a mature system of ethics
30 regulation and then comparing it with ethics standards adopted by other governments, one can

1 get a clearer sense of the principles that underlie government ethics restrictions. Part V notes
2 that the overarching principle that explains most substantive ethics standards is the simple but
3 powerful idea that public office is a public trust. This fiduciary principle goes a long way in
4 explaining government ethics standards, including restrictions on conflicts of interest and on the
5 use of government resources for private purposes. But to explain the full range of ethics
6 restrictions, one must acknowledge the other principles that are at play, such as the related but
7 distinct goal of increasing public confidence in government institutions.

8 Government ethics standards express not just these underlying principles but also certain
9 values or goals that stand in tension with those principles. For example, the fiduciary principle –
10 taken to the extreme – would require that government employees not have any conflicts of
11 interest. Yet government ethics standards accommodate certain conflicts of interest, recognizing
12 both the impossibility of finding an individual who has no interests that conflict with the
13 government² and the concern that ethics standards that are too strict would make government
14 service unduly unattractive.

15 Finally, it is important to acknowledge that governments are just one subset of a larger
16 category – organizations – and government ethics is a subset of organizational ethics.
17 Government ethics has much in common with organizational ethics more generally, but the
18 differences between public and private sector organizations are reflected in the differences
19 between public and private sector ethics norms.

20 **II. A template of government ethics standards: The federal executive branch**

21 As a starting point for discussion, this memorandum discusses the ethics restrictions that
22 apply to federal executive branch employees. It examines the standards *not* because they
23 necessarily are a model that other jurisdictions should follow, but simply because they represent
24 a mature system of ethics regulation, crafted over several decades, providing a coherent system

² See Beth Nolan, Public Interest, *Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U.L. REV. 57 (1992) (noting that “the government does not rely on the Platonic ideal in which public servants are denied all outside economic interests”).

1 of substantive rules and procedures.³ Congress has enacted a few statutes addressing a range of
2 ethics issues: including financial and representational conflicts of interest, gifts, and outside
3 activities.⁴ Many of these statutes provide for criminal penalties for violators. But on top of this
4 statutory framework is a complex set of regulations (more than a hundred pages long) that
5 implement those statutes across the executive branch, going into great detail and providing many
6 examples of how these restrictions should be applied in practice.⁵ In addition, dozens of federal
7 agencies have adopted their own supplementary ethics regulations, imposing additional
8 restrictions on their own employees.⁶

9 Most of these provisions impose restrictions on current government employees, but a few
10 impose post-employment restrictions (regulating the types of work these individuals can engage

³ An organization that provides consulting services to local governments, CityEthics, has developed an excellent Model Code of Ethics. See www.cityethics.org/content/full-text-model-ethics-code.

⁴ 18 U.S.C. § 201 (bribes and illegal gratuities); §§ 203, 205 (representational conflicts); § 207 (post-employment); § 208 (financial conflicts); § 209 (salary supplementation); 216 (penalties); 5 U.S.C. §§ 7321 et seq. (political activities); §§ 7351, 7353 (gifts); 5 U.S.C. Appx. §§ 501-505 (outside income). While some of these statutes apply to legislative branch employees, this paper focuses on how these restrictions apply to the executive branch.

In addition to these statutes, the Constitution itself contains at least one ethics provision, the Emoluments Clause. U.S. CONST. art. I, § 9, cl. 8 ("No person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present . . . of any kind whatever, from any King, Prince, or foreign State.").

⁵ 5 C.F.R. Part 2635 (standards of conduct), 2636 (limits on outside earned income, affiliations and employment for certain noncareer employees), 2637 (post-employment regulations for those who left the government before xxx), 2640 (financial conflicts of interest), 2641 (current post-employment restrictions); 5 C.F.R. Parts 733-34 (political activities).

⁶ See <http://www.oge.gov/Laws-and-Regulations/Agency-Supplemental-Regulations/Agency-Supplemental-Regulations/> (listing forty seven agencies that have adopted supplementary ethics regulations).

1 in after they leave the government).⁷ This part describes the contours of ethics restrictions on
2 current and former federal executive branch employees.

3 **A. Restrictions on current government employees**

4 Most of the federal government's ethics restrictions apply to all executive branch
5 employees, whether their responsibility is great or small, paid or unpaid, full-time or part-time,
6 temporary or permanent. Temporary or intermittent employees are subject to relaxed ethics
7 standards in a few narrow areas. Employees in particularly sensitive positions or in certain
8 agencies (such as high-level officials, political appointees, procurement officials and treaty
9 negotiators) are subject to stricter standards than most. In some federal agencies, most of the
10 individuals performing the government's work are contractor personnel rather than government
11 employees. In general, the only ethics standards that apply to these contractor personnel are the
12 prohibitions on actual corruption (i.e., bribes and illegal gratuities)⁸ rather than conflicts of
13 interest.

14 Federal ethics restrictions on executive branch employees can be divided into four
15 substantive categories: restrictions on financial influences, on representational conflicts of
16 interest, on outside activities, and on the use of government resources for non-government
17 purposes.

18 **1. Financial influences**

19 Ethics restrictions on financial influences include limits on outside payments to
20 government employees, on their financial interests – both their own personal interests and those
21 of family members, organizations with which the employee is affiliated, and prospective
22 employers.

23 **a. Payments from non-Government Sources**

24 **i. Bribes and Gifts**

25 Ethics restrictions on financial influences are aimed at prohibiting or preventing

⁷ E.g., 18 U.S.C. § 207.

⁸ See KATHLEEN CLARK, ETHICS FOR AN OUTSOURCED GOVERNMENT (Administrative Conference of the United States 2011).

1 corruption. Perhaps the quintessential core of corruption is a bribe: offering a government
 2 official something of value with the intent “to influence” an official act.⁹ Congress has
 3 prohibited bribes,¹⁰ and has also prohibited a wider range of conduct that may not be at the very
 4 core of corruption, but nonetheless involves government employees’ using public office for
 5 private gain. These other prohibited activities might be thought of concentric circles that are
 6 closer to or further away from bribery, depending on how inherently corrupt the activity is
 7 considered to be.

8 Activities that are closer to the corrupt core of bribery are generally subject to *criminal*
 9 prohibitions. For example, there are criminal prohibitions on gratuities given “for or because of
 10 any official act performed or to be performed by such official.”¹¹ The main distinction between
 11 a bribe and an illegal gratuity is intent: Bribery requires “a *quid pro quo*—a specific intent to
 12 give or receive something of value *in exchange* for an official act. An illegal gratuity, on the
 13 other hand, may constitute merely a reward for some future act that the public official will take
 14 or for a past act that he has already taken.¹² Not surprisingly, the maximum sanction for an
 15 illegal gratuity is less than that for bribery: two years rather than 15 years imprisonment.¹³

⁹ The federal statute prohibiting bribes and illegal gratuities applies not just to government employees but also to anyone “acting for or on behalf of the United States.” 18 U.S.C. § 201(a)(1) (definition of “public official”). This has been construed to reach individuals who have “some degree of official responsibility for carrying out a federal program or policy,” such as persons running a social service program funded by a federal grant or performing the same duties as a federal corrections officer, but under a private contract. KATHLEEN F. BRICKEY, 2 CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS § 9-30, 296 n.203 (1996). (quoting Dixson v. United States, 465 U.S. 482, 499 (1984)); United States. v. Thomas, 240 F.3d 445 (5th Cir. 2001) (applying bribery statute to guard employed by private company under contract to the INS). It also applies to those who have been selected or nominated for office, 18 U.S.C. §§ 201(a)(2), and, in the case of illegal gratuities, to former officials. § 201(c)(1).

¹⁰ 18 U.S.C. § 201(b).

¹¹ 18 U.S.C. § 201(c). *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 414 (1999).

¹² United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999).

¹³ 18 U.S.C. § 201(b)–(c).

1 In addition to these *criminal* prohibitions on certain gratuities, there are also *non-criminal*
 2 restrictions on a wider range of gifts. An executive branch employee may not solicit or accept
 3 gifts from anyone who could be affected by her work,¹⁴ from anyone regulated by or conducting
 4 business with her agency,¹⁵ or from an organization a majority of whose members fit into the
 5 above categories;¹⁶ from foreign governments;¹⁷ or from subordinates or other government
 6 employees of lower salary.¹⁸ “Gift” is defined broadly to include tangible items as well as
 7 services, favors, discounts, travel, and anything else having monetary value. It does not matter
 8 whether the gifts are provided in kind, through the purchase of a ticket, payment in advance, or
 9 reimbursement after the expense has been incurred.¹⁹ Gifts that are given to an employee’s
 10 family member because of the member’s relationship to the employee are considered “indirect”
 11 gifts to the employee if the employee knows about and acquiesces in the gifts. Such “indirect”
 12 gifts are subject to the same restrictions as gifts given to the employee directly.²⁰ The same is
 13 also true for gifts given to anyone else (including a charitable organization) on the
 14 recommendation of the employee.²¹

15 The implementing regulations exempt certain gifts from these broad prohibitions. First,
 16 although the statute prohibits an employee from accepting “anything of value” from these

¹⁴ 5 U.S.C. § 7353(a)(2).

¹⁵ 5 U.S.C. § 7353(a)(1).

¹⁶ 5 C.F.R. § 2635.203(d)(5). This regulatory gloss on the statutory “prohibited source” definition means that an FCC employee, who may not accept a gift from a television station that is regulated by the FCC, also may not accept a gift from the National Association of Broadcasters if the majority of members of that organization are regulated by the FCC.

¹⁷ 5 U.S.C. § 7342.

¹⁸ 5 U.S.C. § 7351(a) (prohibiting employees from giving gifts to superiors and accepting gifts from employees receiving less pay).

¹⁹ 5 C.F.R. § 2635.203(b).

²⁰ *Id.* § 2635.203(f)(1) (defining indirect gifts as including those to employee’s parent, sibling, spouse, child, or dependent relative); *id.* § 2635.202(a) (prohibiting direct and indirect gifts).

²¹ *Id.* § 2635.203(f)(2).

1 sources,²² the regulations permit employees to accept a gift valued at up to \$20, as long as the
2 gifts from one person in a calendar year do not exceed \$50.²³ Employees are also permitted to
3 accept inexpensive items of food,²⁴ as well as greeting cards and plaques, certificates, and
4 trophies intended solely for presentation.²⁵ The regulations permit employees to accept
5 otherwise prohibited gifts from family and friends,²⁶ as well as benefits that are generally
6 available to government employees or to the public at large.²⁷ The President and Vice President
7 are exempted from all these restrictions on the acceptance (though not the solicitation) of gifts.²⁸
8 In addition, the regulations set out specific circumstances under which employees may accept
9 free attendance at events.²⁹

10 The general gift statute does not provide for criminal penalties, and ordinarily a violation
11 of it will result in, at most, employment discipline. But on at least one occasion, the government
12 has used the financial conflict of interest statute to prosecute an employee who accepted a stream
13 of prohibited gifts from a prohibited source.³⁰

²² 5 U.S.C. § 7353(a).

²³ 5 C.F.R. § 2635.204(a).

²⁴ *Id.* § 2635.203(b)(1).

²⁵ *Id.* § 2635.203(b)(2).

²⁶ *Id.* § 2635.204(b) (allowing employees to accept a gift when “circumstances make it clear that the gift is motivated by a family relationship or personal friendship”).

²⁷ *Id.* § 2635.203(b)(4).

²⁸ *Id.* § 2635.204(j).

²⁹ *Id.* § 2635.204(g).

³⁰ Among the 21 individuals that the government prosecuted in connection with the Jack Abramoff scandal was a Justice Department official, Robert Coughlin, who pleaded guilty to violating the financial conflict of interest statutes, 18 U.S.C. § 208.

Coughlin had a financial interest in the particular matters about which Lobbyist A . . . contacted him because Lobbyist A was providing him with a stream of things of value for and because of Coughlin's official actions in connection with the successful lobbying efforts. . . . The things of value that Lobbyist A provided to Coughlin included meals and

1 Government employees also are prohibited from accepting gifts from foreign
 2 governments, even if no relationship between the foreign government and the employee's or her
 3 agency's responsibilities exists.³¹ The foreign gift ban is illustrative of ethics regulations'
 4 tendency to treat foreign entities more restrictively than their domestic counterparts.³²

drinks on about 25 occasions at Washington, D.C., restaurants and bars . . . ; about 20 tickets to seven sporting events; about five tickets to about three concerts . . . and one round of golf. . . . Coughlin estimates that the value was approximately \$4,800.

United States v. Coughlin, Statement of the Offence (2008) http://media.washingtonpost.com/wp-srv/politics/documents/StatementtotheOffense_042208.pdf; see also Office of Government Ethics, 2009 Conflict of Interest Prosecution Survey (2010); Associated Press, *An overview of convictions related to the corruption probe of lobbyist Jack Abramoff*, WASH. POST, Oct. 26, 2011 (listing the 21 prosecutions).

³¹ U.S. CONST. art. I, § 9, cl. 8 ("No person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present . . . of any kind whatever, from any King, Prince, or foreign State."). Congress has provided limited exceptions to this constitutional ban on foreign gifts. 5 U.S.C. § 7342. Employees who accept foreign gifts not covered by this statute may face civil penalties of \$5,000 on top of the retail value of the gift. *Id.* § 7353(h).

³² Examples of ethics rules being more restrictive toward foreigners include: Exec. Order No. 12,834, 3 C.F.R. 580, 580 (1994) (§ 1(a)) (prohibiting senior presidential appointees from ever lobbying for or giving lobbying advice to foreign governments and foreign political parties after leaving government), *reprinted in* 5 U.S.C. § 7301; *id.* at 581 (§ 1(b)) (prohibiting former employees who have personally and substantially participated in a trade negotiation from lobbying on behalf of foreign -- but not domestic -- business entities); Senate Rule XXXV (restricting the receipt of gifts from foreign agents); House Gift Rule LII, (same); H.R. 459, 104th Cong., 1st Sess. (1995) (proposing to prohibit former members of Congress from representing foreign governments before the United States). For a discussion of other restrictions on foreign entities, see Melvin Rishe, *Foreign Ownership, Control or Influence: The Implications for United States Companies Performing Defense Contracts*, 20 PUB. CONT. L.J. 143 (1991). For an argument in favor of different treatment of foreigners, see Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder -- A Statutory Analysis and Proposals for Reform of the Foreign Agents Registration Act and the Ethics in Government Act*, 78 KY. L.J. 237 (1989-90).

1 Some federal gift restrictions take aim at specific classes of employees. One prohibits
 2 government employees who are involved in the procurement process from receiving anything of
 3 value from a competing contractor.³³ Another statute prohibits meat inspectors from receiving
 4 anything of value from anyone engaged in commerce.³⁴ On its face, this statute purports to
 5 prohibit the affected employees from accepting from meat processors even trivial gratuities, such
 6 as cups of coffee, and also purports to prohibit these employees from receiving birthday gifts
 7 from their families. The courts, however, have construed the statute to apply only where the gift
 8 has more than nominal value and where there is some nexus between the gift and the employee's
 9 official duties.³⁵ President Obama prohibited his top appointees from accepting any gifts from
 10 lobbyists,³⁶ and the government is in the process of expanding that lobbyist gift ban from
 11 presidential appointees to all executive branch employees.³⁷

³³ 41 U.S.C. § 423(b)(2). Violation of this statute can result in civil fines of up to \$100,000. *Id.* § 423(h). This gift restriction applies to "procurement officials," defined as anyone who participates personally and substantially in drafting, reviewing, or approving a specification developed for a procurement; preparing or issuing a solicitation; evaluating bids or selecting sources; reviewing or approving an award, modification, or extension of a contract; and negotiating any aspect of the procurement. 41 U.S.C. § 423(p)(3)(A). This statute seems to prohibit that which the general gift statute already forbids. *See* 5 U.S.C. § 7353.

³⁴ 21 U.S.C. § 622 makes it a crime for "any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this subchapter" to "receive or accept from any person, firm, or corporation engaged in commerce any gift, money, or other thing of value, given with any purpose or intent whatsoever." The fact that this is a criminal prohibition suggests that the risk created by meat inspectors' acceptance of gifts from interested parties is greater than that created when other employees' do so.

³⁵ *United States v. Mullens*, 583 F.2d 134, 140-41 (5th Cir. 1978); *United States v. Seuss*, 474 F.2d 385, 388-90 (1st Cir.).

³⁶ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 1 of the Ethics Pledge)..

³⁷ U.S. Office of Government Ethics, Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts From Registered Lobbyists and Lobbying Organizations, 76 Fed. Reg. 56330 (Sept. 13, 2011).

1 **ii. Compensation**

2 In addition to the prohibition on bribes and the restrictions on gifts, the government has
 3 enacted both criminal and non-criminal restrictions on employees' receiving compensation from
 4 non-governmental parties. An employee may not receive compensation for teaching or speaking
 5 that relates primarily to her government responsibilities,³⁸ and highly paid political appointees
 6 are limited in amount of outside earned income they can receive.³⁹ Some agencies prohibit their
 7 employees from being employed by any company regulated by that agency.⁴⁰ This type of
 8 prohibition is similar in scope to the general gift ban⁴¹ in that it applies to all employees at an
 9 agency and it prohibits employment by all entities regulated by the agency, regardless of whether
 10 the employee herself is actually in a position where she could affect the agency's actions toward
 11 the outside entity.

12 One of the more unusual ethics restrictions is the salary supplementation statute, which

³⁸ 5 C.F.R. 2635.807. An earlier ban on honoraria for almost all government employees was struck down as an unconstitutional burden on the First Amendment rights of executive branch employees at or below the GS-15 level, *United States v. Nat'l Treasury Employees' Union*, 513 U.S. 454 (1995). Although the Court's decision left open the possibility of continuing to enforce the honoraria ban against executive branch employees above the GS-15 level, the Justice Department's Office of Legal Counsel (OLC) concluded that the statute did not survive as against any executive branch employees. *See Memorandum from Walter Dellinger, Assistant Attorney General, to the Attorney General, Re: Legality of Government Honoraria Ban Following U.S. v. National Treasury Employees' Union, available at* <http://www.usdoj.gov/olc/nteu.alt.htm> (Feb. 26, 1996) (noting that most of the people affected by the original honoraria ban were now excluded from its application, and questioning whether Congress would have enacted an honoraria ban that was so significantly smaller in scope).

³⁹ These employees are limited to \$26,955 in outside earned income. *See* 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b), 2636.304 (limiting outside earned income of covered noncareer employees to 15% of the basic rate of pay for level II of the Executive Schedule), 2636.303(a) (defining "covered noncareer employee"); Exec. Ord. No. 13525, 74 Fed. Reg. 69231 (Dec. 23, 2009) setting the pay for Level II at \$179,700).

⁴⁰ *See, e.g.*, 47 U.S.C. § 154(b)(2)(A)(iv) (FCC employees).

⁴¹ 5 U.S.C. § 7353.

1 prohibits an employee from receiving compensation from a nongovernmental source for her
2 governmental work.⁴² This ban was originally enacted in 1917 in reaction to the practice of
3 certain philanthropic foundations of paying the salaries of government employees who were
4 involved in education policy. Congress was concerned that these foundations were exercising
5 undue influence on government policies, and wanted to limit their ability to place (and
6 presumably direct) employees in the government.⁴³ The salary supplementation law is similar to
7 the illegal gratuity provision in that, while both are criminal statutes, neither requires corrupt
8 intent. The primary difference between these two provisions is the payor's purpose in making the
9 payment. The illegal gratuity provision requires that the payment be made "for or because of" an
10 official act by the employee.⁴⁴ The Supreme Court has made clear that this requires proof of a
11 link between the thing of value conferred and a specific "official act." Salary supplementation,
12 by contrast, requires only that the payment be intended to compensate the employee for her
13 services to the federal government.⁴⁵ The government has used the salary supplementation
14 statute in civil and criminal enforcement actions regarding rewards for federal employees.⁴⁶

15 **b. Employees' Financial Interests**

16 A criminal statute prohibits an employee from participating in a particular matter that
17 would affect her own financial interest or the financial interest of someone whose interests are
18 imputed to her. This latter category -- individuals and entities whose interests are imputed to the
19 employee – consists of:

⁴² 18 U.S.C. § 209. Violation can result in five years imprisonment and civil fines of up to \$50,000. *Id.* § 216. For a thorough and insightful discussion of salary supplementation ban, see Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

⁴³ Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 68–69 (1992).

⁴⁴ Nolan, *supra*, at 91–96.

⁴⁵ A criminal conviction for a willful violation of the salary supplementation statute can result in imprisonment for up to five years. 18 U.S.C. § 216(a)(2), (b).

⁴⁶ US v. POGO.

- 1 • the employee’s spouse,
- 2 • the employee’s minor children,
- 3 • any organization in which the employee “is serving as officer, director, trustee,
- 4 general partner or employee,”⁴⁷ and
- 5 • anyone with whom the employee “is negotiating or has any arrangement concerning
- 6 prospective employment.”

7 Through this financial conflict of interest statute, the federal government demands unfettered
8 loyalty of its employees. This strict and criminally enforceable demand for loyalty is limited to
9 financial interests rather than ideological or political interests.⁴⁸ Ethics standards focus on
10 financial interests – those of the employee and those of individuals and organization with whom
11 the employee is associated.⁴⁹ They do not demand ideological loyalty.⁵⁰

12 Several features of this financial conflict standard should be noted: First, it addresses only
13 a relatively narrow slice of familial interests: those of a spouse and minor children. It does not
14 prohibit an employee from acting in a matter that would affect the financial interests of an
15 employee’s domestic partner, a romantic partner, adult children, siblings, parents or other

⁴⁷ *Id.*

⁴⁸ The government focuses on financial loyalty rather than ideological loyalty. It prohibits employees participating in particular matters that could affect the *financial* interests of organizations in which the employee is an officer or “active participant,” but not the ideological or political interests of such an organization. 5 C.F.R. 2635.502(b)(1) (emphasis added).

⁴⁹ By regulation, the government imputes to an employee the financial interests of an organization in which she is an “active participant,” (e.g., “participating in directing the activities of the organization”) even if she is not formally an employee or director. 5 C.F.R. 2635.502(b)(1)(v). But it does not impute to her the financial interests of an organization of which she is a member or to which she donates money. *Id.*

⁵⁰ See, e.g., 5 C.F.R. 2635.502(b)(1)(v) (“Nothing in this section shall be construed to suggest that an employee should not participate in a matter “because of her political, religious or moral views.”)

1 relatives.⁵¹ While this criminal conflict of interest statute defines conflicts narrowly, some
 2 agencies within the federal government have taken a broader view, requiring recusal even where
 3 this statute would not. For example, the Interior Department’s Bureau of Ocean Energy
 4 Management, Regulation and Enforcement⁵² requires employees to recuse themselves from any
 5 duty that relates to operators or contractors that employ a family member or a personal friend.⁵³
 6 As discussed later in this memorandum, other jurisdictions have also taken a broader view of
 7 familial ties that would create a conflict of interest.

8 Second, while this federal statute does not impute to the employee the financial interests
 9 of most relatives (other than a spouse and minor children), it does impute to her the financial
 10 interests of any organization with whom the employee associates as officer director, trustee,
 11 partner or employee. This is perhaps the best example of Congress taking to heart the ancient
 12 insight that a person cannot serve two masters. The government does not want its employees to
 13 participate in matters where the employee’s judgment may be fettered by her own financial
 14 interests, those of a close relative, or those of an organization with whom she is associated.

15 Third, this statute requires employees to recuse themselves, but does not directly restrict
 16 employees’ financial interests.⁵⁴ Employees remain free to invest as they see fit, but their
 17 actions as government employees are restricted based on their investment choices. Other federal
 18 statutes and regulations take a different approach, prohibiting employees in particular agencies

⁵¹ While the criminal conflict of interest statute would not prohibit the employee from participating in such a matter, a regulatory provision that prohibits employees from acting when their impartiality could reasonably be questioned could reach such a situation, depending on the circumstances.

⁵² This agency was formerly known as the Minerals Management Service.

⁵³ Memorandum from Michael R. Bromwich to All BOEMRE District Employees, Policy Regarding Interference with the Performance of Official Duties and Potential Conflicts of Interest (on file with author). This memorandum defines “family member” as a member of employee’s household or a relative with whom the employee maintains a personal connection and regular social contact, and defines “personal friend” as someone “who maintains a significant personal connection to” and maintains regular social contact with the employee or a members of the employee’s family.

⁵⁴ Compare 6 D.C.MUN.REG. 1803 (prohibiting employees from acquiring a financial interest that would create a conflict of interest).

1 from holding particular types of financial interests. For example, Federal Communications
2 Commission (FCC) employees may not have a financial interest in any company engaged in the
3 business of radio or wire communication,⁵⁵ and hundreds of Department of Energy officials may
4 not have any financial interest in companies involved in the electric power, nuclear technology,
5 coal, natural gas, or oil industries.⁵⁶ These restrictions prophylactically require divestment of
6 investments that are likely to create a conflict of interest.

7 In addition to the somewhat narrow criminal conflict of interest statute, the government
8 has also adopted a regulation that presumptively requires recusal in a broader set of
9 circumstances: when “the circumstances would cause a reasonable person with knowledge of the
10 relevant facts to question [the employee’s] impartiality” and:

11 • a party in the matter is -- or is represented by -- someone closely associated with the
12 employee,⁵⁷ or

⁵⁵ 47 U.S.C. § 154(b)(2)(A)(ii).

⁵⁶ 42 U.S.C. § 7211 (1988). Violation can result in civil penalties of up to \$10,000. *Id.* § 7218(b). U.S. DEP’T. OF ENERGY, REPORT TO THE CONGRESS AS REQUIRED BY SECTION 3161 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1994, at 2 (1994), (“At this time, 846 Department of Energy employees are prohibited . . . from holding any interest in an ‘energy concern.’”).

⁵⁷ The following categories of individuals are closely associated:

- a member of the employee’s household,
- a relative with whom the employee has a close personal relationship,
- an organization in which the employee is an active participant (such as an serving as an official of the organization),
- a person with whom the employee has or seeks to have a business, contractual or financial relationship other than routine consumer transactions,
- someone for whom the employee has served within the last year in the capacity as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee, and
- a person for whom a close relative of the employee is serving or seeking to serve as one of the above capacities.

5 C.F.R. 2635.502(b).

1 • the matter is likely to have a direct and predictable effect on the financial interest of a
2 member of the employee's household.⁵⁸

3 **2. Representational Conflicts**

4 In addition to the above restrictions on *financial* conflicts of interest, Congress has
5 enacted a ban on certain *representational* conflicts of interest. Federal employees may not
6 represent non-federal parties in their claims against the government.⁵⁹ In addition, an executive
7 branch employee may not serve as an expert witness for an outside party in a case involving the
8 government.⁶⁰

9 **3. Affiliations / Outside Activities**

10 **a. While in government service**

11 One of the most significant limitations on outside activities is the Hatch Act's restrictions
12 on partisan political activities.⁶¹ Most executive branch employees are prohibited from soliciting
13 or accepting contributions for partisan political campaigns⁶² and from running for a partisan
14 political office.⁶³ Employees in law enforcement and intelligence agencies are subject to more
15 stringent restrictions, and are prohibited from taking an active part in political campaigns.⁶⁴ The

⁵⁸ 5 C.F.R. 2635.502(a).

⁵⁹ 18 U.S.C. § 205. They are also prohibited from having a financial stake in such claims. 18 U.S.C. § 203.

⁶⁰ 5 C.F.R. 2635.805.

⁶¹ 5 U.S.C. §§ 7321-26. See also 5 C.F.R. Parts 733-34 (regulations implementing the Hatch Act). The Hatch Act also prohibits the use of government office for partisan political purposes. See Section xx.yy.

⁶² 5 U.S.C. § 7323(a)(2).

⁶³ 5 U.S.C. § 7323 (a)(3). In certain suburbs of Washington, DC and in a few other communities around the country where a large percentage of residents are federal employees (and thus subject to Hatch Act restrictions), Congress has permitted slightly looser restrictions, allowing employees to run as independent candidates in partisan political elections. See 5 U.S.C. § 7325; 5 CFR Part 733.

⁶⁴ 5 U.S.C. § 7323(b)(2). Interestingly, this stricter standard does not apply to the highest level officials in those agencies: Senate-confirmed Presidential appointees. *Id.*

1 federal government has imposed similar restrictions on employees of state governments who are
2 doing federally-funded work.⁶⁵

3 In addition, there are regulatory restrictions on being awarded a government contract⁶⁶
4 and high-level employees are prohibited from engaging in any profession that involves a
5 fiduciary relationship.⁶⁷ In addition, some officials are prohibited from engaging in any paid or
6 unpaid work outside their government job. Members of the Federal Communications
7 Commission, for example, may not engage in "any other business, vocation, profession, or
8 employment while serving as . . . members."⁶⁸ A similar prohibition applies to all full-time
9 presidential appointees.⁶⁹

10 The Obama Administration has recently added a new restriction on anyone who serves as
11 a member of a boards and commissions.⁷⁰ These are individuals whose primary affiliation (and
12 employment) is outside of government, but who provide advice to the government on a
13 temporary or intermittent basis. The Obama administration has prohibited anyone who is a

⁶⁵ 5 U.S.C. §§ 1501-08; 5 C.F.R. § 151.

⁶⁶ 48 C.F.R. § 3.601.

⁶⁷ 5 U.S.C. app. III § 502(a)(3).

⁶⁸ 47 U.S.C. § 154(b)(4); *see also* 42 U.S.C. § 5841(e) (1988) (applying a similar prohibition to members of the Nuclear Regulatory Commission); *id.* § 7171(b) (Federal Energy Regulatory Commission).

⁶⁹ Exec. Order No. 12,731, 3 C.F.R. 306 (1991), *reprinted in* 5 U.S.C. § 7301.

⁷⁰ This restriction applies to any board, commission, task force or similar group created by the executive branch or Congress to serve a specific function, regardless of whether it is subject to the Federal Advisory Committee Act (FACA). It applies not only to those members who are actually employees -- Special Government Employees (SGEs) – but also to non-employees who serve in a representative capacity on Federal Advisory Committees and are not otherwise subject to government ethics standards. Office of Management and Budget, Final Guidance on Appointment of Lobbyists to Federal Boards and Commission, Oct. 5, 2011.

1 federally registered lobbyist from serving on such a board or committee.⁷¹ Where some
2 members of such committees are appointed by an outside entity rather than the federal
3 government, agencies are directed to encourage that outside entity not to appoint a federally
4 registered lobbyist.⁷² Individuals who register as federal lobbyists are now signing up for a
5 blacklist, preventing them from participating on government task forces even in a private
6 capacity.

7 **b. Prior to government service**

8 In addition to prohibiting *current* federally registered lobbyists from serving on boards
9 and commissions, the Obama administration has also placed restrictions on *former* federally
10 registered lobbyists. It has imposed a two-year cooling off period before a registered lobbyist
11 can be appointed to a post in an agency that she lobbied or before can participate in any
12 particular matter or on any issue area on which she lobbied.⁷³ In addition, it imposes a two-year
13 ban on all appointees (even those who were not lobbyists) participating in a particular matter
14 involving specific parties that is directly and substantially related to the appointee's former
15 employer or client.⁷⁴

16 These new bans on former lobbyists are in addition to the few long-standing but narrow
17 restrictions that are based on an individual's employment *prior* to joining the government. A
18 newly appointed government employee must recuse herself for one year from participating in
19 any matter involving her former employer if her impartiality could reasonably be questioned,⁷⁵
20 and for two years if that employer gave her a payment greater than \$10,000 that may be related

⁷¹ The OMB Guidance specifically prohibits appointment and re-appointment, and directs agencies to require that members annual certify that they are not registered lobbyists, and to request the resignation of any member who subsequently becomes a registered lobbyist.

⁷² Id.

⁷³ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 3 of the Ethics Pledge).

⁷⁴ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 2 of the Ethics Pledge). The executive order specifies that a “particular matter” can be a regulation or a contract.

⁷⁵ 5 C.F.R. § 2635.502.

1 to her government position.⁷⁶ Some agencies have adopted broader recusal requirements based
2 on an employee's pre-government employment. For example, during their first year of
3 employment at the FDIC, new employees may not participate in any matter in which their
4 immediate prior employer is a party or represents a party.⁷⁷

5 **4. Use of government office for non-government purpose**

6 The government prohibits employees from using their position for private purposes.⁷⁸
7 Examples include the statutory prohibitions on using one's government position to hire
8 relatives,⁷⁹ and regulatory prohibitions on using public office for private gain;⁸⁰ using non-public
9 government information for personal gain;⁸¹ using government time or property for private
10 purposes, such as using government letterhead for letters of recommendation that are unrelated to
11 the government work;⁸² and the disclosure of sensitive procurement-related information.⁸³ Other
12 regulations prevent employees' from using their government position to further even beneficent
13 outside interests, such as raising money for charitable organizations.⁸⁴

⁷⁶ 5 C.F.R. § 2635.503 (requiring recusal where the payment was “not pursuant to the former employer's established compensation program” and was made “after the former employer knew that the individual was being considered for a Government position”).

⁷⁷ 5 C.F.R. 3201.105(a).

⁷⁸ The government does permit incidental use of government equipment for personal purposes where the incidental costs are nominal, such as the use of an office telephone to make a personal call.

⁷⁹ 5 U.S.C. § 3110.

⁸⁰ 5 C.F.R. 2635.702.

⁸¹ 5 C.F.R. 2635.703.

⁸² 5 C.F.R. 2635.702(b).

⁸³ 41 U.S.C. § 423(a). This ban applies not just to government employees but to anyone “who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement.” *Id.* at § 423(a)(2)(A).

⁸⁴ 5 C.F.R. 2635.808.

1 There are also specific prohibitions on one particular kind of private benefit: partisan
2 political benefit. The Hatch Act prohibits employees from using official authority or influence to
3 interfere with or affect an election,⁸⁵ and from soliciting or discouraging political activity by
4 anyone with business before or under investigation by her office.⁸⁶ They also may not engage in
5 partisan political activity while on duty, while wearing a government uniform or insignia, or
6 while in a government building or vehicle.⁸⁷

7 **B. Restrictions on former government employees**

8 The federal government imposes two narrow post-employment bans on all its former
9 employees. A former executive branch employee is permanently barred from communicating
10 with current government officials on behalf of someone else regarding particular matters if she
11 worked on that matter while in government,⁸⁸ and such communications are barred for two years
12 if the matter was under her responsibility during her last year in government.⁸⁹ The ban applies
13 only if the employee “participated personally and substantially” in a “particular matter involving
14 specific parties” while in government. What makes this ban particularly narrow is the scope of
15 the prohibition: it prohibits only communications and appearances on behalf of a non-federal
16 party. Its focus on communications and appearances means that a former employee may provide
17 behind-the-scenes advice to non-governmental parties about the very matters that the employee
18 worked on while in government.⁹⁰

⁸⁵ 5 U.S.C. 7323(a)(1).

⁸⁶ 5 U.S.C. 7323(a)(4).

⁸⁷ 5 U.S.C. § 7324(a).

⁸⁸ 18 U.S.C. § 207(a)(1).

⁸⁹ 18 U.S.C. § 207(a)(2). *See also* 5 C.F.R. 2641.201. In addition, the EPA prohibits the award of non-competitive contracts to former EPA employees in their first year after leaving the agency, or to firms that are controlled by them or that employ them. 48 C.F.R. 1503.601. The Nuclear Regulatory Commission (NRC) has a similar regulation, but applies for its former employees in the first two years after they leave the commission. 48 C.F.R. 2009.100(a).

⁹⁰ Former government officials who are lawyers are subject to bar rules that prohibit this conduct. ABA Model Rule 1.11(a). See discussion *infra*.

1 Bar rules impose a similar ban, except that the bar ban naturally applies only to a narrow
2 set of former government employees: lawyers.⁹¹ Nonetheless, the bar rule prohibits a broader set
3 of activities: any representation of a private party (rather than simply appearances and
4 communications with intent to influence.) What explains this difference between the statutory
5 standard for former government employees and the bar standard for former government lawyers?
6 Congress narrowed an earlier broader post-employment restriction out of fear that it would
7 impose inappropriate burdens on scientists.⁹²

8 In addition to the general post-employment ban, there are also several specialized and
9 narrowly drawn post-employment restrictions on certain classes of former government
10 employees. These statutes prohibit types of activities:

11 • communicating with current government officials in an attempt to influence them on
12 behalf of others;⁹³

13 • representing others who seek to influence current government officials;⁹⁴ and

⁹¹ ABA Model Rule 1.11(a).

⁹² See *infra* note 210.

⁹³ A criminal conflict of interest statute imposes two temporary bans on communications:

- a 1-year ban on former high-level officials contacting officials in the agency where they worked in the year prior to leaving government service; 18 U.S.C. § 207(c). President Obama issued an executive order on his first full day in office requiring Presidential appointees to pledge that they would abide by this ban for two years (rather than the statutorily-required one year); Exec. Ord. No. 13490, (Jan. 21, 2009); and
- a 2-year ban on former very high-level officials contacting officials in the agency where they worked in the year prior to leaving government service or other high level officials. 18 U.S.C. § 207(d).

⁹⁴ That criminal statute also prohibits three different types of representation:

- a 1-year ban on former trade or treaty negotiators representing or giving advice concerning such negotiations that occurred during their last year in government; 18 U.S.C. § 207(b);
- a 1-year ban on former high-level officials representing foreign governments and political parties; 18 U.S.C. § 207(f); and

- receiving compensation from particular parties with whom the employee had dealings while in government.⁹⁵

These specialized post-employment restrictions are generally limited to high-level or highly paid employees. Presidents have sometimes imposed additional post-employment restrictions on their high-level appointees. President Obama required all of his appointees to pledge that they would not lobby any senior executive branch officials after they leave the government until the end of his administration.⁹⁶ President Clinton also imposed a lobbying ban on his senior political appointees,⁹⁷ but rescinded it at the end of his administration.⁹⁸

C. Patterns of Variation within the Executive Branch

1. Stricter Standards for Employees in Sensitive Positions

In addition to the statutes and regulations that apply to all executive branch employees, many agencies have adopted additional standards for their own employees and the government has imposed additional ethics restrictions on those who are thought to have particularly sensitive

- a permanent ban on the US Trade Representative and Deputy Trade Representative representing foreign governments and political parties. 18 U.S.C. § 207(f)(2).

⁹⁵ Two non-criminal statutes restrict certain former employees from accepting compensation from particular parties, including:

- a 1-year ban on former procurement officials' accepting compensation from contractors with whom they did business; 41 U.S.C. § 423(d); and
- a 1-year ban on former bank examiners' accepting compensation from banks they examined. 12 U.S.C. §§ 1820(k), 1786(w).

See Table: Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor Personnel for a list of the post-employment restrictions.

⁹⁶ Ex. Ord. No. 13490 (Jan. 21, 2009). President Clinton imposed on his senior political appointees a similar lobbying ban, Ex. Ord. 12834 (Jan. 20, 1993), but rescinded it at the end of his administration. Jason Peckenpaugh, *Clinton Lifts Lobbying Restrictions on Appointees*, GOVT. EXEC. (Jan. 2, 2001).

⁹⁷ Ex. Ord. 12834 (Jan. 20, 1993).

⁹⁸ Jason Peckenpaugh, *Clinton Lifts Lobbying Restrictions on Appointees*, GOVT. EXEC. (Jan. 2, 2001).

1 positions, such as high-level officials, political appointees, and those involved in treaty
2 negotiation, bank examinations and procurement.⁹⁹

3 Presidential appointees may not receive any outside earned income;¹⁰⁰ may not accept any
4 gifts from lobbyists;¹⁰¹ and may not participate in particular matters. Non-career employees are
5 subject to increased restrictions on their compensation for expressive activities,¹⁰² and highly
6 paid non-career employees are limited in the outside earned income they can receive.¹⁰³

7 President Obama issued an executive order imposing new restrictions on political
8 appointees based on their employment prior to joining the government. The executive order
9 imposes a two-year cooling off period before a registered lobbyist can be appointed to a post in
10 an agency that she lobbied or can participate in any particular matter or on any issue area on

⁹⁹ In addition to the ethics statutes and regulations that apply across the entire executive branch, many government agencies have additional restrictions that apply only to employees within this agency. *See* 5 C.F.R. Chapters 21-82. Congress has also enacted some agency-specific restrictions. *See, e.g.*, 47 U.S.C. § 154(b)(2)(A)(ii) (prohibiting all F.C.C. employees from having a financial interest in any company engaged in “the business of communication by wire or radio or in the use of the electromagnetic spectrum”).

¹⁰⁰ 5 C.F.R. 2635.804(a).

¹⁰¹ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 1 of the Ethics Pledge).

¹⁰² Noncareer employees are subject to a relatively broad prohibition on receiving compensation for expressive activity, such as teaching, speaking or writing. They may not receive compensation if the expression concerns subject matter, industry or economic sector affected by her agency. 5 C.F.R. 2635.807(a)(2)(i)(E)(3). By contrast, regular employees are subject to a narrower prohibition for such compensation: only if it concerns her agency’s policies or a matter the employee has worked on during the previous year. C.F.R. 2635.807(a)(2)(i)(E)(1), (2).

¹⁰³ These employees are limited to \$26,955 in outside earned income. *See* 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b), 2636.304 (limiting outside earned income of covered noncareer employees to 15% of the basic rate of pay for level II of the Executive Schedule), 2636.303(a) (defining “covered noncareer employee”); Exec. Ord. No. 13525, 74 Fed. Reg. 69231 (Dec. 23, 2009) setting the pay for Level II at \$179,700).

1 which she lobbied.¹⁰⁴ In addition, it imposes a two-year ban on all appointees (even those who
2 were not lobbyists) participating in a particular matter involving specific parties that is directly
3 and substantially related to the appointee's former employer or client.¹⁰⁵

4 **2. Slightly Looser Standards for Temporary Employees**

5 Nearly fifty years ago, when Congress re-wrote the then-existing ethics statutes, it
6 recognized that imposing uniform ethics standards on all government employees could make it
7 difficult for the government to hire experts for temporary assignments.¹⁰⁶ So the omnibus ethics
8 legislation enacted in 1962 created a new category of federal employee -- “Special Government
9 Employee” (SGE) -- for those who would work for the government on a temporary or
10 intermittent basis: 130 or fewer days in a 12-month period.¹⁰⁷

11 As of 2009, the government had 17,600 SGEs.¹⁰⁸ While Congress created the SGE
12 category so that the government could access individuals with special expertise, at least one
13 government agency uses volunteer SGEs as free labor to leverage its limited resources. The

¹⁰⁴ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 3 of the Ethics Pledge).

¹⁰⁵ Exec. Ord. No. 13490, 74 Fed. Reg. 4673, (Jan. 21, 2009) (§ 2 of the Ethics Pledge). The executive order specifies that a “particular matter” can be a regulation or a contract.

¹⁰⁶ Daniel Guttman, *Organizational Conflict Of Interest and the Growth of Big Government*, 15 HARV. J. LEGIS. 297, 303 (1978) (noting that this legislation “facilitat[ed] the Government's recruitment of persons with specialized knowledge and skills for service on a part-time basis”) (quoting S. Rep. No. 2213, 87th Cong., 2nd Sess. 4 (1962)).

¹⁰⁷ A Special Government Employee is an “employee of the executive or legislative branch . . . who is retained . . . with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days . . .” 18 U.S.C. § 202(a). The government further divides this group into two categories: those who have worked less than 60 days, and those who will work between 60 and 130 days in a year. Some of the ethics statutes apply only to the latter group of SGEs. *See, e.g.*, 18 U.S. § 207(c) (1-year ban on former senior officials contacting employees of the agency where they worked during their last year in government).

¹⁰⁸ June 22, 2010 telephone conversation with Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

1 Occupational Safety and Health Administration (OSHA) has recruited over 1100 people to serve
2 as unpaid SGEs to evaluate workplaces.¹⁰⁹

3 Many ethics restrictions, including the criminal prohibitions on bribery and illegal
4 gratuities, gift regulations and most of the criminal post-employment restrictions, apply to all
5 SGEs.¹¹⁰ A few ethics provisions, such as the ban on compensation for fiduciary services, the
6 limit on outside earned income, the surtax on compensation from private foundations and the
7 option of obtaining of certificate of divestiture to obtain favorable tax treatment for divesting
8 financial holdings, do not apply to SGEs at all. The criminal prohibition on salary
9 supplementation applies only to SGEs who are paid by the government.¹¹¹

¹⁰⁹ This program of using volunteer SGEs has enabled OSHA “to leverage [its] limited resources by utilizing private sector safety and health professionals during VPP onsite evaluations.” Policies and Procedures Manual for Special Government Employee (SGE) activity conducted under the auspices of the Occupational Safety and Health Administration's (OSHA) Voluntary Protection Program, Directive No. CSP-03-01-001 (Jan. 4, 2002) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2810&p_text_version=FALSE#1-VIII). The leveraging is literally true. SGEs can outnumber government employees on evaluation teams. *Id.* at Ch. 4, § I.B.

List of Active SGEs, available at http://www.osha.gov/dcsp/vpp/sge/active_sges.html. OSHA asserts that these SGEs are subject to the same ethical standards as regular government employees. Policies and Procedures Manual for Special Government Employee (SGE) activity conducted under the auspices of the Occupational Safety and Health Administration's (OSHA) Voluntary Protection Program, Directive No. CSP-03-01-001 (Jan. 4, 2002) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2810&p_text_version=FALSE#1-VIII) (“While at an onsite evaluation, an SGE is held to the same ethical and legal standards as a . . . government employee.”)

¹¹⁰ See Table I (Ethics Restrictions on Executive Branch Employees, SGEs and Contractor Personnel) and Table II (Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor Personnel).

¹¹¹ 18 U.S.C. § 209(c). This limited application of the salary supplementation statute makes sense because if an SGE is not receiving any salary from the government, it would be illogical to prevent that SGE from receiving a salary from a non-government entity.

1 Some ethics restrictions, including limits on representational services, award of
2 government contracts, fundraising, service as an expert witness, receiving compensation for
3 expression and certain post-employment activities, apply to SGEs under a more narrow range of
4 circumstances than for regular employees. While regular employees may not provide
5 representational services or receive compensation for such services whenever the United States
6 has an interest in the matter, this ban applies to SGEs only if the matter is narrow in scope (i.e., it
7 involves specific parties) and if the SGE actually participated in the matter while in government.
8 If the matter involves not just the government in general but the SGE’s agency, then SGEs who
9 are serving more than 60 days are also covered by the representation ban.

10 While government contracts cannot be awarded to regular government employees, they
11 can be awarded to an SGE unless the contract arose directly out of the SGE’s activities, the SGE
12 was in a position to influence the contract award, or some other conflict of interest exists.¹¹²
13 While regular executive branch employees are prohibited from serving as an expert witness in
14 any proceeding in which the United States has an interest, that prohibition applies to SGEs only
15 if they have participated in the same matter while in government or, in the case of a proceeding
16 that involves the SGE’s agency, to SGEs who are serving more than 60 days, have been
17 appointed by the President, or are serving on a statutorily created commission. While regular
18 employees are prohibited from receiving compensation for expressive activity whenever the
19 subject matter of the expression deals in significant part with her agency’s policies or
20 programs,¹¹³ SGEs are exempted from this restriction.¹¹⁴ While regular employees are
21 prohibited from soliciting charitable contributions from anyone regulated by their agencies,¹¹⁵

¹¹² 48 C.F.R. § 3.601(b).

¹¹³ 5 C.F.R. 2635.807(a)(2)(i)(E)(2).

¹¹⁴ 5 C.F.R. 2635.807(a)(2)(i)(E)(4). SGEs who are in noncareer positions are also exempted from the broader restriction on receiving compensation for expression related to her agency’s general subject matter or industry. *Id.* The prohibition on compensated expression that deals with specific matters also has more limited application to SGEs. *Id.*

¹¹⁵ 5 C.F.R. § 2635.808(c)(1)(i).

1 SGEs are prohibited from soliciting contributions only from those who could be affected by the
 2 SGE's own duties.¹¹⁶

3 Two post-employment restrictions apply only to SGEs who have worked more than 60
 4 days within a year: the one-year ban on a former senior official contacting employees of the
 5 agency where the employee worked during the previous year, and the one-year ban on a former
 6 senior official representing foreign governments and political parties.¹¹⁷ Limiting these bans to
 7 those who have worked more than 60 days may be justified by a theory that those with less
 8 experience in government are less apt to be in a position to inappropriately influence their former
 9 government colleagues or less apt to have confidential information that could be passed on to
 10 foreign governments.

11 One of the ways that the federal government obtains advice from experts is by appointing
 12 them to serve on advisory committees. Advisory committees consist of individuals from diverse
 13 backgrounds who bring their own expertise, experience and perspective to address particular
 14 policy problems and provide advice to policy-makers.¹¹⁸ The members' individual perspectives
 15 might be conceived of as conflicts of interest, but the government accommodates – rather than
 16 eliminates – those conflicts of interest. In the Federal Advisory Committee Act (FACA),
 17 Congress mandated that committee membership must "be fairly balanced in terms of the points
 18 of views represented," and that members must disclose conflicts of interest.¹¹⁹

¹¹⁶ 5 C.F.R. § 2635.808(c)(1)(ii).

¹¹⁷ 18 U.S.C. § 207(c)(2)(B).

¹¹⁸ The Federal Advisory Committee Act also permits the appointment of "representative" members who are supposed to represent particular industries or interest groups. Such "representative" members are not considered government employees at all, and are not subject to the conflict of interest or disclosure requirements. *See* Office of Government Ethics, Op. 82x22 (Memorandum dated July 9, 1982 from J. Jackson Walter, Director of the Office of Government Ethics to Heads of Departments and Agencies of the Executive Branch regarding Members of Federal Advisory Committees and the Conflict-of-Interest Statutes); Office of Government Ethics, Letter to the Chairman of a National Commission dated June 24, 1993, 1993 OGE LEXIS 510.

¹¹⁹ 5 U.S.C. Appx. § 5(b)(2).

1 The criminal prohibition on financial conflicts of interest does not apply to SGEs who
2 serve on advisory committees if certain criteria are met, such as if they are dealing with matters
3 that are broad in scope (i.e. involving policy rather than particular parties) and if it would affect
4 the SGE or her employer in the same way it would affect other similarly situated individuals or
5 entities.¹²⁰ In addition, an agency official can waive the conflict if she determines that the need
6 for the SGE's services on the advisory committee outweighs the conflict.¹²¹

7 The modified ethics restrictions for SGEs demonstrate that government ethics regulation
8 need not involve an all-or-nothing approach. The government can protect its ethical concerns
9 while accommodating its other interests, including its need to obtain expertise on a temporary
10 basis.

11 **D. Employees vs. Grantee / Contractor Personnel**

12 The discussion above describes the extensive and complex array of ethics statutes and
13 regulations that restrict current and former government employees' activities and financial
14 interests. As will be discussed further in Section IV, *infra*, most these restrictions aim to ensure
15 that when government employees take action, they do so in the interest of the government rather
16 than for their own (or some other private) interest.

17 So far, this memorandum has focused on the ethics standards that apply to government
18 employees. The casual observer might mistakenly assume that the individuals who are
19 performing the government's work are government employees. But increasingly, much of the
20 government's work is performed *not* by employees of the government but by employees of
21 organizations that receive grants or contracts.¹²² With regard to one particular type of grant –
22 those for scientific research – the government has required research institutions to develop and

¹²⁰ 5 C.F.R. 2640.203(g).

¹²¹ 18 U.S.C. § 208(b)(3).

¹²² While it not clear how many individuals are performing services for the government under grants, the government actually awards even more money in grants than it does in contracts. Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts In and Out of Government*, 62 ALAB. L. REV. 955 (forthcoming 2011).

1 administer conflict of interest disclosure programs for their own employees.¹²³ It has now begun
2 taking a similar approach for some of its contractor personnel as well.

3 The government has increasingly turned to contractor personnel to perform services that
4 previously were performed by its own employees. The number of government employees has
5 fallen by 12 percent in recent decades, and the amount that the government spends on service
6 contracts has increased dramatically, rising 85% in inflation-adjusted dollars.¹²⁴

7 In some cases, an agency contracts with an entity to perform one discrete task (such as
8 performing a study), and the entity then uses its own personnel to perform that task on its own
9 premises away from a government office. But in recent decades, much of service contracting has
10 followed a different model, known as “staff augmentation” or colloquially referred to as “body
11 shops.”¹²⁵ Body shops are companies that supply the government with laborers (“bodies”) to
12 work in government offices, side-by-side with government employees, and often to perform
13 exactly the same tasks as government employees.¹²⁶ Agencies contract with body shops to
14 supply the labor that the agency will not or cannot hire directly, and contractor personnel engage
15 in functions that are central to the government’s functioning, such as defining and managing
16 project resources, developing briefings, financial plans and budgets, evaluating and managing
17 programs, advising on the selection of contractors, “making trade-off decisions among costs and
18 capabilities,”¹²⁷ and conducting management oversight.¹²⁸ In some agencies, most of the
19 individuals performing the agency’s work are contractor personnel rather than employees.¹²⁹

¹²³ See 42 C.F.R. 50.601 *et seq.*

¹²⁴ While we have reliable data on the amount of money that the government spends on service contracts, we do not have reliable data on the number of individuals providing those services.

¹²⁵ Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 PUB. CONT. L.J. 263, 291 (2004).

¹²⁶ The literature on contracting refers to this phenomenon as the multi-sector or blended workforce.

¹²⁷ Government Accountability Office, Defense Acquisitions: DOD’s Increased Reliance on Service Contractors Exacerbates Long-standing Challenges (Statement of David M. Walker, Comptroller General of the United States), Jan. 23, 2008, at 1, 4.

1 Most of the federal ethics statutes and regulations discussed above do not apply to
2 contractor personnel, even if they are working in government offices, side-by-side with
3 government employees, with access to government resources and influencing government
4 action.¹³⁰ But a few of them apply to anyone “acting on behalf of the government,” and thus
5 reach contractor personnel performing services for the government. The criminal prohibitions on
6 bribery and illegal gratuities have this broader language,¹³¹ and the government has successfully
7 prosecuted contractor personnel for accepting bribes in connection with their work for the
8 government.¹³² The criminal prohibition on disclosure of sensitive procurement information and
9 the prohibition on serving as a foreign agent also have this broader reach.¹³³ The predecessor to
10 the current criminal financial conflict of interest statute covered anyone who “acts as an . . .

¹²⁸ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 45-46 (2008).

¹²⁹ Senate Homeland Security and Government Affairs Committee, *Lieberman, Collins Astounded DHS Contract Workers Exceed Number Of Civilian Employees* (Press Release), Feb. 24, 2010.

¹³⁰ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 3 (2008) (“no [DoD] or FAR [Federal Acquisition Regulation] policy obliges DoD offices using contractor employees to require that they be free from personal conflicts of interest”).

¹³¹ 18 U.S.C. § 201(a). In addition, Congress enacted an anti-kickback statute that reaches contractor and subcontractor personnel. 41 U.S.C. § 51 *et seq.*

¹³² See GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 11 (2008) (describing 2006 bribery convictions of contractor personnel at the Space and Naval Warfare Systems Center and the Coalition Provisional Authority in Iraq for steering contracts). See also *Dixson v. United States*, 465 U.S. 482 (1984) (bribery statute reaches non-governmental organization employee who administered federal grants).

¹³³ 41 U.S.C. § 423; 18 U.S.C. § 219.

1 agent of the United States.”¹³⁴ But when Congress overhauled ethics statutes in 1962, it
 2 narrowed the scope to just officers and employees.¹³⁵

3 A handful of agencies have issued regulations imposing ethics restrictions on the
 4 employees of some of their contractors.¹³⁶ These regulations are generally narrow in scope,
 5 covering only certain types of contractors. For example, the Department of Health and Human
 6 Services regulates the personal conflicts of interest of contractor personnel who work on the
 7 Medicaid Integrity Audit Program.¹³⁷ Even with respect to covered contractors, the regulations
 8 generally restrict only certain types of conflicts of interest rather than imposing more
 9 comprehensive restrictions. The U.S. Agency for International Development (USAID), for
 10 example, restricts the financial investments and outside employment of its contractors’
 11 employees who are stationed abroad, but does not restrict their receipt of gifts.¹³⁸

12 Some agencies without contractor ethics regulations have nonetheless adopted formal
 13 policies addressing conflicts of interests among their contractor personnel. For example, while
 14 the Defense Department has no regulations addressing contractor personnel ethics, it has issued
 15 several policies to address these issues in particular contexts. Some agencies have addressed this
 16 issue in a more ad hoc fashion rather than in a more systematic way by including personal
 17 conflict of interest clauses in their contracts.¹³⁹ And the government recently announced a new

¹³⁴ 18 U.S.C. § 434. The seminal Supreme Court case interpreting this statute, *United States v. Mississippi Valley Generating Co.* (also known as the *Dixon-Yates case*) involved a conflict of interest not of a regular government employee but of an unpaid part-time consultant.

¹³⁵ 18 U.S.C. § 208(a).

¹³⁶ Agencies that have adopted regulations imposing ethics restrictions on at least some of their contractors include the Agency for International Development (USAID), the Department of Energy, the Environmental Protection Agency, the Federal Deposit Insurance Corporation, Department of Health and Human Services, the Nuclear Regulatory Commission, and the Treasury Department.

¹³⁷ 42 C.F.R. 455.238.

¹³⁸ 48 C.F.R. 752.7027.

¹³⁹ See GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERN WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 15, 48-52 (2008) (Air Force Electronic Systems Center and the Army Communications Electronics Lifecycle Management Command have used clauses requiring

1 requirement to impose conflict of interest ethics standards on contractor personnel who perform
2 a particularly sensitive function: assisting the government in contracting with other contractors
3 (meta-contracting).¹⁴⁰

4 **III. Implementation mechanisms**

5 This section discusses the mechanisms that governments use to implement ethics
6 restrictions, highlighting the variety of structural approaches that government have adopted.
7 There are eight distinct functions involved in implementing substantive ethics standards. To
8 implement ethics standards, government engage in the following eight functions. Governments:

- 9 1. train employees on the standards,
- 10 2. give them advice in response to their specific requests,
- 11 3. require employees in sensitive positions to disclose their finances
- 12 4. review those disclosures for compliance with ethics standards,
- 13 5. encourage or require the reporting of misconduct
- 14 6. investigate reports of misconduct
- 15 7. determine whether allegations of misconduct has occurred
- 16 8. sanction misconduct where it has occurred.

17 The first four functions are aimed at preventing ethics violations from occurring. The final four
18 respond to ethics allegations.

19 In the federal government, the primary responsibility for the first four functions falls
20 upon ethics officers in each agency and the Office of Government Ethics (OGE). There are
21 thousands of employees involved in these preventive functions, most of whom work in ethics
22 offices within each agency along with the approximately 100 employees of OGE. These ethics

contractors to certify that their employees do not have any personal conflicts, or by requiring individual employees of contractors to sign agreements not to disclose certain sensitive information they learn through their work).

¹⁴⁰ Federal Acquisition Regulation; Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 76 Fed. Reg. 68017 (Nov. 2, 2011). This regulation requires contractors to obtain financial disclosures from their employees who perform an acquisition function and review those disclosures, but it does not require them to provide ethics training for those employees. Id.

1 officials are required to provide information about ethics standards to all new employees,¹⁴¹ and
2 must provide at least one hour of ethics training annually to presidential appointees, White
3 House employees, contracting officers,¹⁴² and all other employees who are required to file public
4 or confidential financial disclosure reports.¹⁴³ This represents a significant investment of
5 resources in ethics training, and ethics officials have created both online and live training
6 programs.

7 These same officials also respond to specific requests for ethics advice from current and
8 former employees, who may choose whether or not to seek it.¹⁴⁴ Recently, Congress has
9 *required* former high-level or procurement officials from the Defense Department (DoD) to seek
10 a written legal opinion from a DoD ethics official before receiving compensation from a DoD
11 contractor within 2 years of leaving the department.¹⁴⁵ Ethics officials also respond to requests
12 for permission to engage in activities that require prior approval. The chief ethics officer in
13 every agency (the Designated Agency Ethics Official or DAEO) can provide immunity from
14 administrative discipline to employees who seek and follow ethics advice as long as the
15 employee provides complete and accurate information.¹⁴⁶ This immunity does not extend to
16 criminal prosecution, and at least one official who gave inaccurate information to an ethics

¹⁴¹ 5 C.F.R. 2639.703.

¹⁴² 5 C.F.R. 2639.705(a).

¹⁴³ 5 C.F.R. §§ 2639.704(a), 2639.705(a). For SGEs who are expected to work 60 or fewer days and SGEs who must file public financial disclosures, agencies can provide written training materials instead of one hour of training. 5 C.F.R. §§ 2639.704(e), 2639.705(d). That training must be conducted by a live instructor (rather than through software) at least once every three years.

¹⁴⁴ By regulation, when a current or former employee seeks advice from an ethics official about whether her acceptance of compensation from a contractor would violate 41 U.S.C. § 423(d), the ethics official must provide a response within 30 days, and the employee and contractor can rely on the ethics official's advice. FAR 3.104-6(d).

¹⁴⁵ National Defense Authorization Act of Jan. 28, 2008, P.L. 110-181, Div A, Title VIII, Subtitle D, § 847, 121 Stat. 243.

¹⁴⁶ 5 C.F.R. 2638.203(b)(7).

1 officer was later prosecuted for his false statement.¹⁴⁷ In general, the advice provided is
2 confidential. But OGE does publish redacted versions of legal opinions about ethics statutes and
3 regulations on a regular basis.¹⁴⁸

4 A third component of ethics prevention is the requirement that certain employees in
5 sensitive positions disclose their financial interests and outside activities, which are then
6 reviewed by ethics officials for compliance with ethics standards. Every year, approximately
7 25,000 employees must submit public financial disclosure forms,¹⁴⁹ and about 300,000
8 additional employees must submit confidential financial disclosure forms,¹⁵⁰ revealing
9 information about their income, assets, liabilities,¹⁵¹ gifts, travel reimbursements, outside
10 employment and business affiliations.¹⁵²

11 All SGEs must file financial disclosure statements, although most of them are subject
12 only to confidential (rather than public) financial disclosures.¹⁵³ Some SGEs who would
13 ordinarily be required to file public financial disclosure forms because of the significance of their
14 position can file confidential disclosures instead if they will serve less than 60 days, if the agency

¹⁴⁷ United States v. Safavian, 644 F.Supp.2d 1, 9 (D.D.C. 2009) (finding material GSA Administrator's false statement to ethics officer regarding a golf trip to Scotland sponsored by Jack Abramoff), aff'd, 649. F.3d. 688 (D.C. Cir. 2011).

¹⁴⁸ 5 U.S.C. App. § 402(b)(8).

¹⁴⁹ August 4, 2010 email to author from Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

¹⁵⁰ August 4, 2010 email to author from Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

¹⁵¹ Filers must report loans over \$10,000, except those from financial institutions granted on terms made available to the general public.

¹⁵² See OGE Form 450, Confidential Financial Disclosure Report, and SF 278, Public Financial Disclosure Report. Public filers must also disclose transactions of real property and securities. *Id.*

¹⁵³ 5 C.F.R. § 2634.904(a)(2) (requiring SGEs to file confidential disclosures); See also 5 C.F.R. §§ 2634.202(h); 2634.204; 2634.205 (exempting certain SGEs from public disclosure requirements).

1 head certifies that there is a special need for their services, or if they serve in the White House
2 with a Presidential appointment or commission.

3 Once the employees submit their disclosure forms, agency officials then review their
4 forms to check for compliance with ethics standards. When these reviews reveal financial
5 conflicts, employees generally have the option of recusing themselves from participating in
6 matters that could affect their finances or divesting themselves of those assets that would
7 otherwise cause the conflict. Since divesting may result in capital gains tax, Congress enacted a
8 special program (a “certificate of divestiture”) to relieve this tax burden.¹⁵⁴

9 While the questions on the confidential financial disclosure form (SF-450) are closely
10 tailored to provide the information necessary to check on ethics compliance, the questions on the
11 public financial disclosure form (SF-278) asks for additional information that is irrelevant to
12 ethics compliance. For example, from the point of view of federal conflict of interest standards,
13 the value of an employee’s stock in a particular company are irrelevant once that value is over a
14 certain threshold that would suggest materiality. But the public form requires officials to
15 disclose the value of their holdings, at least within particular ranges.¹⁵⁵

¹⁵⁴ The option of obtaining a certificate of divestiture is not available to Special Government Employees. 26 U.S.C. § 1043(b)(1)(A).

¹⁵⁵ The ranges for assets listed on the SF 278 are:

None or less than \$1001

\$1000 - \$15,000

\$15,001 - \$50,000

\$50,001 - \$100,000

\$100,001 - \$250,000

\$250,001 - \$500,000

\$500,001 - \$1,000,000

\$1,000,001 - \$5,000,000

\$5,000,001 - \$25,000,000

over \$25,000,000

1 While these forms are called “public,” the government does not automatically make them
2 public. Instead, they are available to be requested by the public, and are made available on the
3 condition that the requester does not use them for a commercial purpose.¹⁵⁶ Some
4 nongovernmental and journalism organizations have requested large batches of these disclosures,
5 and then made them available on their websites.¹⁵⁷ In addition, the government has withheld
6 from public disclosure the “public” financial disclosure forms for officials in intelligence
7 agencies.

8 When the government has been unsuccessful in preventing functions, the government
9 also performs several other ethics-related functions in response to allegations of unethical
10 conduct. One of these is to require or encourage employees to report evidence of serious
11 misconduct. Employees may be in the best position to observe misconduct, and if they fail to
12 report it, such conduct can continue unabated. One notorious illustration of this phenomenon
13 involved a District of Columbia employee, Harriette Walters, who stole \$48 million over the
14 course of two decades. Walters lavished gifts worth over \$1.2 million on other employees. Other
15 employees with whom she worked never reported her unexplained wealth or her violation of the
16 regulation prohibiting employees from giving gifts to supervisors or those with higher salaries. A
17 later investigation reported:

18 There were a number of indications suggesting that something was amiss . . . , not
19 the least of which was Walters’ extravagant generosity toward co-workers. But no
20 one spoke up, raised a question, or considered whether such generosity was
21 appropriate. . . . [One] employee . . . confronted Walters[, who] . . . denied any
22 wrongdoing. The employee . . . did not report the allegation . . . [but] received
23 several gifts and checks totaling \$1,000 from Walters.¹⁵⁸

¹⁵⁶ See Kenneth P. Vogel, Obama team’s finances hard to access, Politico, Jan. 30, 2009,
<http://dyn.politico.com/printstory.cfm?uuid=239D5241-18FE-70B2-A8F578741262432C>.

¹⁵⁷ ProPublica.

¹⁵⁸ REPORT OF INVESTIGATION SUBMITTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA 58 (Dec. 15, 2008).

1 To prevent this kind of situation, the federal government requires its employees to report
 2 criminal wrongdoing to their agency head and to the Attorney General.¹⁵⁹ It also formally
 3 encourages the reporting of fraud, waste and abuse by prohibiting retaliation against those who
 4 come forward with such reports.¹⁶⁰ While the federal government does not have a strong record
 5 of actually protecting such whistleblowers from retaliation,¹⁶¹ the federal office tasked with such
 6 protection has recently taken steps to provide such protection to whistleblowers.¹⁶²

7 Once someone has reported alleged wrongdoing, it is up to the governmental to
 8 investigate it. In the federal government, agency Inspectors Generals (IGs) have the primary
 9 responsibility for ethics investigations. IGs *investigate* but they do not *enforce*. Instead, if an IG
 10 concludes that an employee has violated an ethics standard, she must refer the case elsewhere for
 11 enforcement. She can either refer it to the Justice Department, which can pursue a criminal or
 12 civil case against the employee, or she can refer it back to the agency, which can pursue
 13 employment discipline against the employee, up to and including termination.¹⁶³ In their non-

¹⁵⁹ 28 USC § 535b.

¹⁶⁰ 5 U.S.C. § 2302(b)(8)(A)(i)-(ii) (prohibiting retaliation against certain executive-branch employees who disclose information that they "reasonably believe[] evidences ... a violation of any law, rule, or regulation, ... gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.")

¹⁶¹ See, e.g., Testimony of Adam Miles and Thomas Devine, Government Accountability Project, "Ensuring a Merit-Based Employment System: An Examination of the Merit Systems Protection Board and the Office of Special Counsel," House Government Oversight and Reform Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia (July 12, 2007) (criticizing the recent record of the federal office with responsibility for protecting whistleblowers, the Office of Special Counsel).

¹⁶² Joe Davidson, *Whistleblowers get a defender*, WASH. POST, Oct. 18, 2011 (the Office of Special Counsel orders preventing the government from taking adverse personnel actions against two whistleblowers). This journalist noted dryly: "There's something special lately about the Office of Special Counsel. It's doing its job." Id.

¹⁶³ See DIANA J. VEILLEUX, RECENT CASES INVOLVING ETHICS AND CONFLICTS OF INTEREST AT THE MERIT SYSTEMS PROTECTION BOARD (August 2011) (on file with author).

1 ethics work, IGs often work with Justice Department investigators on criminal investigations,
2 and they may be more apt to investigate allegations that could result in criminal charges rather
3 than those that would simply result in employment discipline.

4 The government sometimes takes a multi-pronged approach to enforcement, involving
5 both the Justice Department and employment discipline. This occurred recently in a case
6 implicating the salary supplementation ban. An Interior Department economist assisted a
7 nongovernmental organization, the Project on Government Oversight (POGO), in obtaining
8 information that became the basis for a successful False Claims Act (FCA) lawsuit.¹⁶⁴ After
9 POGO received a substantial settlement in that case, it gave a \$383,600 “public service award”
10 to the economist.¹⁶⁵ The government brought a civil lawsuit against POGO and the economist,
11 claiming they violated the salary supplementation ban.¹⁶⁶ In addition, the Interior Department
12 sought to remove the economist from his job.¹⁶⁷

13 **IV. Variations in non-Federal jurisdictions**

14 This section highlights some of the key variations found in state and local ethics
15 standards for executive branch employees (e.g., which affiliations to capture; what types of post-
16 employment restrictions to impose). The purpose of this section is *not* to provide a

¹⁶⁴ The economist told POGO that “oil royalties were underpaid and . . . [explained] how to draft Freedom of Information Act (“FOIA”) requests for government documents.” Based on that information, POGO filed a FCA lawsuit alleging that major oil companies undervalued the oil they extracted and underpaid the oil royalties they owed government. The economist declined POGO’s offer to join the FCA lawsuit, but entered into an agreement in which POGO would pay him one-third of its recovery. *Berman v. Dept. of Interior*, 2011 WL 5304134 (Fed. Cir. 2011).

¹⁶⁵ *Id.*

¹⁶⁶ The D.C. Circuit vacated a jury verdict in favor of the government, finding that the jury instructions failed to explain that intent was a required element, and remanded the case. *United States v. Project on Government Oversight*, 616 F.3d 544 (D.C. Cir. 2010)

¹⁶⁷ The Merit Systems Protection Board (MSPB) ruled that the government could remove him, *Berman v. Dep’t of Interior*, No. DC0752090294-I-1, but the Federal Circuit reversed, noting that the MSPB relied on a jury verdict that was later overturned on appeal. *Berman v. Dept. of Interior*, 2011 WL 5304134 (Fed. Cir. 2011).

1 comprehensive state-by-state, city-by-city survey, but instead to identify a few key variations
2 from the federal executive branch template and explore reasons for such variations.¹⁶⁸ This
3 section discusses the variety of structural approaches that governments have adopted, from
4 creating a single, independent ethics commission to perform all eight functions for the entire
5 government to distributing these functions across agencies.

6 Governments vary significantly in where they place responsibility for performing these
7 ethics functions. The federal government places prevention responsibility on ethics officers who
8 work in the government's many individual agencies, places whistleblower protection
9 responsibility on an independent agency,¹⁶⁹ places investigative responsibility on independent
10 IGs within each agency, and places enforcement responsibility on the management of each
11 agency or the Justice Department, depending on whether the misconduct is a violation of ethics
12 regulations or statutes.

13 Many cities and states have taken a different approach, placing most of these duties on a
14 single independent agency that performs these functions for the entire government. These ethics
15 agencies provide training, give advice, administer the financial disclosure system and review
16 those disclosures, investigate ethics allegations,¹⁷⁰ and impose or recommend sanctions
17 (including employment sanctions, civil fines and disgorgement of profits).¹⁷¹

18 There are several advantages to putting all these functions in a single agency. First, it
19 reduces the chances of inconsistent interpretation of ethics standards. Second, an agency that is

¹⁶⁸ It may also be appropriate to explore variations found in legislative and judicial branches. I do not plan to explore those in this draft, but could do so in a later draft.

¹⁶⁹ The U.S. Office of Special Counsel is responsible for investigating whistleblowers' claims of retaliation.

¹⁷⁰ In some cities, the investigative function is delegated to another agency. In New York City, for example, the investigations are performed by the Department of Investigations, which then reports back to the Conflict of Interest Board.

¹⁷¹ Fines can range up to \$25,000. <http://www.nyc.gov/html/conflicts/html/about/enforcement.shtml> A violation of the Conflicts of Interest Law is also a misdemeanor that the District Attorney's Office may prosecute.

1 responsible for ethics enforcement will likely tailor its training, advice and evaluation of
2 disclosures to focus on preventing significant problems. An agency with all these
3 responsibilities knows that weaknesses in its training program may later come back to haunt it in
4 enforcement actions.

5 These ethics agencies are usually led by a multi-member board consisting of members of
6 the community who make decisions on policy matters and enforcement actions, but do not work
7 as full-time employees. While board members are members of the community who may not
8 have a background in ethics or law enforcement, these agencies are generally staffed by ethics
9 and compliance professionals, experienced investigators and former prosecutors. They recognize
10 the educational and symbolic function of enforcement actions – that enforcement can spur other
11 employees to take ethics concerns more seriously.

12 **V. Principles Underlying Government Ethics Restrictions and Countervailing Concerns**

13 This part of the memorandum attempts to map out the principles that underlie the
14 substantive ethics standards that governments have adopted and the mechanisms that
15 governments use to implement those standards.

16 **A. Principles Underlying Substantive Standards**

17 The federal government's extensive array of ethics restrictions has more in common with
18 the tax code than the Ten Commandments or the Golden Rule. As such, some observers have
19 criticized these restrictions as being so complicated that they lack the moral authority that one
20 would hope for in an *ethics* code. Nonetheless, even within this complexity, one can discern
21 several distinct principles that motivate these many provisions: expressing the fiduciary nature of
22 public office; the related goal of promoting public confidence in government; maintaining
23 control of government workers; and ensuring that officials devote adequate attention to their
24 responsibilities. On the other hand, if these principles were taken to their limit, it might be
25 impossible to find employees who could meet the criteria demanded. The government has
26 recognized that certain countervailing concerns must sometimes be accommodated, limiting the
27 reach of these underlying principles. In addition, with respect to some ethics standards, the
28 government has chosen to favor or disfavor particular groups in ways that are not easily
29 explained by underlying principles or other values. This section describes the principles
30 underlying government ethics standards, the countervailing concerns that limit their reach, and

1 those areas in which ethics standards simply reflect a policy decision to favor or disfavor
2 particular groups.

3 **1. The fiduciary nature of public office**

4 The principle that underlies most of these restrictions is the fiduciary nature of public
5 office: the idea that public office is a public trust.¹⁷² In a relationship of trust, the trusted party is
6 expected to act for the benefit of the other, and the law imposes a fiduciary obligation on the
7 trusted party to ensure that she acts solely in the interest of the trusting party.¹⁷³ These are called
8 fiduciary relationships, and the trusted party is called a fiduciary. These relationships are
9 governed not just by the explicit terms of any agreement between the parties but by additional
10 terms imposed by the common law.¹⁷⁴ The law sees these relationships as valuable, and will
11 prevent fiduciaries from abusing their position of trust.¹⁷⁵

¹⁷² ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287 (1993)

¹⁷³ Hospital Products Ltd v United States Surgical Corporation, 156 CLR 41, 96-7 (1984-5) (“The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.”) (quoted in Flannigan at 306). See also Guerin v The Queen, 2 SCR 335 [1985] (“where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.”) (quoted in Flannigan at 307).

¹⁷⁴ Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887 (“Once a court concludes that a particular relationship has a fiduciary character, the parties' manifest intention does not control their obligations to each other as dispository as it does under a contract analysis.”); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C.L. REV. 595, 598 (1997) (“[T]he content of . . . restrictions [on actions by fiduciaries] and the power to alter [those restrictions] differ from the content and modifiability of the restrictions that 'mere' contract law imposes on non-fiduciary . . . contracting parties.”).

¹⁷⁵ P. D. Finn, *'The Fiduciary Principle'*, at 26 T. G. Youdan (ed), EQUITY, FIDUCIARIES AND TRUSTS, Carswell, Toronto, 1989, cited in Robert Flannigan, *The Fiduciary Obligation*, 9 Oxford J. Legal Stud. 285, 297 (1989).

1 Fiduciary relationships arise in two distinct factual settings.¹⁷⁶ In the first, an influence-
2 based trust relationship, a person trusts a fiduciary to give her advice about a decision.¹⁷⁷ In the
3 second, an access-based trust relationship, a person *entrusts* a fiduciary with access to an asset so
4 that the fiduciary can use the asset to benefit the beneficiary.¹⁷⁸ The asset could be, for example,
5 tangible property, a financial instrument, or confidential information.

6 But the mere existence of influence or access is not enough to create a fiduciary
7 relationship. The influence or access must be coupled with an expectation (either subjectively
8 intended or imposed by operation of law) that the party with the influence or access will act in
9 the interest of the trusting party.¹⁷⁹ If one party gives another access to her assets but there is no
10 expectation that the other will use that access for her benefit, then she has merely given the other
11 a gift, and no fiduciary obligation arises.¹⁸⁰ Similarly, if someone can influence another by

¹⁷⁶ Flannigan at 309 (“There are . . . two kinds of trusts that will attract fiduciary status. They are, firstly, the trust which gives the trusted party the ability to exercise ‘influence’ over the trusting party and, secondly, the trust which allows the trusted party to acquire ‘access’ to the employment of assets.”)

¹⁷⁷ Flannigan refers to this type as a “deferential trust.”

¹⁷⁸ Flannigan refers to this as a “vigilant trust.” The fiduciary obligation deters the fiduciary from acting in a way that “would have the effect of diverting or not maintaining the asset value.” Flannigan at 292. This is commonly referred to as “agency costs,” but Flannigan refers to them “intermediary costs.” Flannigan at 289-290.

Flannigan further explains :

 . . . Both types of trust in fact result in the trusted party acquiring ‘access’ to the employment of assets. In the case of deferential trust, however, the access is indirect because it occurs through ‘influence’ exerted by the trusted party. But in either case, and to the same extent, the ‘access’ to assets may be turned to mischievous ends.

Flannigan at 309

¹⁷⁹ Flannigan has identified fact-based and status-based fiduciary relationships. Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 294, n. 45 (1989). Subjectively intended expectations occur in fact-based fiduciary relationships. Expectations imposed by operation of law occur in status-based fiduciary relationships.

¹⁸⁰ Flannigan at 308 (“Not every kind of access will be of a fiduciary character. A person may acquire

1 giving her advice, but there is no expectation that the adviser is acting on the other’s behalf, then
 2 no fiduciary duty arises.¹⁸¹ A fiduciary is someone who has influence on a decision or access to
 3 resources, but must use that influence or access to benefit the other party rather than herself.¹⁸²
 4 This fiduciary principle entails two distinct prohibitions: conflicts of interest and the use of
 5 government resources for non-government purposes.

6 Someone is in a position of trust if she can give influence another or has access to
 7 resources, but must use that influence or access on behalf of someone other than herself. For
 8 more than a century, courts have recognized and enforced government officials’ fiduciary
 9 obligations even in the absence of any specific statutory or regulatory codification of that
 10 obligation.¹⁸³ As the following discussion makes clear, Congress and the executive branch have
 11 also recognized the fiduciary nature of governmental power by enacting statutes and regulations
 12 that reflect employees’ fiduciary duties.¹⁸⁴

13 Three aspects of the fiduciary obligation are particularly relevant to government officials.
 14 First, the norm against conflicts: a fiduciary must not place herself in a position where her own
 15 interest conflicts with her duty toward a beneficiary. Second, the norm against misusing
 16 resources: a fiduciary must use the beneficiary’s assets to help the beneficiary rather than to help
 17 herself or another party. Third, the norm of impartiality: a fiduciary who allocates benefits

access as a gift.”).

¹⁸¹ See *infra* discussion of “representational members” of FACA committees, who are not even temporary employees of the government and are not subject to the government’s fiduciary-based ethics restrictions.

¹⁸² See Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 309 (1989) (discussing advice- and access-based fiduciary relationships). The precise identity of the government official’s beneficiary is a matter of some contention, with possibilities including the nation, the government itself, and the public. See parallel discussion of identifying the client of government lawyers. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, WASH. U. L. REV. (2007). What matters here is that a government official must act on behalf of someone other than herself, and thus can be said to owe fiduciary duties.

¹⁸³ Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 74 (1996).

¹⁸⁴ See, e.g., 5 C.F.R. 2635.101(a) (“Public service is a public trust.”).

1 among beneficiaries must treat beneficiaries of the same class equally and beneficiaries of
2 different classes fairly.¹⁸⁵

3 The fiduciary norm against conflicts is implicated whenever a fiduciary could personally
4 benefit from a decision she makes or advice that she gives on behalf of a beneficiary. The anti-
5 conflict norm is reflected in many of the restrictions on outside payments to government
6 employees. These fiduciary-based restrictions include limits on gifts and payments from those
7 who could be affected by an employee's duties,¹⁸⁶ criminal prohibitions on bribes and gratuities
8 related to government work,¹⁸⁷ and restrictions on participation in matters that could affect an
9 employee's own financial interest or that of someone whose interests are imputed to her (such as
10 a family member, an organization with which she is affiliated, or of a party with whom she is
11 negotiating for future employment).¹⁸⁸

12 The fiduciary norm against misuse of resources is explicitly reflected in restrictions on
13 using public office for private gain,¹⁸⁹ using government time for private purposes,¹⁹⁰ using
14 government position for fundraising or electioneering, and restrictions on partisan political
15 activities in the workplace. It is implicit in the restrictions on accepting gifts from

¹⁸⁵ Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 311 (1989) (requirement that fiduciaries not trust property or confidential information included in the conflict component); Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 71 (1996).

¹⁸⁶ 5 U.S.C. § 7353(a)(2).

¹⁸⁷ 18 U.S.C. § 201.

¹⁸⁸ 18 U.S.C. § 208.

¹⁸⁹ 5 C.F.R. 2635.702.

¹⁹⁰ 5 C.F.R. 2635.705.

1 subordinates¹⁹¹ and the anti-nepotism rules.¹⁹² The fiduciary norm of impartiality is reflected in
2 regulations that prohibit employees from giving preferential treatment.¹⁹³

3 Often a fiduciary has access to confidential information in order to conduct her duties for
4 a beneficiary, and the fiduciary duty requires that she use that confidential information only to
5 further the beneficiary's interest rather than those of herself or another private party. This
6 fiduciary duty is reflected in the regulatory restriction on using government information for
7 personal gain.¹⁹⁴ The fiduciary duty not to misuse information continues even after the
8 relationship has ended. The continuing duty to protect information is reflected in an ethics
9 statute that prohibits the disclosure of sensitive procurement information,¹⁹⁵ and may be reflected
10 in some of the post-employment restrictions.¹⁹⁶

11 While the restrictions described above directly express fiduciary norms, other restrictions
12 are quasi-fiduciary in nature. They reflect a fiduciary-like concern, but they use a proxy, often
13 broadening the scope of the restriction. For example, the direct fiduciary restriction on gifts
14 prohibits employees from accepting gifts from anyone who could be affected by their duties.¹⁹⁷
15 A broader proxy-based restriction prohibits an employee from accepting a gift from anyone who
16 is regulated by her agency.¹⁹⁸ These broader, proxy-based restrictions prevent the higher-order
17 effects created by an environment in which a regulated company can give gifts to the employees

¹⁹¹ 5 C.F.R. 2635.302(a)(1).

¹⁹² 5 U.S.C. § 3110(b).

¹⁹³ *See, e.g.*, 5 C.F.R. 2635.101(a)(8).

¹⁹⁴ 5 C.F.R. 2635.703.

¹⁹⁵ 41 U.S.C. § 423(a).

¹⁹⁶ *See* discussion below.

¹⁹⁷ 5 U.S.C. § 7353(b).

¹⁹⁸ 5 U.S.C. § 7353(a).

1 of the agency that regulates it, even if not to the officials directly regulating it.¹⁹⁹ Another
2 example of a quasi-fiduciary restriction is the government's ban on employees' accepting gifts
3 from any other employee of lower salary.²⁰⁰ This regulation uses salary as a proxy for
4 subordinate position. The government also limits the partisan political activities of civil servants
5 not just in the workplace but also outside the workplace. These regulations prohibit employees
6 from soliciting or accepting campaign donations for partisan political candidates. While such
7 outside activities would not necessarily cause a civil servant to act in a partisan manner in the
8 workplace, banning those activities helps to insulate the civil service from partisanship,
9 preventing the creation of a partisan culture that would undermine both the impartiality and the
10 appearance of impartiality in decisions made by such civil servants.

11 Other quasi-fiduciary restrictions include the bans on representing private parties in
12 disputes with the government (and on accepting compensation for such representation). These
13 bans grew out of experiences during the nineteenth century, when government officials exploited
14 their positions to assist outsiders with claims against the federal government. Rather than
15 fashioning a narrowly tailored ban on employees' inappropriately exploiting their position,
16 Congress enacted a broad ban on any employee representing those with claims against the
17 federal government. This criminal ban on representation reflects a legitimate fiduciary concern:
18 the misuse of government position. But it is also much broader than what would strictly be
19 necessary to prevent inappropriate exploitation of government position. Thus, the representation
20 ban is but one illustration of the inexact proxies that the government uses in ethics restrictions.
21 Rather than applying to just those employees who could use their government position to aid
22 private parties with claims against the government, the ban applies to all employees, regardless
23 of their position.

¹⁹⁹ See Department of Interior Inspector General, Investigative Report: Island Operating Company *et al.* (2010) (employees of the Mineral Management Service accepted gifts of travel and football tickets from oil and gas company employees).

²⁰⁰ The use of such proxies is not without criticism. See PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

1 Similar concerns motivate the bans on employees' serving as an expert witness for such
 2 parties²⁰¹ and on being awarded government contracts. Whether these activities would constitute
 3 a violation of a government official's fiduciary obligation would depend on a close examination
 4 of the particular facts: was the employee exploiting confidential information or her government
 5 position on behalf of a private party or herself? The government has dispensed with this kind of
 6 fact-specific inquiry by enacting broader, proxy-based restrictions.²⁰²

7 The ethics statutes and regulations are not pure or perfect expressions of fiduciary
 8 concerns. They often use inexact proxies rather than addressing directly the potential harm. For
 9 example, high-level officials and political appointees are subject to stricter regulation of their
 10 outside activities, their acceptance of gifts, and their post-government employment. These
 11 tighter restrictions may reflect a judgment that such employees may exercise greater discretion
 12 and thus could more severely damage the government through the improper exercise of that
 13 discretion. Employees who are expected to work less than six months are subject to fewer
 14 restrictions, and those expected to work less than three months are subject to even fewer.²⁰³ This
 15 may reflect both the presumption that temporary employees are less likely to exercise broad
 16 discretion and the concern that imposing a broad swath of ethics restrictions on them would
 17 make them less likely to agree to serve. The ethics rules' imperfect expression of fiduciary duty
 18 may reflect the government's need to accommodate other values, such as the need to obtain
 19 expertise on a temporary basis or the desire to permit fluidity in the flow of personnel in and out
 20 of government.²⁰⁴

²⁰¹ 5 C.F.R. 2635.805.

²⁰² Another example of a proxy is the government's decision to restrict compensation for certain outside activities (such as teaching) rather than restricting the outside activity itself. PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

²⁰³ See Appendix.

²⁰⁴ See Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

1 **2. Promoting public confidence in government**

2 The fiduciary norms against conflicts, misuse of resources and partiality can explain most
 3 government ethics restrictions, but not all of them. Government ethics laws also attempt to
 4 further a goal that is closely related to but distinct from the fiduciary principle: the goal of
 5 promoting public confidence in the government’s integrity.²⁰⁵ It is not sufficient that the
 6 government be honest. It must also appear to be honest so that the public will have faith in it.²⁰⁶

7 This need to promote public confidence in government explains the pervasiveness of
 8 public financial disclosure requirements. If the purpose of financial disclosure was simply to
 9 help ensure employees get the advice they need to comply with ethics standards, then such
 10 “disclosures” could be confidential, as they are for 300,000 federal employees. But governments
 11 also impose public financial disclosures, enabling the public to see for itself whether its elected
 12 officials and others have conflicts of interest.²⁰⁷

13 This need to promote public confidence appears to be the primary motivation for the
 14 government’s varied post-employment restrictions, a seemingly ad hoc collection of temporary
 15 and permanent bans former government employees communicating with some or all federal
 16 officials on behalf of others;²⁰⁸ providing representation or advice on particular topics (e.g.,
 17 treaty negotiations);²⁰⁹ assisting certain types of parties (e.g., foreign governments and political
 18 parties);²¹⁰ and receiving compensation from parties that they could have affected while in
 19 government.²¹¹

²⁰⁵ This principle – promoting public trust – is not entirely independent of fiduciary theory because fiduciary-based restrictions also generally promote public confidence in government. But some government ethics restrictions (including some post-employment bans) cannot be explained by fiduciary theory, and instead seem to be aimed at promoting confidence. Many post-employment restrictions fall into this category.

²⁰⁶ Caesar’s wife quotation.

²⁰⁷ Public financial disclosure also furthers the distinct but related goal of transparency. See *infra*.

²⁰⁸ 18 U.S.C. § 207(a).

²⁰⁹ 18 U.S.C. § 207(b).

²¹⁰ 18 U.S.C. § 207(f). *See also* discussion *infra*.

1 At first glance, some of these post-employment restrictions (such as the bans applicable
 2 to particular matters in which a government employee participated personally and substantially
 3 or which was under the employee’s responsibility) may appear to be aimed at preventing the
 4 misuse of a government resource, confidential information that the former employee learned
 5 while still in government. But these bans on communications with government officials do not
 6 prohibit former employees from disclosing or using confidential information, and such
 7 employees remain free to give advice behind-the-scenes. While Congress included a ban on
 8 such advice in the 1978 Ethics in Government Act, it repealed that provision before it went into
 9 effect after many argued that it would prevent appropriate fluidity between the government and
 10 the private sectors.²¹²

11 Post-employment restrictions may also be aimed at preventing current government
 12 employees from steering their conduct in a ways that could benefit them after they leave the
 13 government. Current employees are already prohibited from participating in matters that could
 14 affect the financial interests of someone with whom they have an arrangement for future
 15 employment or with whom they are negotiating for such employment.²¹³ The typical concern is
 16 that a current employee might conduct herself in a way to curry favor with possible future
 17 employers (with whom she has not begun employment negotiations).²¹⁴

²¹¹ 41 U.S.C. § 423(d) (1-year ban on former procurement officials accepting compensation from contractors with whom they did business); 12 U.S.C. §§ 1820(k), 1786(w) (1-year ban on former bank examiners accepting compensation from banks they examined).

²¹² OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 14 (2006).

²¹³ 18 U.S.C. § 208(a).

²¹⁴ See Martin F. Grace, Richard D. Phillips, *Regulator performance, regulatory environment and outcomes: An examination of insurance regulator career incentives on state insurance markets*, 32 J. BANKING & FIN. 116 (2008). Larry Ribstein has developed an interesting analysis of the converse concern: that employees will increase government enforcement in a way that will expand the demand for private services that they could offer when they leave the government. Larry E. Ribstein, *Agents Prosecuting Agents*, Illinois Public Law and Legal Theory Research Paper No. 10-25 (2011). (“Creating and expanding theories of criminal liability may increase the private sector’s demand for former

1 One way that post-employment bans may promote public confidence is by ensuring that
2 former high-level officials cannot misuse the relationships that they have developed while in
3 office. For example, a criminal statute imposes a temporary ban on former high-level employees
4 contacting certain government officials, regardless of whether there is any factual nexus between
5 their former government work and the matter they are now handling.²¹⁵ Similarly, President
6 Obama has banned all of his Presidential appointees who leave office from lobbying any high-
7 level officials for the duration of his administration.²¹⁶

8 Here, the protected asset is not confidential information, as such, but instead the
9 relationships that a government employee develops while in government. Using those
10 relationships on behalf of private parties is seen as inappropriate exploitation of an asset gained
11 by reason of government service.

12 **3. Other principles**

13 Another principle behind ethics restrictions is the goal of maintaining Congressional and
14 executive branch control of federal workers. For example, restrictions on salary supplementation
15 and on agencies' acceptance of volunteer services reflect Congress's desire to control the
16 conduct of government operations through its appropriations power.²¹⁷ An additional goal is to
17 ensure that workers devote adequate attention to their duties. The limits on outside earned
18 income for certain high-level appointees appear to promote this goal, ensuring that these officials
19 are not distracted by other professional duties.²¹⁸ Here, Congress has used money as a proxy for
20 the time that an employee would devote to that other job.

21 Another principle reflected in government ethics standards is the norm of equal
22 treatment: the idea that similarly situated people should be treated similarly. One can find

prosecutors who can defend firms from these charges and counsel them how to avoid criminal liability.
In other words, prosecutors turn up the firs so they can sell extinguishers.”)

²¹⁵ 18 U.S.C. § 207(d).

²¹⁶ Ex. Ord. 13490 (Jan. 21, 2009), 74 Fed. Reg. 4673.

²¹⁷ Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

²¹⁸ 5 C.F.R. 2635.804(a); 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b).

1 explicit expression of this norm in the regulation setting out the general principles of government
2 service, requiring employees to “act impartially and not give preferential treatment to any private
3 organization or individual.”²¹⁹ It may also be implicit in other regulations, such as the
4 prohibition on hiring relatives.²²⁰

5 **4. Countervailing Concerns**

6 While the principles identified above seem to explain most government ethics restrictions,
7 certain countervailing concerns help explain the limits on ethics standards. These countervailing
8 concerns include practical considerations, such as the recognition that as government ethics
9 standards become more strict, government service will become less attractive for those who have
10 other employment options.²²¹ Governments also limit the application of ethics standards that
11 would otherwise interfere with cultural norms. For example, fiduciary standards would suggest
12 that a government employee should not accept a gift from anyone who could be affected by the
13 employee’s work, but gift prohibitions generally include exceptions for gifts from family
14 members or gifts under a certain value, recognizing the place of gift-giving in our culture.

15 Another countervailing concern is the desire for limited fluidity in and out of the
16 government workforce. Although many government employees enjoy civil-service protection
17 and may enjoy long tenure, some government positions are set aside for political appointees who,
18 in general, serve in government for a few years or less. In addition, a significant portion of the

²¹⁹ 5 C.F.R. 2635.101(b)(8).

²²⁰ 5 U.S.C. § 3110(b).

²²¹ The government’s recent experience with military “mentors” illustrates this phenomenon. For a number of years, the Pentagon had hired retired flag officers to serve as “mentors” to current leaders, but had avoided imposing government ethics standards on these mentors by hiring them as contractors rather than employees. Tom Vanden Brook, Ken Dilanian and Ray Locker, *How Some Retired Military Officers Became Well-Paid Consultants: Retired Military Officers Cash in as Well-Paid Consultants*, USA TODAY, Nov. 18, 2009. In 2010, the Secretary of Defense required that mentors be subject to government ethics standards. Office of the Secretary of Defense, *Memorandum: Policy on Senior Mentors* (April 1, 2010). After that change, 94% of the mentors decided to discontinue their service. INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, DOD COMPLIED WITH POLICIES ON CONVERTING SENIOR MENTORS TO HIGHLY QUALIFIED EXPERTS, BUT FEW SENIOR MENTORS CONVERTED (2011).

1 professionals who have civil service protection do not spend their entire careers in government.
 2 Instead, they spend part of their career in government, gaining both substantive expertise and
 3 knowledge of how the government administers an area of law, and then enter the private sector
 4 to apply that expertise and knowledge, often at significantly increased remuneration.²²² Some of
 5 these professionals later return to the government, often as political appointees in leadership
 6 positions.²²³

7 The narrow scope of most post-employment restrictions makes this kind of career pattern
 8 possible. Rigorous application of the fiduciary principle would prohibit a former government
 9 employee from giving advice to a non-government party on any matter on which that she worked
 10 or had access to confidential information while in government. That is precisely the restriction
 11 that bar rules impose on former government lawyers.²²⁴ While professional rules impose this
 12 fiduciary-based standard on former government lawyers, the government has not imposed a
 13 fiduciary-based standard on all former government employees. Instead, it has opted for a much
 14 narrower ban, prohibiting only communications back to the government on behalf of a private
 15 party. The fiduciary principle ran up against a competing value: the desire for fluidity in and out
 16 of the government workforce.

²²² See, e.g., Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, Harvard Law and Economics Discussions Paper No. 27 (2009), papers.ssrn.com/sol3/papers.cfm?abstract_id=1333717#. Professor Gadinis notes “the high frequency of personnel movements between the SEC . . . and the financial industry and . . . law firms and accounting firms.” More than half of the S.E.C.’s workforce came from the private sector, and almost half of them plan to stay at the S.E.C. less than five years. *Id.* at 48-49.

²²³ E.g., Yeon-Koo Che, *Revolving Doors and the Optimal Tolerance for Agency Collusion*, 26 RAND J. ECON. 378 (1995) (describing the revolving door phenomenon); () .

²²⁴ The legal ethics rule for former government lawyers more closely tracks the fiduciary concern with protecting confidential information. It prohibits a lawyer who was formerly a government official from representing someone on a matter that she worked on while in government. ABA Model Rule of Professional Conduct 1.11(a). *See also* Model Rule 1.11(c) (prohibiting the former government official from representation if she had access to confidential government information that could be used to the detriment of another party).

1 **5. Favor / Disfavor Particular Groups**

2 Some ethics restrictions seem to be motivated not by principle but by a desire to favor or
 3 disfavor particular groups or activities. The criminal post-employment statutes favor colleges,
 4 universities, nonprofit hospitals and research organizations by exempting them from many of the
 5 bans on communication and representation.²²⁵ They disfavor foreign governments and political
 6 parties, prohibiting former high-level officials from representing them regardless of whether
 7 there is any nexus between that representation and their former government duties.²²⁶ This
 8 disfavoring of foreign governments has a long history, from the Constitution's ban on certain
 9 government officials accepting gifts or honorary titles from foreign nations to a statute
 10 prohibiting all government employees from accepting gifts from foreign governments.²²⁷

11 Another group that has been disfavored by the Obama administration's ethics reforms is
 12 lobbyists. On his first full day in office, President Obama issued an executive order severely
 13 restricting registered lobbyists' ability to become political appointees.²²⁸ He later issued a
 14 memorandum limiting registered lobbyists' ability to communicate with executive branch
 15 officials regarding the Recovery Act, requiring any such communications about particular

²²⁵ 18 U.S.C. § 207(j)(2)(B). At least one other jurisdiction has exempted non-profit organizations from some of its conflict of interest standards. *See* District of Columbia Office of Campaign Finance, Interpretative Opinion 04-07.

²²⁶ 18 U.S.C. § 207(f). Another example of an ethics restriction aimed at disfavoring particular parties is the statutory ban on accepting gifts from foreign governments. 5 U.S.C. § 7342.

²²⁷ U.S. CONST. art. I, § 9, cl. 8 ("No person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present . . . of any kind whatever, from any King, Prince, or foreign State."); 5 U.S.C. § 7342.

²²⁸ Executive Order 13490, 74 Fed.Reg. 4673 (Jan. 21, 2009) (2-year ban on registered lobbyists seeking or accepting a political appointment in an agency they lobbied; participating in the specific issue area they lobbied; and participating in any particular matter on which they lobbied). The Executive Order does not define "specific issue area," so the scope of this prohibition is unclear.

Even as a Presidential candidate, Barack Obama refused to accept political donations from registered lobbyists. *See* Obama Returns Lobbyists' Donations, April 14, 2007 (available at <http://thecaucus.blogs.nytimes.com/2007/04/14/obama-returns-lobbyists-donations/>).

1 projects to be in writing rather than oral,²²⁹ and instructed agency heads not to appoint registered
2 lobbyists to advisory committees, boards or commissions.²³⁰

3 In singling out lobbyists for disfavored treatment, President Obama has invoked the
4 populist rhetoric of “reducing the undue influence of special interests.”²³¹ These anti-lobbyist
5 initiatives may be aimed at preventing biases that are based not on an individual’s current
6 financial interests but on the individual’s past associations. Even so, these measures are both
7 underinclusive and overinclusive. They are underinclusive in that they do not cover someone
8 like former Senator Tom Daschle, who advised special interests on public policy and legislative
9 initiatives, but did not communicate on their behalf, and thus did not have to register as a
10 lobbyist.²³² They are overinclusive because they cover not just those lobbyists who have worked
11 for moneyed “special interests,” but also those who lobbied for human rights and for children in
12 foster care.²³³

13 **B. Principles Underlying the Mechanisms**

14 The principles described help explain the substantive standards that governments have
15 adopted for their employees. But a different set of principles helps explain the mechanisms that
16 governments have adopted to implement those standards.

17 **1. Accountability**

18 The norm of accountability -- requiring employees to account for their actions to
19 someone else -- is found in most of the functions associated with implementing ethics

²²⁹ Presidential Memorandum re: Recovery Act Funds (March 20, 2009).

²³⁰ Presidential Memorandum--Lobbyists on Agency Boards and Commissions (June 18, 2010).

²³¹ Presidential Memorandum--Lobbyists on Agency Boards and Commissions (June 18, 2010).

²³² Michael Scherer, *Daschle’s Problems: When is a Lobbyist Not a Lobbyist?*, TIME, Feb. 3, 2009.

²³³ Jonathan Martin, *Lobbyist Ban Limits Obama’s Options*, POLITICO, March 13. 2009; Peter Baker, *Nonprofit Groups Seeking Exceptions to Lobby Rule*, N.Y. TIMES, April 21, 2009.

1 standards:²³⁴ Accountability itself consists of several distinct stages: gathering information
 2 from the employee and others about the employee's conduct, evaluation of the conduct for
 3 conformity with ethical standards, and response where the conduct does not comply with those
 4 standards. One can discern this norm of accountability in six of the eight functions associated
 5 with implementing ethics standards: financial disclosure and review, encouraging employees to
 6 report misconduct, investigating and evaluating allegations of misconduct, and sanctioning such
 7 misconduct where it occurs.

8 The norm of accountability is also expressed in the statutory protection provided to
 9 employees who blow the whistle on government misconduct, those who disclose it outside of
 10 governmental channels.²³⁵ Through these statutes, Congress has, in effect, made a policy choice
 11 favoring transparency regarding government misconduct. A variety of statutes indicate that the
 12 government does not claim to have a legitimate interest in keeping secret information about
 13 government wrongdoing. In 1958, Congress adopted a resolution calling upon all government
 14 employees to "expose corruption wherever discovered."²³⁶ More concretely, federal, state, and

²³⁴ See Rob Jenkins, *The Role of Political Institutions in Promoting Accountability*, in PERFORMANCE ACCOUNTABILITY AND COMBATING CORRUPTION 135, 136 (Anwar Shah ed., 2007); see also Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999) ("Accountability refers to the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others . . .").

²³⁵ Congress provides protections for disclosures outside government channels only if the information is not otherwise protected. See discussion below.

²³⁶ H.R. Con. Res. 175, 85th Cong. July 11, 1958, 72 Stat. B12 (1958) ("It is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees Expose corruption wherever discovered."). But cf. Kenneth W. Dam, *The Special Responsibilities of Lawyers in the Executive Branch*, 55 CHI. BAR REC. 4, 8 (1974) (asserting that this Concurrent Procedure should not "be regarded as having the force of law [because] the legislative history itself states that it "creates no new law"").

1 local governments have passed dozens of whistleblower statutes prohibiting retaliation against
2 government employees who disclose government wrongdoing.²³⁷

3 At the federal level, federal law prohibits retaliation against certain executive-branch
4 employees who disclose information that they "reasonably believe[] evidences ... a violation of
5 any law, rule, or regulation, ... gross mismanagement, a gross waste of funds, an abuse of
6 authority, or a substantial and specific danger to public health or safety."²³⁸ The statute applies
7 to many but not all executive-branch employees. In general, it applies to civil service employees,
8 to career appointees in the Senior Executive Service, and to employees in the "excepted service"
9 unless their positions have been "excepted from the competitive service because of [their]
10 confidential, policy-determining, policy-making, or policy-advocating character."²³⁹ It does not
11 apply to military service members or to employees of the FBI, CIA, NSA, or any other agency or
12 unit of an agency that the President determines has as its "principal function ... foreign
13 intelligence or counterintelligence."²⁴⁰

²³⁷ Robert T. Begg, *Whistleblower Law and Ethics*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 156, 161, 168 (Patricia E. Salkin ed., 1999) (asserting that forty-six states and "even some local governments" have adopted whistleblower protection statutes); Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 136 (2003) (asserting that thirty-eight states have adopted whistleblower protection for government employees). *See generally* DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE (2d ed. 2004).

²³⁸ 5 U.S.C. § 2302(b)(8)(A)(i)-(ii) (2000). The statute provides protection to current employees, former employees, and applicants. 5 U.S.C. § 1221(a) (2000). For an excellent discussion of the federal Whistleblower Protection Act and its history, see Begg, *supra*, at 156.

²³⁹ 5 U.S.C. § 2302(a)(2)(B) (2000).

²⁴⁰ 5 U.S.C. § 2302(a)(2)(C)(ii) (2000). Congress has passed legislation providing limited whistleblower protection to intelligence agency employees and military service members who disclose information to members of Congress. Intelligence Community Whistleblower Protection Act of 1998 § 702(b), Pub. L. No. 105-272, 112 Stat. 2413 (codified at Inspector General Act of 1978, 5 U.S.C. app. § 8H); Military Whistleblower Protection Act, 10 U.S.C. § 1034 (2000); see also LOUIS FISHER, CONG. RESEARCH SERV., NATIONAL SECURITY WHISTLEBLOWERS (2005).

1 Employees can blow the whistle internally by disclosing the information to another
2 government official, such as an inspector general, or externally by disclosing it to someone
3 outside government, such as a member of the press.²⁴¹ Where disclosure of the information is
4 not "specifically prohibited by law," the employee may choose either internal or external
5 disclosure.²⁴² But if disclosure of the information is "specifically prohibited by law," then in
6 order to be protected from reprisal, the government employee must disclose the information
7 internally to one of several identified government officials.²⁴³

8 **2. Transparency**

9 Another value expressed in ethics mechanisms is transparency. While some ethics
10 functions are conducted in secret (such as investigations and advice to specific employees), the
11 federal government has partially embraced transparency by making the financial disclosures of
12 25,000 of its highest-level officials available to the public upon request. This is only a *partial*
13 embrace of transparency in that the government does not actually provide these documents
14 online and instead provides them to those who specifically request them. But a nongovernmental

Employees of the judicial and legislative branches are also excluded from its coverage. 5 U.S.C. § 2302(a)(2)(C) (2000) (defining the statute's coverage as executive-branch agencies and the Government Printing Office).

²⁴¹ If the employee is disclosing information the disclosure of which is "specifically prohibited by law," including information that is "specifically required by Executive order to be kept secret," then the employee will be protected from retaliation only if he discloses the information to an agency Inspector General, to the Special Counsel, or to another official designated by the agency head. Otherwise, the employee is not protected against retaliation. 5 U.S.C. § 2302(b)(8)(A)-(B) (2000); see H.R Rep. No. 103-769, at 18 (1994), quoted in L. PAIGE WHITAKER, CONG. RESEARCH SERV., THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW 4 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33918.pdf>.

²⁴² While the Whistleblower Protection Act purports to protect any disclosure, the Court of Appeals for the Federal Circuit - the only appellate court with jurisdiction over whistleblower lawsuits - has construed the statute narrowly, and has excluded from protection disclosures to supervisors within the chain of command, to co-workers, and to suspected wrongdoers. Radack, *supra*, at 136 n.76 (citing Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1344, 1351 (Fed. Cir. 2001)).

²⁴³ 5 U.S.C. § 2302(b)(8)(B).

1 organization, ProPublica requested these forms for 179 top officials in the Obama administration,
2 made them available online, and invited the public to examine them in depth.²⁴⁴

3 **3. Limited Independence**

4 At the municipal level, ethics agencies are usually led by a multi-member board
5 consisting of members of the community who make decisions on policy matters and enforcement
6 actions, but do not work as full-time employees. In some cities these board members are
7 nominated by the Mayor and confirmed by the City Council.²⁴⁵ In other cities members are
8 chosen by different city officials, with the Mayor appointing one member, the City Attorney
9 appointing another, etc.²⁴⁶ In Miami, members are appointed by non-city officials, including the
10 Deans of two local law schools.²⁴⁷ The members of these boards treat this work as a part-time
11 civic duty and are not otherwise employed by the government.²⁴⁸ As a result, these agencies
12 have some limited political independence from the officials whose actions that are judging.

13 They have independence in that their primary source of income is not the government. The
14 agency's independence is nonetheless limited in two ways. First, the members are appointed by
15 city officials²⁴⁹ and may feel grateful to are simply be aligned with those officials. Second, a
16 multi-member board is less likely to fall into the problem of overzealous enforcement that many
17 perceived in the federal government's Independent Counsel mechanism. Another way in which

²⁴⁴ Christopher Weaver, *Check Out the Obama Team's Financial Filings*, PROPUBLICA, April 8, 2009, <http://www.propublica.org/article/check-out-the-obama-teams-financial-filings-408>.

²⁴⁵ Chicago Chapter 2-156-310 Appointment of Members (Article 4); New York City; Philadelphia Chapter 11.

²⁴⁶ Los Angeles City Charter, Article 7; San Francisco Ethics Commission By-Laws. Miami-Dade Ordinance Establishing the Ethics Commission Sec. 2-1069(e)(4); New York City; Philadelphia Chapter 11 (Ethics Standards & Financial Disclosures), §1106(d); San Francisco Ethics Commission By-Laws, Article III, §3: Conditions of Appointment.

²⁴⁷ Ordinance Establishing the Miami-Dade Ethics Commission.

²⁴⁸ Chicago Chapter 2-156-310 Appointment of Members (Article 4); Los Angeles City Charter, Article 7 §700(d); Qualifications;

²⁴⁹ with the exception of Miami-Dade.

1 some of these agencies have independence is that their budgets are protected through statutory
2 mandates, and cannot easily be reduced by the politicians whose conduct they oversee.²⁵⁰

3 The partial nature of this independence reflects inherently political nature of government.
4 Government incumbents have an interest in ensuring public confidence, but also want to prevent
5 ethics enforcement from being overly energetic. Ethics institutions with some degree of
6 independence can help ensure the legitimacy of their governments. But ethics institutions
7 generally are not as insulated from political control as the federal judiciary or the Federal
8 Reserve.

9 **VI. Ethics in Public and Private Sector Organizations**

10 Some of the principles that underlie government ethics standards also exist and are
11 expressed in private sector organizations. The most significant principle – the fiduciary nature of
12 governmental office – is also true in the private sector.²⁵¹

13 While many private organizations have not adopted the same type of detailed rules that
14 the federal government has adopted for its million-member workforce, many of them do have
15 codes of conduct that reflect fiduciary principles, as well as the need to control their employees
16 and to ensure that they are devoting adequate attention to their work. But there are several
17 important differences between the private and public sector that are relevant to this discussion of
18 organizational ethics: governments' need to promote public confidence in them, the related norm
19 of transparency, and the norm of acting with fairness toward others.

20 One of the key ways that public sector organizations differ from those in the private
21 sector is the norm of transparency, and this difference has implications for the mechanisms used
22 to implement ethics standards. The overriding norm regarding government information in the
23 modern era is disclosure unless there is a good reason for secrecy. At the federal level, one finds
24 this principle not in the U.S. Constitution, but in constitutive statutes that determine how
25 governments will operate. The federal open government laws include the Freedom of

²⁵⁰ See, e.g., *Gov. Robert Bentley signs into law a needed bill that will protect the Ethics Commission from retaliation by lawmakers*, BIRMINGHAM NEWS, May 25, 2011. Compare Aaron Gould Sheinin, *Legislature slashes watchdog agency*, ATLANTA JOURNAL-CONSTITUTION, Sept. 12, 2009.

²⁵¹ TAMAR FRANKEL, FIDUCIARY LAW (2010)

1 Information Act (FOIA),²⁵² Privacy Act of 1974,²⁵³ Government in the Sunshine Act,²⁵⁴ Federal
2 Advisory Committee Act,²⁵⁵ and the Presidential Records Act of 1978.²⁵⁶ These statutes
3 establish a baseline of providing the public with access to government information, both in terms
4 of government documents and government meetings. Under the FOIA, executive-branch
5 agencies are required to publish their rules, regulations, and policies; final opinions made in the
6 adjudication of cases; and information about how the agencies are organized.²⁵⁷ The statute
7 makes all other government documents public upon request, unless there is a good reason for the
8 government to keep the document secret.²⁵⁸ The FOIA sets out nine specific exceptions to this
9 mandated disclosure upon request.²⁵⁹ When someone seeks disclosure of government
10 information, there is a presumption that the information will be made available. Where the
11 government refuses to disclose it, the burden is on the government to justify the refusal.²⁶⁰ This
12 presumption in favor of disclosure is consistent with principles of robust democratic government.

13 As a result of this norm of transparency, the federal government makes available for
14 public review otherwise private financial information regarding 25,000 government leaders. This
15 practice of making of such financial disclosures public reflects not just the norm of transparency,
16 but also the need to promote public confidence in the government. In some communities, there
17 is so much distrust of government that members of the public do not trust that government
18 officials will adequately assess conflicts of interest that may be apparent on confidential financial

²⁵² 5 U.S.C. § 552.

²⁵³ 5 U.S.C. § 552a.

²⁵⁴ 5 U.S.C. § 552b.

²⁵⁵ 5 U.S.C. app. §§1-16.

²⁵⁶ 44 U.S.C. §§2201-2207.

²⁵⁷ 5 U.S.C. § 552(a)(1)-(a)(2).

²⁵⁸ Id. § 552(a)(3), (b).

²⁵⁹ Id. § 552(b).

²⁶⁰ Id. § 552(a)(4)(B) (where a requester appeals an agency's denial of information "the burden is on the agency to sustain its action").

1 disclosures. The public wants to see for themselves the information about government leaders' 2 personal finances.²⁶¹ There is no analog to this kind of public disclosure of otherwise private 3 financial information about employees in the private sector.

4 While governments are subject to the overriding norm of transparency, private sector 5 organizations generally have not been. Traditionally, they have the option to keep much of their 6 information confidential, even information about their own wrongdoing. But one aspect of 7 transparency, encouraging whistleblowers, is increasingly true in the private sector as well as the 8 public sector. For decades there has been a patchwork of statutory protection for public and 9 private sector workers across the country. In the last decade, however, Congress has attempted 10 to increase whistleblowing in the private sector. It responded to 2002 corporate scandals and the 11 2008 financial crisis by enacting statutes requiring private sector organizations to facilitate 12 internal whistleblowing and providing certain private sector employees with a financial incentive 13 to blow the whistle on some unethical conduct.²⁶²

14 Third, unlike governments, they are not subject to the norm of acting with fairness to 15 others. Private sector organizations – like individuals – are generally free to act unfairly toward 16 others, as long as that unfairness does not constitute an illegal act. In our legal tradition, the 17 sovereign is not free to act in the same way as any private litigant but is expected to act fairly and 18 impartially.²⁶³ This obligation of fairness is seen most prominently in criminal prosecutions. As 19 the United States Supreme Court declared in *Berger v. United States*,

20 The United States Attorney is the representative not of an ordinary party to a 21 controversy, but of a sovereignty whose obligation to govern impartially is as 22 compelling as its obligation to govern at all; and whose interest, therefore, in a

²⁶¹ See, e.g., Harry Jaffe, *Full disclosure for D.C. Council: Show us the tax returns*, WASH. EXAMINER, June 13, 2011, <http://washingtonexaminer.com/local/dc/2011/06/full-disclosure-dc-council-show-us-tax-returns#ixzz1cxRYLdh7>.

²⁶² Sarbanes Oxley; Dodd Frank.

²⁶³ Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 311-13 (1989).

1 criminal prosecution is not that it shall win a case, but that justice shall be
2 done.²⁶⁴

3 This norm of fairness is reflected in prosecutors' obligations to provide criminal defendants with
4 information that can help the defense, a deviation from the normal adversary process.²⁶⁵ This
5 obligation to act fairly is so central to the government lawyer's mission that the Justice
6 Department building has this quotation inscribed near the entrance to the Attorney General's
7 office: "The United States wins its point whenever justice is done its citizens in the courts."²⁶⁶ As
8 the Supreme Court explained in Berger, the obligation to do justice is based on the government's
9 obligation as a sovereign "to govern impartially."²⁶⁷

²⁶⁴ Berger v. United States, 295 U.S. 78, 88 (1935).

²⁶⁵ Brady v. Maryland, 373 U.S. 83, 87-88 (1963). Model Rule 3.8(d) requires prosecutors to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Model Rules of Prof'l Conduct R. 3.8(d) (2007).

²⁶⁶ This quotation from former Solicitor General Lehmann is inscribed in the Rotunda of the Justice Department building. See Janet Reno, *Indigent Defense: Legal Service for Poor Needs Vigilance*, CHAMPION, May 1998, at 32, available at <http://www.nacdl.org/CHAMPION/ARTICLES/98may05.htm>.

²⁶⁷ Berger, 295 U.S. at 88.

Appendix:
Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor Personnel

Provision	Trigger in government	Scope of ban	Duration	Applies to SGEs?	Applies to Contractor Personnel?
18 U.S.C. § 207 – general post-employment statute					
(a)(1)	participated personally and substantially in a matter	Communicate with federal official regarding same matter	permanent	Yes	No
(a)(2)	matter was pending under employee during last year in government	Communicate with federal official regarding same matter	2 years	Yes	No
(c)	Served as a senior official	Contact officials in agency where worked during last year in government	1 year	Yes	No
(d)	Served as a very senior official	Contact high level officials in any agency or officials in agency where worked during last year in government	2 years	Yes	No
(b)	Served as a trade or treaty negotiator	Represent non-federal party regarding negotiations	1 year	Yes	No
(f)	Served as a senior official	Represent foreign government or political party	1 year	Yes ¹	No
(f)(2)	Served as US Trade Representative (USTR) & Deputy USTR	Represent foreign government or political party	permanent	Yes	No
41 U.S.C. § 423 – Procurement Integrity statute					
(d)*	Served as contracting officer, program manager, or made a decision re: a contract, subcontract modification, applicable rate, payment or settlement of a claim	Accept compensation from contractor involved	1 year	Yes	No
(a)	Advised the US on a procurement or had access to contractor bid, proposal, or source selection info	Disclose contractor bid, proposal, or source selection info	Until award of the contract	Yes	Yes
Bank Examination statutes					
12 U.S.C. §§ 1820(k), 1786(w) ²	Was employee of a Federal Reserve bank, Federal banking agency or National Credit Union Administration & served as senior examiner of a depository institution for 2 or more months during last 12 months of employment	Accept compensation as employee, officer, director or consultant from that depository institution	1 year	Yes	No

¹ Applies to SGEs who serve more than 60 days and to very senior SGEs who serve less than 60 days.

² These provisions are non-criminal, but provide for civil monetary penalties and administrative penalties, such as contract rescission, suspension or debarment, 41 U.S.C. § 423(e), and industry-wide prohibition orders. 12 U.S.C. §§ 1820(k)(6); §1786(w)(5).