



ALABAMA

State Ethics Consultant Report 2025

Report Prepared by:
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Date: February 3, 2025

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Memorandum

To: Mr. Othni J. Lathram, Director, Alabama Legislative Services Agency
From: James Bopp, Jr. & Taylor C. Shetina
Date: February 3, 2025
Re: Report of Review and Recommendations for the Code of Ethics for Public Servants

We have been retained by the Alabama Legislative Services Agency to review and to make recommendations for improvement, if warranted, of the Alabama Code of Ethics for Public Officials, Employees, Etc., Ala. Code § 36-25-1, *et seq.* (“**Ethics Code**”).

This is our Report, which is in four Parts: **I. Constitutional Analysis, II. Comparative Analysis to the American Law Institute Government Ethics Guidelines, III. National Survey Analysis, and IV. Recommendations.**

Generally our Report focuses on the statutory provisions, and a few of the Alabama Ethics Commission’s (“**Ethics Commission**”) Administrative Rules, because these have legal effect. We are of course aware that there are Ethics Commission interpretations of these laws, which sometimes ameliorates their negative effects, but they do not have the force of law and are subject to being changed by the Ethics Commission at their discretion. In addition, we are aware of court interpretations and constructions of some of these laws, but a law’s meaning should be plain on the face of the statute, to give the public notice of their import, without having to hire a lawyer to read court decisions to advise them. Thus, what is pertinent to the Alabama State Legislature is what the laws provide and allow on the face of the statute, because this is what is

in their purview and control and ability to effect.

I. Constitutional Analysis

Any review of government ethics laws, such as the Ethics Code, must start with a review of the potentially applicable U.S. Constitution's protections of the First and Fourteenth Amendments.¹ Government ethics laws regulate speech and lobbying so they are subject to the First Amendment protections of speech and petition. And all laws are subject to the Fourteenth Amendment requirements of equal protection from selective enforcement and of due process protections from vague and overbroad laws and requiring notice and an opportunity to be heard. The Ethics Code will be analyzed to determine whether its provisions raise any of these constitutional concerns.

A. First Amendment Speech and Petition

1. Rule of Law

The First Amendment of the U.S. Constitution protect the freedom of speech. It protects speech about matters of public concern and extends to “[a]ll ideas having even the slightest redeeming social importance.”² Thus, matters of public concern are those of “political, social or other concern to the community.”³ “The content, form, and context of the speech will determine

¹ Of course, the Alabama Constitution also governs the Ethics Code. Many of the provisions are similar to the U.S. Constitution and Alabama court decisions on the application of both the U.S. Constitution and Alabama's have been examined and will be referred to if applicable to our analysis.

² *Roth v. United States*, 354 U.S. 476, 484 (1957).

³ *Connick v. Myers*, 461 U.S. 138 (1983).

whether it is protected, with content the most important factor,”⁴ and certainly include matters regarding government affairs.

The First Amendment also enshrines the right to petition the government for redress of grievances. This fundamental right is closely intertwined with the freedoms of speech and assembly, enabling citizens to voice concerns and advocate for policy changes, both individually and collectively. Interest groups frequently exercise this right through lobbying efforts both directly with government policy makers and by communications to the general public through grass roots lobbying.

While the government possesses authority to regulate lobbying activities, it must do so without infringing upon First Amendment protections. Disclosure requirements for Lobbyist spending and activities are generally permissible as measures to promote transparency.⁵ However, laws that categorically prohibit certain lobbying activities or impose excessively onerous restrictions may violate the First Amendment if they lack a compelling state justification. The need to safeguard the right to petition must be balanced against the imperative of preventing corruption and undue influence in the political process.

2. Application to the Ethics Code

⁴ Ann C. Hodges, Matters of Public Concern Standard in Free Speech Cases, in Encyclopedia of American Civil Liberties (Paul Finkelman, ed., Routledge 2006).

⁵ See generally Glen Krutz & Sylvie Waskiewicz, PhD, American Government 3e, 10.5 Free Speech and the Regulation of Interest Groups, OpenStax (Jul. 28, 2021), <https://openstax.org/books/american-government-3e/pages/10-5-free-speech-and-the-regulation-of-interest-groups> (Acknowledging that while interest groups have a right to promote their viewpoints under the First Amendment, the government can regulate lobbying by prohibiting certain activities, such as giving gifts to lawmakers and compensating Lobbyists with commissions for successful lobbying efforts).

a. The Ethics Commission Prohibition on Speech related to the Complaint Procedure (§ 36-25-4(c))

§ 36-25-4(c) imposes broad secrecy requirements regarding the complaint, procedure, some similar to those related to a grand jury proceeding, Sections 12-16-214 to 12-16-216, but most much broader. The secrecy requirements do not just apply to an Ethics Commission hearing but also applies to “all investigatory activities taken by the director, the commission, or a member thereof, staff, employees, or any person engaged by the commission in response to a complaint filed with the commission and to all proceedings relating thereto before the commission.” The restrictions also apply to “all information and evidence supplied to the Attorney General or district attorney.”

Of course, confidentiality of an ethics complaint procedure can be justified as a protection for a Respondent’s reputational and professional interests, but also involves matters of public concern protected by the First Amendment. While not yet fully resolved, it seems clear that the confidentiality requirement can be properly applied to the Ethics Commission itself, and, by default, to participants regarding disclosure of testimony before an investigatory body and that person’s interaction with the body.⁶ However, the government may not prohibit third parties, such as the press, from reporting on a pending inquiry.⁷ Furthermore, the government may not prohibit the Complainant or participants from publicly disclosing the substance of complaints about the conduct of a government official,⁸ or the Complainant publically disclosing the filing

⁶ *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Cir. 1994).

⁷ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

⁸ See, e.g., *Cox v. McLean*, 49 F.Supp.3d 765 (D. Mont. 2014).

of the complaint,⁹ particularly after the dismissal of a complaint,¹⁰ since these strikes at the heart of the First Amendment.¹¹

Finally, prohibiting the Respondent from speaking out about the matter is a serious prohibition on the Respondent's speech. and, if a Respondent decides to do it or authorizes another to do so, the prohibition is not justified as a protection of the Respondent's reputational and professional interests.¹² As a result, similar complaint procedures, such as that of the Federal Election Commission, prohibit the FEC itself from making public any information about an FEC investigation, and prohibits any other person from making public an investigation, "without the written consent of the respondent."¹³ The Ethics Code's broad prohibition of speech is likely unconstitutional.

b. Restrictions on Public Servants' Right to Petition (§§ 36-25-1.1, 36-25-13(b), 36-25-13(f), 36-25-23(a))

⁹ *R.M. v. Supreme Court of New Jersey*, 185 N.J. 208, 883 A.2d 369 (N.J. 2005); *Petition of Brooks*, 140 N.H. 813 (1996); *Doe v. Judicial Qualifications Commission*, 748 F.Supp. 1520 (S.D. Fla. 1990); *but see Kamasinski*, 44 F.3d 106.

¹⁰ *Cox*, 49 F.Supp.3d 765.

¹¹ *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Butterworth v. Smith*, 494 U.S. 624, 636-37 (1990) (J. Scalia, concurring).

¹² *Henry v. AG*, 45 F.4th 1272, 1282 (11th Cir. 2022)(citing *Butterworth*, 494 U.S. at 634).

¹³ 52 U. S.C. § 30109(a)(12)(A); 11 C.F.R 111.21(a).

§ 36-25-1.1
**Legislative Restriction on
Executive Lobbying**

No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency.

§ 36-25-13(g)
Personal Case Ban

No public official or employee who personally regulated, audited, or investigated a private entity may accept employment with that entity for two years.

§ 36-25-13(f)

SCOPE: Most narrow/specific
WHO: Former public servants
WHAT: Legal representation/assistance
WHERE: State matters personally handled
DURATION: Two years post-employment
TRIGGER: Personal participation required
EXCEPTION: Self-representation/state work

SCOPE: Regulated entities only
WHO: Public Servants who regulated private entity
WHAT: Employment with regulated entity
WHERE: Specific businesses overseen
DURATION: Two years post-employment
TRIGGER: Personal participation required

§ 36-25-13(b)

No elected official may lobby former agency for two years post-term

SCOPE: Former agency only
WHO: Former elected officials
WHAT: Paid lobbying/representation
WHERE: Specific former agency/body
DURATION: 2 years post-term** even if left office early
EXCEPTION: Judiciary members in legal capacity

§ 36-25-23(a)

No elected official may lobby any government body during term

SCOPE: All government bodies
WHO: Current elected officials
WHAT: Paid lobbying/representation
WHERE: Any government entity/branch
DURATION: During entire elected term
EXCEPTION: Judiciary members in legal capacity

§ 36-25-13(a)(c)

No public official or employee shall influence grants or contracts, or represent clients before former agency for two years

SCOPE: Basic revolving door ban
WHO: All public servants
WHAT: Lobbying/representation
WHERE: Former government body
DURATION: Two years post-service

Public Servant Revolving Door Restrictions

Multiple provisions in the Ethics Code risk infringing on Public Servants' own right to petition the government. The broad scope of § 36-25-1.1 creates a sweeping ban on legislators representing any "person, firm, corporation, or other business entity" before executive departments and agencies. Significantly, this prohibition does not only apply to representing outside interests; it also prevents legislators from appearing before executive agencies on behalf of businesses they personally own or operate. This means legislators cannot advocate before

these agencies even when their own business interests are at stake. § 36-25-13(b)'s two-year ban prevents former elected officials from lobbying their previous agencies, regardless of the legitimacy or public benefit of their advocacy. § 36-25-23(a) imposes a blanket prohibition on elected officials representing any clients before any government body during their term, without distinguishing between corrupt influence and valuable representation. § 36-25-13(f)'s restriction broadly prevents Public Servants from working with previously regulated entities, even when their expertise could promote informed decision-making. Rather than targeting specific corrupt practices or implementing more limited duration periods, these provisions create expansive temporal and scope-based restrictions that capture a substantial amount of legitimate petitioning activity.

The state must establish a compelling justification for these sweeping proscriptions on Public Servants' ability to engage in petitioning activity on behalf of themselves or their businesses and none is apparent. Furthermore, the provisions are not narrowly tailored to address specific risks of improper influence or quid pro quo since there is no intent or purpose requirement. An outright ban on representing one's own business interests before the government imposes too great a burden on the right to petition, relative to any state interest in preventing corruption.

c. Mandatory Lobbyist Training (§ 36-25-4.2)

§ 36-25-4.2 institutes a mandatory ethics training program for Lobbyists. Those who fail to attend within ninety days of registering are completely barred from lobbying. While the state has a legitimate interest in ensuring Lobbyists understand the ethics laws that govern them, prohibiting all petitioning activity is a disproportionate penalty for non-attendance at a training

program. As currently structured, this provision imposes too harsh a burden on the right to petition.

B. First and Fourteenth Amendments: Overbreadth

1. Rule of Law

a. Federal Law

The First Amendment overbreadth doctrine invalidates laws that restrict substantially more protected conduct than necessary to achieve their legitimate purposes. A statute is overbroad, in violation of the First Amendment, when a “substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”¹⁴ The critical inquiry focuses on whether the law reaches “a substantial amount of constitutionally protected conduct” beyond what is necessary to serve its legitimate governmental interests.¹⁵

The Supreme Court’s analysis in *United States v. Sun-Diamond Growers* provides crucial guidance for evaluating ethics restrictions that might impinge on constitutionally protected activities.¹⁶ There, the Court examined a federal gratuity statute prohibiting gifts to public officials “for or because of any official act.” The Court rejected the government’s argument that the statute could be violated merely by providing gifts because of an official’s position or to build goodwill. Instead, the Court held that prosecutors must prove a direct link between the gift and a specific official act that the gift was intended to reward or influence.

¹⁴ *United States v. Stevens*, 559 U.S. 460 (2010).

¹⁵ *City of Houston v. Hill*, 482 U.S. 451 (1987).

¹⁶ 526 U.S. 398 (1999).

The *Sun-Diamond* Court's reasoning emphasized several principles particularly relevant to evaluating ethics restrictions. First, when statutory language refers to "official acts," it naturally suggests a connection to specific governmental actions rather than mere official status. Second, broader interpretations that would criminalize innocent gift-giving must be rejected unless clearly required by statutory text. Third, when legislatures intend to create broad prophylactic gift bans, they typically do so through explicit and precise statutory language. Finally, narrower interpretations of ethics restrictions better harmonize with the broader framework of targeted regulations governing official conduct.

These principles from *Sun-Diamond* carry special force when examining state ethics laws that might restrict constitutionally protected conduct. While states have a legitimate interest in preventing corruption, restrictions that broadly restrict interactions based solely on the participants' status rather than any connection to the possibility of improper influence raise serious constitutional concerns. The overbreadth doctrine requires careful scrutiny of such restrictions to ensure they do not unnecessarily burden First Amendment rights of association, petition, and commercial speech in pursuit of their anti-corruption goals.

The *Sun-Diamond* framework thus establishes that ethics restrictions must be narrowly focused on preventing actual corruption rather than broadly restricting interactions between entire categories of citizens based solely on their status or relationships. Absent clear statutory language explicitly creating broader prophylactic rules, such restrictions are limited to those that require a meaningful connection between prohibited conduct and specific official acts that might be improperly influenced.

Thus, even gift bans, which appropriately do not require a purpose to influence, need to be narrowly focused on appropriate prohibited sources, such as those whose interests would be affected, giving gifts to appropriately Prohibited Recipients, those Public Servants, either Public Officials or Public Employees, whose performance of official duties could substantially affect their interest.

b. Alabama Law

Although the overbreadth doctrine is typically applied in the context of First Amendment freedoms, the Alabama Supreme Court has recognized a broader application of the doctrine to due process challenges that do not involve First Amendment rights.¹⁷ Under Alabama law, a statute is unconstitutionally overbroad if it “casts a net so wide” that it “sweeps unnecessarily broadly and thereby invades the area of protected freedoms.”¹⁸ The key inquiry is whether the statute’s language is so expansive that it restricts a substantial amount of innocent conduct unrelated to the statute’s legitimate purpose.

The Alabama Court of Appeals’ decision in *Connor v. City of Birmingham* provides a helpful illustration of an unconstitutionally overbroad law.¹⁹ In *Connor*, the court struck down a city ordinance prohibiting two unmarried individuals of the opposite sex from sharing a hotel room. The court reasoned that the ordinance’s sweeping language encompassed many lawful and innocent situations, such as:

¹⁷ *Scott & Scott, Inc. v. City of Mountain Brook*, 844 So. 2d 577 (Ala. 2002).

¹⁸ *Wallen v. City of Mobile*, 270 So. 3d 1190 (Ala. Crim. App. 2018) (citing *Ross Neely Express, Inc. v. Ala. Dep’t of Env’t Mgmt.*, 437 So. 2d 82, 85 (Ala. 1983)).

¹⁹ *Connor v. City of Birmingham*, 60 So. 2d 474 (Ala. Ct. App.), cert. denied, 60 So. 2d 479 (Ala. 1952).

- (1) a parent visiting their adult child of the opposite sex in a hotel room;
- (2) a brother visiting his sister in her hotel room;
- (3) a salesperson showcasing their merchandise to a potential buyer of the opposite sex in a hotel sample room.

By indiscriminately criminalizing such a broad range of conduct without regard to the innocence of the parties' purpose, the ordinance violated due process. The court emphasized that "illegality cannot be made to attach to such lawful conduct by arbitrary fiat" and that a statute's "illegal aspects [must not] far outweigh the valid."

2. Application to the Ethics Code

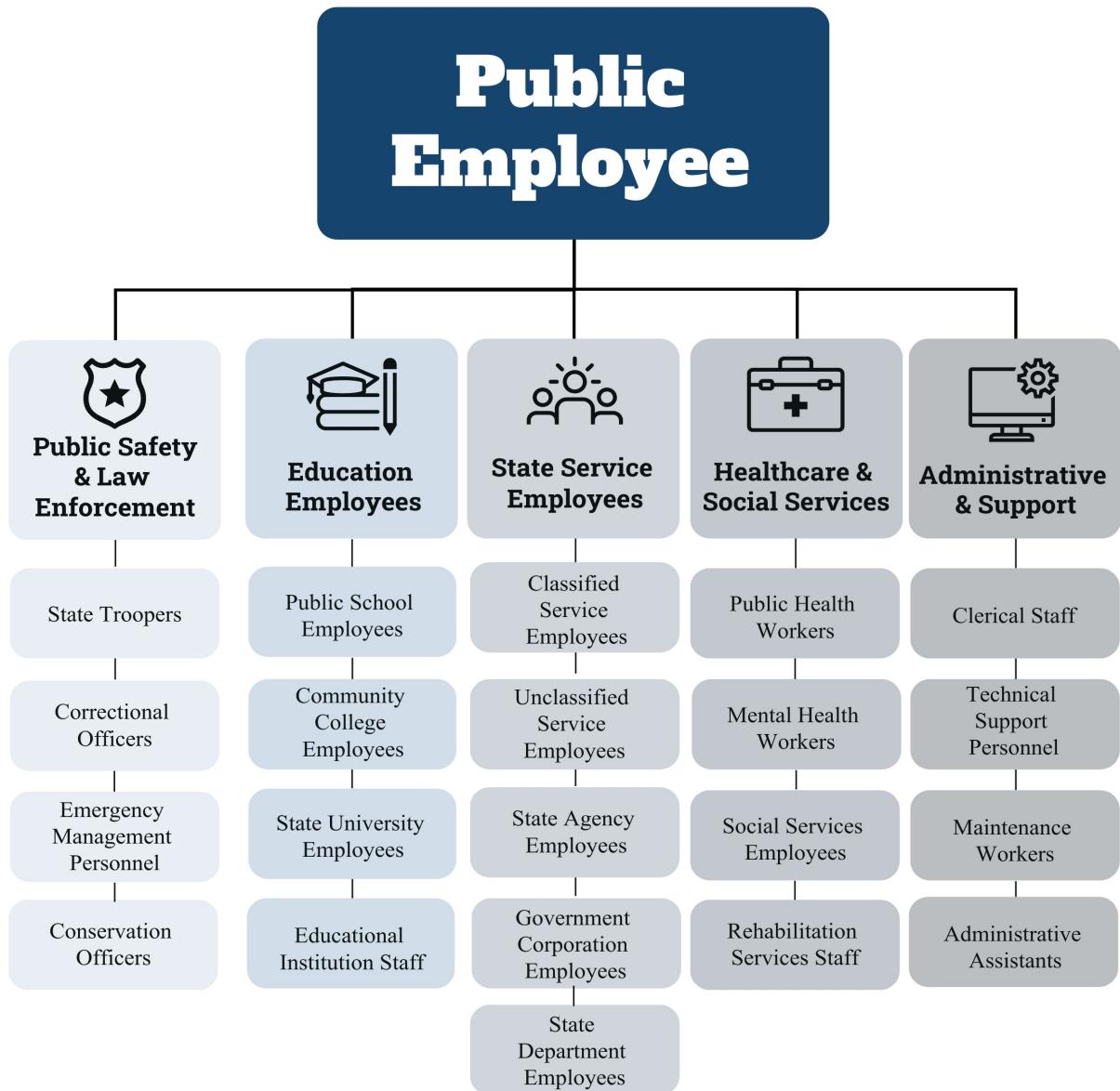
a. Definition of Public Employee (§ 36-25-1(26))

The definition of Public Employee includes any person employed by any unit of government, excepting only health care employees, and is overbroad by including many government employees with virtually no discretionary governmental authority, for example, Public School Teachers, Public Safety, Law Enforcement and Correctional Officers, and Administrative and Support Staff. The Legislature should carefully consider whether there are other categories of Public Employees who should be exempted.

i. Public School Teachers and Administrative Staff

Public school teachers are Public Employees even though they have virtually no discretionary governmental authority. They must follow state-mandated curriculum and cannot modify academic standards, control procurement, or influence regulatory policy. Administrative staff in educational institutions face similar restrictions despite exercising purely ministerial functions. These employees process standard paperwork according to fixed procedures and have

no independent decision-making authority. They cannot modify policies, allocate resources, or



b. Definition of Public Official (§ 36-25-1(27))

The definition of Public Officials is abridges First Amendment freedoms and is overbroad by encompassing political party chairs and members of the judiciary.

i. Chairs and Vice-Chairs of State Political Parties

§ 36-25-1(27) explicitly defines “Public Official” to include “the chairs and vice-chairs or the equivalent offices of each state political party.” This classification subjects these party officials to the same ethics restrictions as elected and appointed government officials, despite their lack of any governmental authority. Unlike the Secretary of Agriculture in *Sun-Diamond*, party chairs cannot make regulatory decisions, award contracts, or exercise any other government authority.

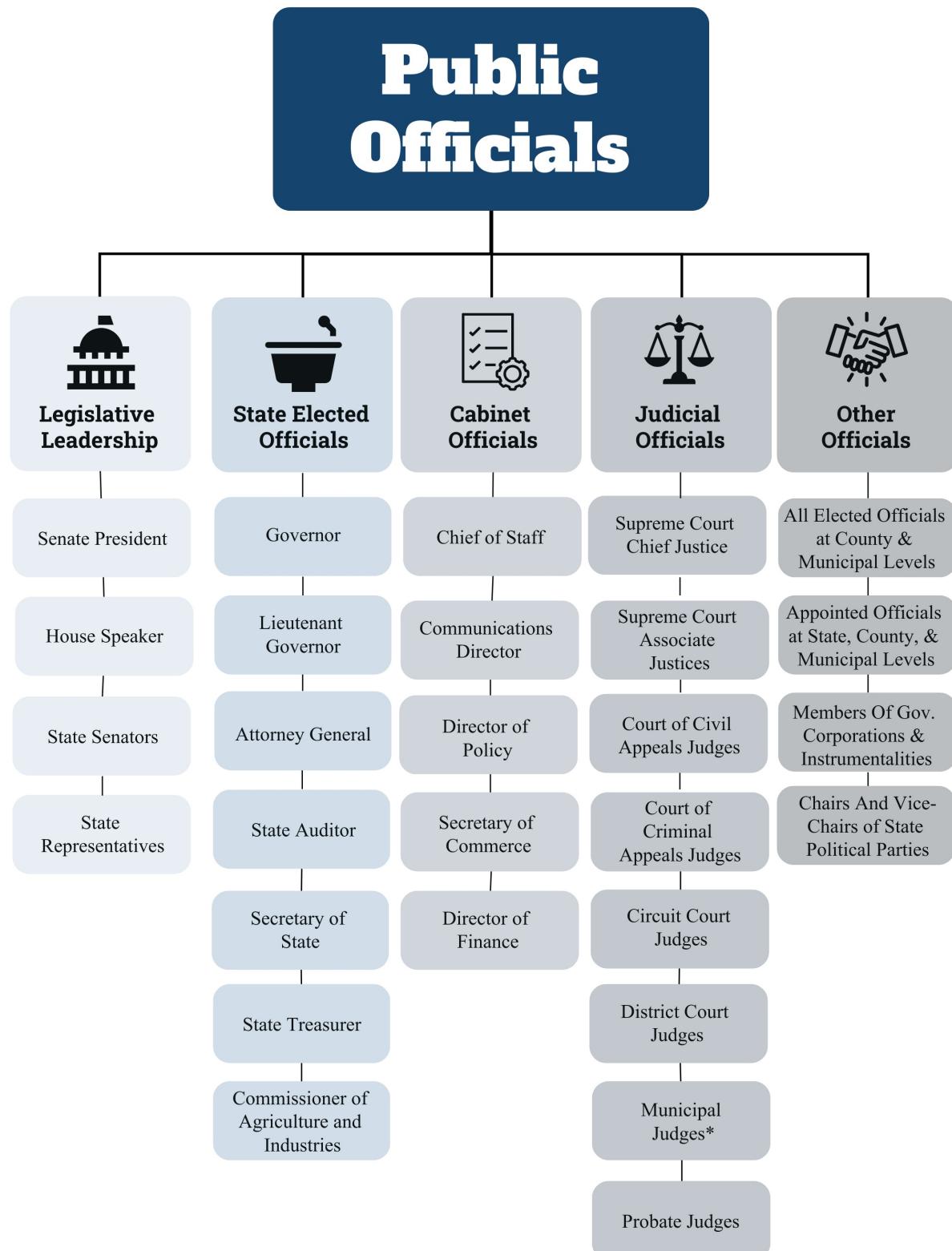
The Ethics Code’s application to party leadership raises constitutional concerns by infringing on protected political association rights. By treating party chairs as Public Officials, the Ethics Code imposes governmental restrictions on private political organization operations without a connection to preventing corruption of official acts. This broad application exceeds the narrowly tailored approach required for restrictions on political activity. The Ethics Code’s application to these individuals extends far beyond *Sun-Diamond*’s framework by restricting gifts without any possible connection to official acts.

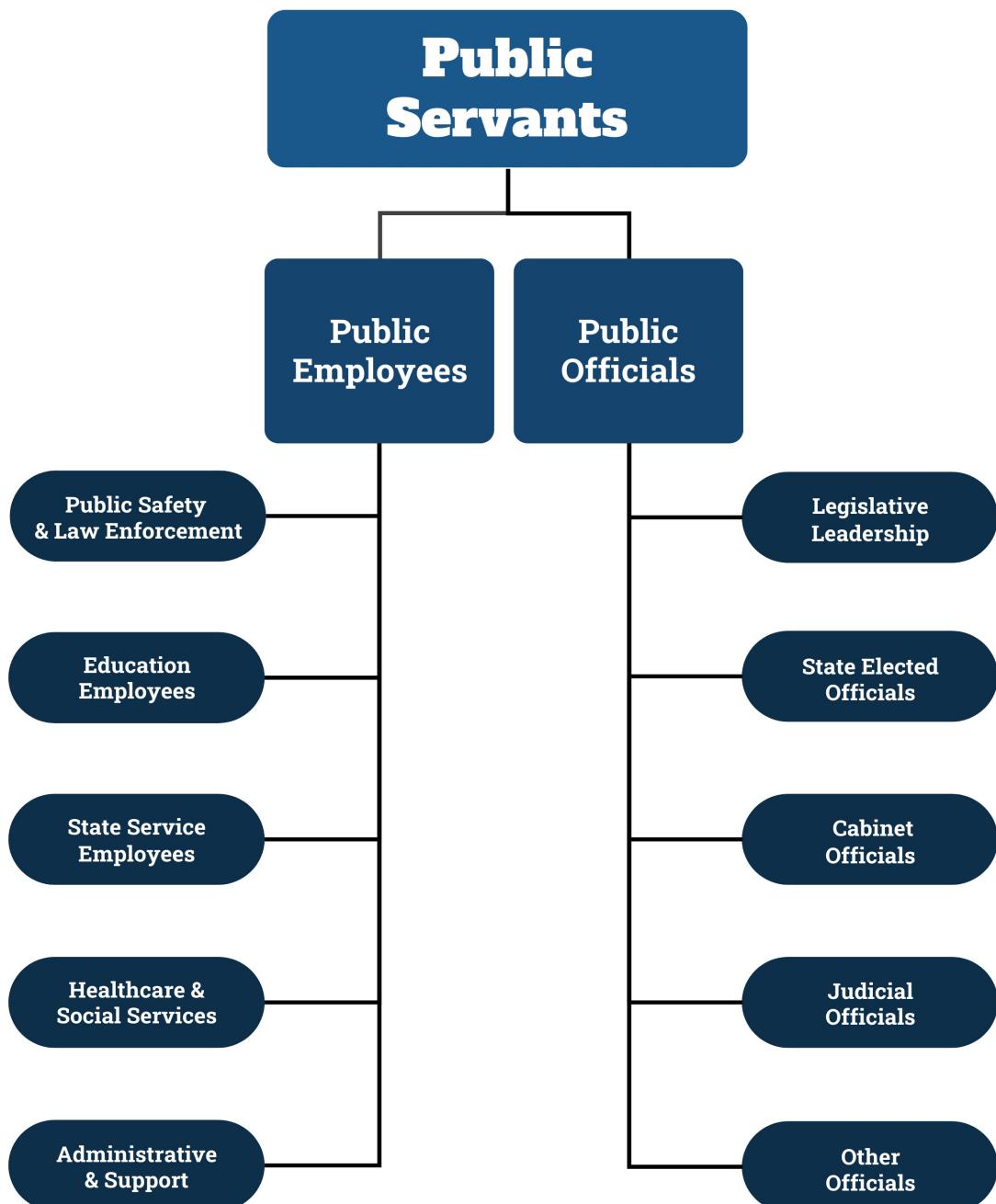
ii. Judicial Officers

§ 36-25-1(27) encompasses Judicial Officers since they are “elected to public office,” and this raises significant overbreadth concerns due to the unique nature of judicial authority and existing safeguards governing judicial conduct. While judges do exercise government power, they do so in a fundamentally different manner that inherently limits opportunities for corruption. The judicial role is distinguished by judicial ethical requirements for absolute impartiality and independence in decision-making, strict limitations on ex parte communications,

and decisions based solely on law and evidence presented in formal proceedings. This stands in stark contrast to legislators who regularly meet with constituents and interest groups, or executive officials who routinely engage with regulated industries. Judges operate within a highly structured system that already contains robust protections against corruption through formal court proceedings, public record requirements, appellate review, and mandatory recusal rules.

By applying the same restrictions in the Ethics Code to judges as all other Public Officials, subjects them to two Ethics Code and imposes unnecessary constraints on legitimate judicial activities without addressing any demonstrated risk of corruption. This one-size-fits-all approach, by treating judicial officers as Public Officials, ignores the distinct ethical frameworks governing judicial conduct and the inherent safeguards built into the judicial decision-making process.





**c. Prohibition on Offers and Solicitations of Things of Value (“Lobbyist Gifts”)
(§ 36-25-5.1)**

§ 36-25-5.1 creates a restriction on Lobbyist and others associated with Lobbyist from giving a Thing of Value to Public Servants or their Family Members. On the giving side, the Ethics Code restricts not only traditional Lobbyists²⁰ who advocate before government officials, but also their subordinates who may have no role in lobbying activities, and Principals²¹ who may become subject to the Ethics Code’s restrictions through routine business relationships (“**Prohibited Source(s)**”). The receiving side restrictions cast an even wider net, encompassing all Public Officials²² and Public Employees²³ (“**Public Servant**”), regardless of their actual authority or ability to influence government action, and extending beyond Households to Other Close Relatives,²⁴ a gift to whom is unlikely to influence a Public Servant (“**Prohibited Recipient(s)**”).

The Ethics Code’s broad reach is particularly problematic since both Prohibited Sources and Prohibited Recipients include many people whose interests would not be substantially affected by the performance of the official duties of many of the Public Officials or Public Employees effected. While the Ethics Code includes narrow exceptions to a Thing of Value, § 36-25-1(34), for De Minimis²⁵ items, § 36-25-1(11), these limited carve-outs do little to address the

²⁰ § 36-25-1(21).

²¹ § 36-25-1(24).

²² § 36-25-1(27).

²³ § 36-25-1(26).

²⁴ § 36-25-1(14), (15).

²⁵ § 36-25-1(11).

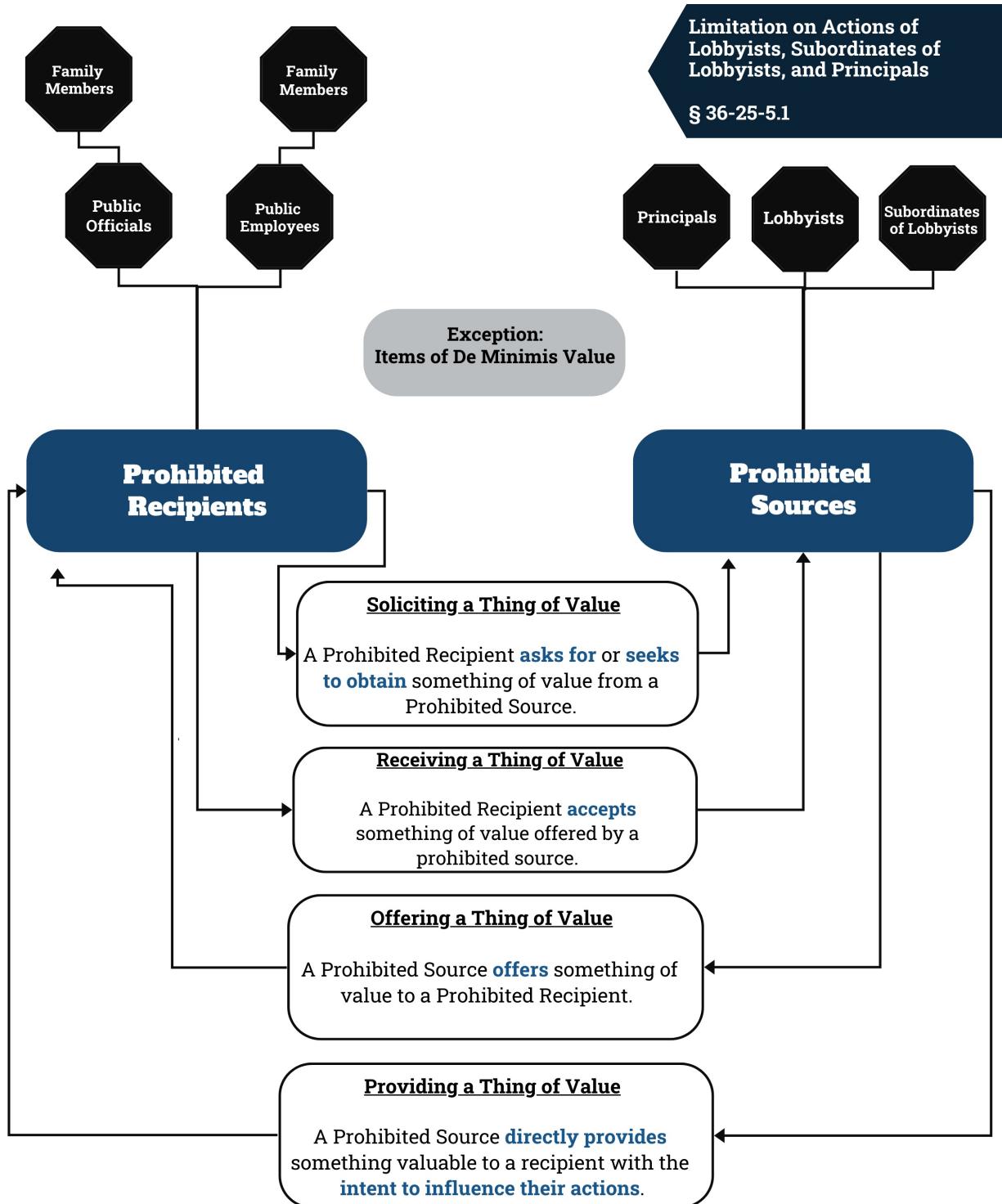
fundamental overbreadth problems created by the status-based approach of restricting gift between Lobbyist and many Public Servants who have no ability to exercise any government power to cause the official action, here adoption or defeat of legislation, executive approval of legislation, adoption or defeat of regulations, that the Lobbyist seeks to influence.

Under the overbreadth doctrine, § 36-25-5.1 appears constitutionally deficient because it: (1) prohibits a substantial amount of innocent conduct; (2) creates a chilling effect on protected First Amendment activities; (3) lacks sufficient connection to the government's anti-corruption interest; and (4) is not narrowly tailored when less restrictive alternatives are available.

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i. Overbroad Scope of Prohibited Recipients Affects an Extensive Network of Innocent Parties

The Ethics Code's restrictions on Prohibited Recipients demonstrate even more severe overbreadth problems by creating an intricate web of prohibited parties based solely on their status or relationship to government employment. Unlike *Sun-Diamond*'s focus on gifts linked to specific official acts, § 36-25-5.1 restricts all transfers of value to Prohibited Recipients regardless of the Prohibited Recipient's actual authority or ability to influence government action desired by a Lobbyist. This blanket prohibition extends far beyond any legitimate anti-corruption purpose by treating all government positions identically despite vast differences in their official decision-making power, and even creating extensive restrictions on Prohibited Recipients who have no connection to government service at all.

(a) Family Members

The Ethic Code's application to Family Members presents severe overbreadth problems that parallel both *Sun-Diamond*'s concerns and the Alabama courts' rejection of laws that penalize substantial innocent conduct. Like the hotel ordinance struck down in *Connor*, § 36-25-5.1's sweeping language encompasses numerous innocent parties that have no connection to its anti-corruption purpose.

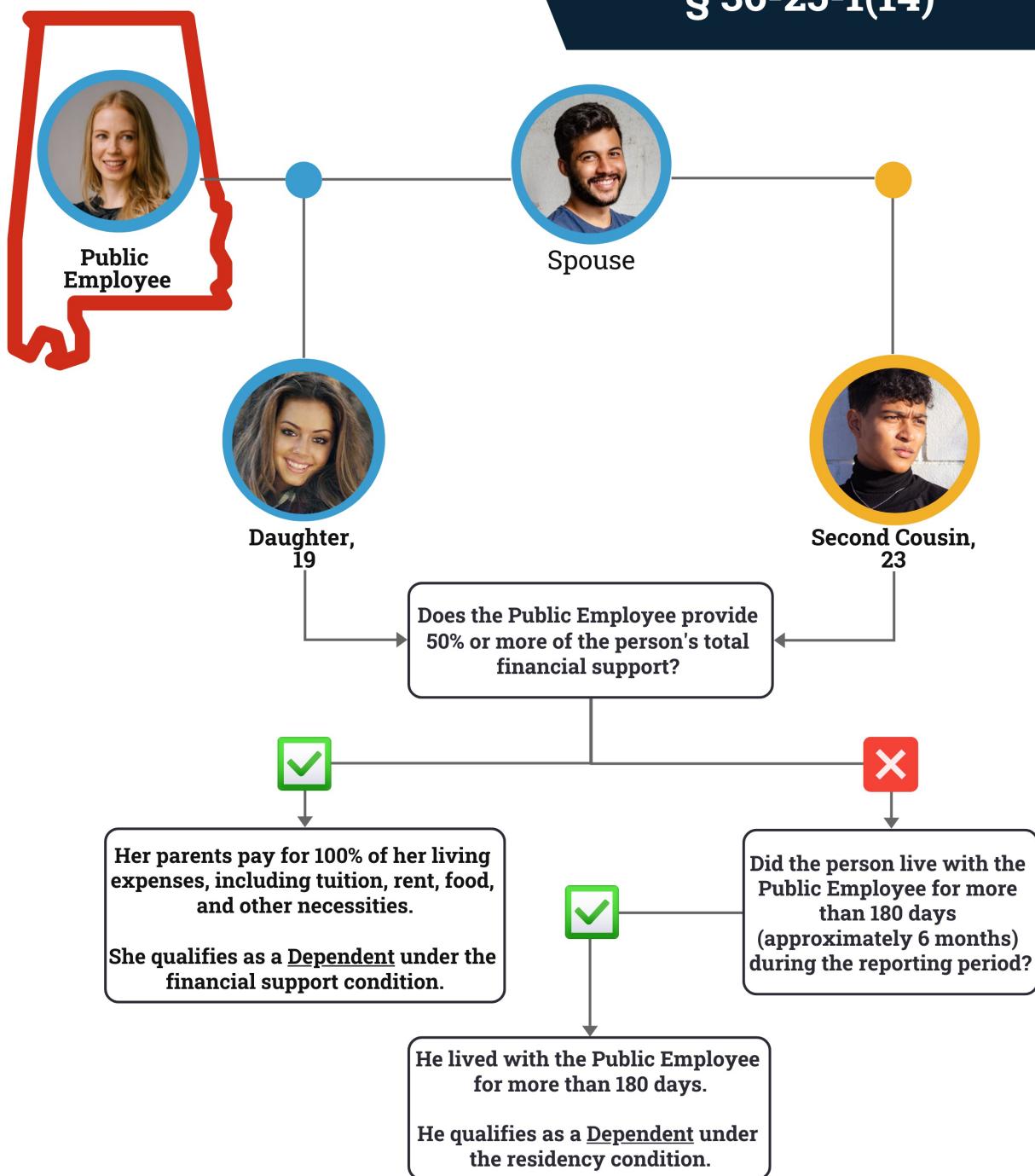
The Ethics Code's restriction on Family Members of Public Officials extends to spouses, dependents, adult children and their spouses, parents, spouse's parents, and siblings and their

spouses, § 36-25-1(15).²⁶ While it would be appropriate to include Households in the gift ban, including Other Close Relatives²⁷ affects countless innocent persons based solely on family relationships but no real likelihood that their receipt of a gift from a Lobbyist would influence the official actions sought by the Lobbyist from the related Public Servant.

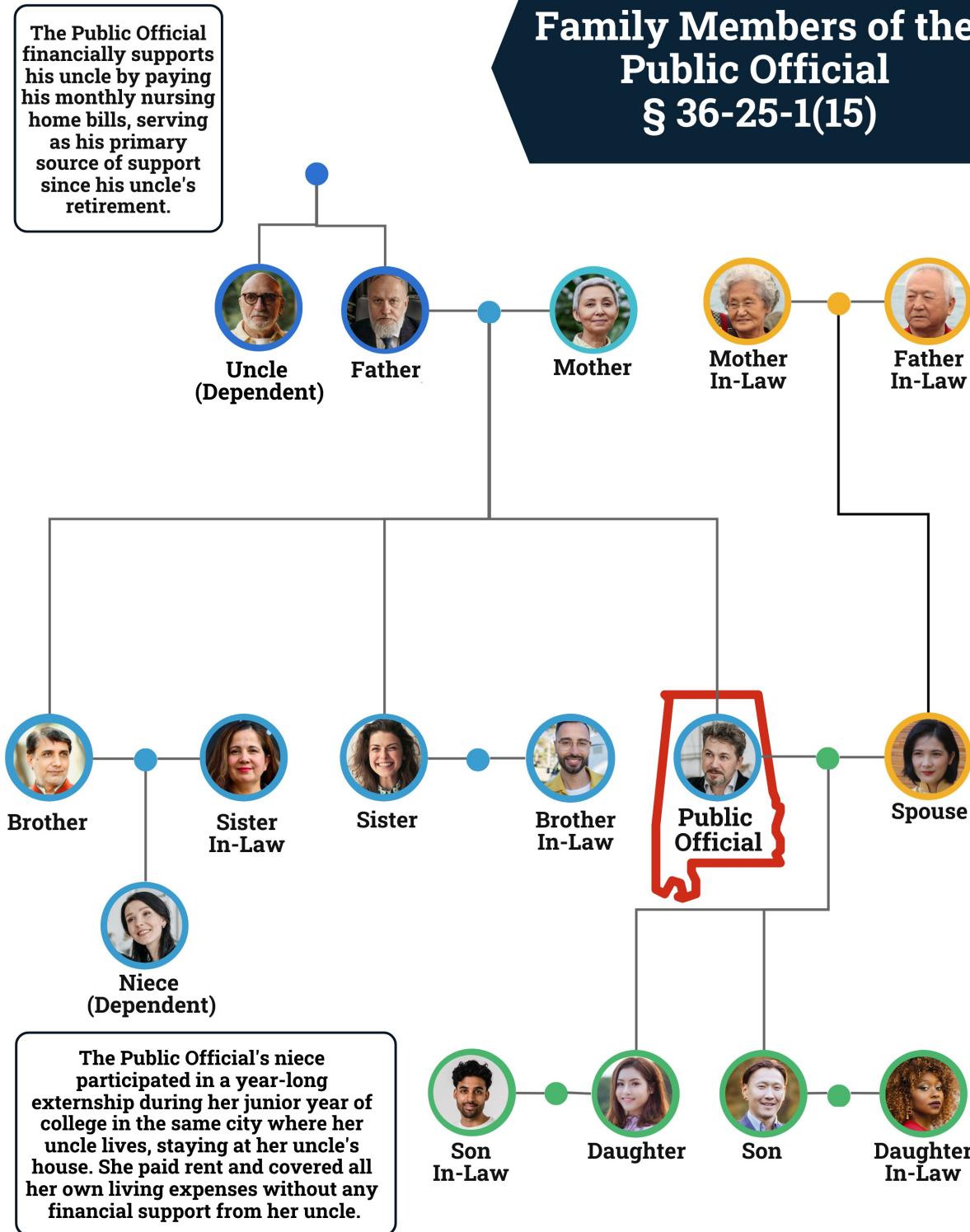
²⁶ Family Members of Public Employees is appropriately limited to “the spouse or a dependent of the public employee,” § 36-25-1(14), as is Household. § 36-25-1(17) (“**Household**”).

²⁷ Here, adult children and their spouses, parents, spouse’s parents, and siblings and their spouses.

Family Members of the Public Employee § 36-25-1(14)



Family Members of the Public Official § 36-25-1(15)



(b) Chairs and Vice-Chairs of State Political Parties

The application of § 36-25-5.1 to political party chair by § 36-25-1(27) explicitly including political party chairs as a “Public Official” demonstrates the absurdity of treating them that way. Political party chairs do not occupy an official public position or do not have the authority to exercise any governmental power to here effect official action, i.e., the adoption or defeat of legislation, executive approval of legislation, adoption or defeat of regulations, that a Lobbyist seeks to influence. Party chairs, while influential in political processes, possess no actual governmental authority to exercise state power or effectuate official action

The application of the Lobbyist Gift restriction to party leadership raises constitutional concerns by infringing on protected political association rights and is overbroad.

(c) Judicial Officers

The application of § 36-25-5.1 to judicial officers also reveals why they should not be included in Public Officials to whom § 36-25-5.1 applies. Unlike some of the other Public Officials and Public Employees covered by the Lobby Gift restriction, judges do not have the legislative power to adoption or defeat legislation, the executive power to approve to legislation, or the executive power to adopt or defeat regulations, that a Lobbyist seeks to influence.

There is no possible legal or constitutional justification, therefor, to prohibit gifts from Lobbyists to Judicial Officers.

(d) Legislative Officials

The temporal limitations on legislative power demonstrate significant overbreadth in § 36-25-5.1's restrictions. Alabama's legislature operates part-time, with regular sessions lasting approximately four months per year. During the remaining nine months, legislators cannot vote on legislation, hold official committee meetings, or take any formal legislative action. Yet the Ethics Code applies identical restrictions year-round, prohibiting normal business and social interactions even when legislators have no ability to take official action. For example, a state senator who practices law should be concerned about accepting standard legal referrals from a firm that employs a Lobbyist, even during the extensive period when the legislature is not in session and no official action is possible. Similarly, several states prohibit campaign contribution to Legislator during the period that the Legislature is in session, but not otherwise.²⁸

²⁸ Indiana Code § 3-9-2-12.

Changes in Prohibited Recipients Across Sections

Ethics Code Section	Public Officials & Employees	Family Members Included	Household Members Included	Businesses Associated	Former Officials & Employees
§ 36-25-5 <i>Use of Official Position for Personal Gain</i>	Prohibited	Prohibited		Prohibited	
§ 36-25-1(8) <i>Conflict of Interest</i>	Prohibited	Prohibited		Prohibited	
§ 36-25-5.1 <i>Limitation on Actions of Lobbyists, Subordinates of Lobbyists, and Principals</i>	Prohibited	Prohibited			
§ 36-25-7 <i>Offering, Soliciting, or Receiving Anything for Purpose of Influencing Official Action</i>	Prohibited	Prohibited	Prohibited		
§ 36-25-8 <i>Use or Disclosure of Confidential Information for Private Financial Gain</i>	Prohibited	Prohibited			Prohibited

ii. Overbroad Scope of Prohibited Sources Restricts Legitimate Business and Social Activities

§ 36-25-5.1 establishes an expansive category of Prohibited Sources, encompassing not only traditional Lobbyists but also all subordinates and Principals, § 36-25-5.1(24), which is any person or business who employs or retains a Lobbyist, many of which with merely tangential ties to lobbying activity, and inadvertently captures individuals who occasionally interact with government officials, extends to all employees working under anyone classified as a Lobbyist regardless of their actual duties, and affects entire businesses that hire Lobbyists.

(a) Lobbyists and Subordinates of Lobbyist

The Ethics Code's application to Lobbyists, professional advocates who are paid to interact with Public Servants, is appropriate, § 36-25-5.1 also applies to all subordinates of Lobbyist. The definition of Lobbyist § 36-25-1(21)(a)(4), however, appropriately already includes any employee or agent of a Lobbyist who regularly communicates with Legislators about legislation, but § 36-25-5.1 unreasonably goes way beyond. This potentially has sever consequences since some lawyers, for instance, are paid for lobbying for a client, exposing all subordinate employees of the law firm to Lobbyist restrictions, even though many of these subordinates have no role in lobbying at all. This broad application to subordinates of Lobbyists creates exactly the type of overbreadth rejected in *Sun-Diamond* by restricting legitimate activities of subordinates based solely on employment relationships rather than any connection with lobbying.

(b) Principals

Furthermore, § 36-25-5.1 creates unconstitutional overbreadth through its application to Principals, defined in § 36-25-1(24) as “a person or business which employs, hires, or otherwise retains a lobbyist.” The Ethics Code’s treatment of Principals presents particularly severe overbreadth concerns because an entire can unknowingly acquire Principal status by any connection to Lobbyists, regardless of the nature or extent of the lobbying engaged in. This creates a strict liability regime far removed from *Sun-Diamond*’s emphasis on connecting restrictions to actual corruption risks.

The Ethics Code’s broad restrictions on Principals creates substantial economic inefficiencies. Businesses must either avoid relationships with Lobbyists, limiting their access to professional services, or implement extensive monitoring systems to track both their Principal status and relationships with Prohibited Sources, or refuse to provided services to broad categories of customers, Public Servants. By restricting business operations based solely on attenuated connections to lobbying activities, § 36-25-5.1 imposes substantial burdens on legitimate commerce without any reasonable relationship to preventing corruption.

iii. Narrow De Minimis Exception

The De Minimis exception, while well-intentioned, fails to cure constitutional defects inherent in the Ethics Code. The De Minimis exception allows for the acceptance of items of minimal value, specifically setting a threshold of \$32 per occasion and \$64 per calendar year.²⁹ This limit is so low that it is likely to encompass numerous commonplace interactions, chilling

²⁹ The Ethics Commission recently adjusted the De Minimis threshold from \$25.00 per occasion and \$50.00 annual aggregate to \$32.00 per occasion and \$64.00 annual aggregate, reflecting cost of living increases pursuant to § 36-25-1(11).

legitimate professional and social conduct. The Supreme Court's decision in *Randall v. Sorrell*, offers a compelling illustration of the problems arising from excessively low monetary thresholds.³⁰ In *Randall*, the Court struck down Vermont's Act 64, which imposed strict contribution limits, including a \$400 limit per candidate per election cycle for gubernatorial races. The Court found these limits to be unconstitutionally low, emphasizing that the risk of corruption posed by such small contributions was minimal and did not justify the substantial burden on political speech and association.

Parallels can be drawn between Act 64's contribution limits and the Ethics Code's "De Minimis" exception. The Supreme Court in *Randall* found that Act 64's limits threatened basic democratic functions, preventing legitimate campaign activities and voter outreach, with particular burden falling on new or challenger candidates. Similarly, the Ethics Code's \$32 threshold threatens to criminalize ordinary, harmless interactions fundamental to professional and social relationships. The chilling effect extends beyond just the direct participants, as organizations and individuals may avoid even permissible interactions out of an abundance of caution, thereby hampering normal business and civic relationships. This overcautious approach particularly impacts new entrants to lobbying or public service, who may lack the institutional knowledge to navigate.

Both regulations demonstrate how overly restrictive monetary limits can sweep too broadly, capturing innocent conduct while discouraging legitimate participation in civic processes. They create unnecessary administrative burdens and potentially harm the very public interests they

³⁰ 548 U.S. 230 (2006).

aim to protect, ultimately missing the mark in targeting actual corruption risks.

iv. Lack of Exception from the Lobbyist Gift Ban for Gifts Unlikely to Influence an Appropriate Public Servant.

For gifts that fall within the Lobbyist Gift ban and are not excepted, some of them are still unlikely to influence a Public Servant. To ensure that the Lobbyist Gift ban is not overbroad, many states allow a fact based determination of whether a particular gift violated the Lobbyist Gift ban by a reasonable person or reasonable inference test. In order to ensure against overbreadth, the Ethics Commission be required to engage in a fact based inquiry on whether under one or both of these tests, undue influence was intended, expected or inferred from a specific gift.

d. Prohibition on Corruptly Influencing Official Action (§ 36-25-7) (“Corruptly Influence”)

§36-25-7 ban Prohibited Recipients from soliciting or receiving anything for the purpose of corruptly influence official action.” This provision requires proof that the conduct was undertaken “voluntarily, deliberately, and dishonestly” to achieve an unlawful result, creating a clear nexus between the prohibited conduct and actual corruption. Similarly, the Bribery Statute, § 13A-10-61(a)(1), prohibits a Public Servant from soliciting or accepting “anything of value” “with the intent that the Public Servant’s vote, opinion, judgment, exercises of discretion or other action in his official capacity will thereby be corruptly influenced.” These two provisions overlap, though one is in the Ethics Code and the other is a crime, by using similar terminology and concepts and need to be reconciled.

Furthermore, it is important to consider the “official action” requirement in §36-25-7 in light

of the U.S. Supreme Court’s decision in *McDonnell v. United States*.³¹ The *McDonnell* ruling significantly narrowed the scope of what constitutes an “official act” in public corruption cases.

In *McDonnell*, the Court overturned the bribery convictions of former Virginia Governor Bob McDonnell. Prosecutors had argued that McDonnell committed “official acts” by accepting gifts and loans from a businessman in exchange for actions like setting up meetings, making phone calls, and hosting events to promote the businessman’s product. However, the Supreme Court rejected this broad interpretation.

The Court held that “setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an ‘official act.’” Rather, an official act requires a concrete “decision or action” on a specific pending or may be brought matter involving the formal exercise of government power.³² Anything less, the Court reasoned, would criminalize routine political interactions between officials and constituents.

However, the Corrupt Influence statute and the Ethics Code does not have a definition of “official action,” so one is required.³³

³¹ 136 S. Ct. 2355 (2016).

³² *Id.* at 2369-72.

³³ The reach of the Corrupt Influence Statute is also appropriately limited to the Household, so, in that respect, it is not overbroad.

Comparison of Bribery Statute
(§ 13A-10-61) &
Ethics Code
(§ 36-25-7)

Element	Bribery Statute (§ 13A-10-61)	Ethics Code (§ 36-25-7)
Scope of Prohibited Items	Limited to "things of value."	Applies to anything, regardless of whether it is a "thing of value."
Prohibited Actions	Focuses on offering, conferring, or agreeing to confer items.	Covers offering, giving, soliciting, or receiving items.
Intent Requirement	Requires intent to corruptly influence specific actions (vote, opinion, etc.).	Requires corrupt intent but does not specify particular actions like votes/opinions.
Recipient/Source Coverage	Applies only to public servants.	Includes public officials/employees, family members, and household members.
Additional Money Restriction	Not addressed.	Prohibits soliciting/receiving extra money beyond official salary for advice/assistance on government matters (§ 36-25-7(d)).
Definition of Corruption	Not explicitly defined in this statute.	Explicitly defines "corruptly" as acting voluntarily, deliberately, and dishonestly (§ 36-25-7(e)).
Penalty	<ol style="list-style-type: none">1. Classified as a felony offense under Alabama law.2. Requires proof beyond a reasonable doubt that the defendant acted with corrupt intent.	<ol style="list-style-type: none">1. Violations may result in misdemeanor or felony charges depending on circumstances (§ 36-25-27).2. Includes administrative penalties for additional money solicitation (§ 36-25-7(d)).3. Broader enforcement mechanisms through the Alabama Ethics Commission.

C. 14th Amendment Equal Protection: Selective Enforcement

1. Rule of Law

The selective enforcement doctrine provides protection against discriminatory application of laws and regulations. Under established precedent from the Eleventh Circuit, when a commission exercises its discretion in an arbitrary, capricious, or discriminatory manner, affected parties may challenge such actions as violations of equal protection.³⁴

Alabama state courts have refined this doctrine through several landmark decisions. *Swann v. Graysville* established the fundamental principle that governing bodies must apply laws uniformly to similarly situated individuals.³⁵ While recognizing prosecutorial discretion's necessity, *Simonetti v. Birmingham* clarified that selective enforcement becomes constitutionally problematic when targeting specific individuals without general enforcement intent.³⁶

The Alabama Court of Criminal Appeals established a three-part test for proving discriminatory enforcement:

- (1) selectivity in enforcement,
- (2) intentional selectivity, and
- (3) selectivity based on an invidious or unjustifiable standard.³⁷

However, merely demonstrating inconsistent enforcement or conscious selectivity is insufficient

³⁴ *Greenbriar, Ltd. v. Alabaster*, 881 F.2d 1570 (11th Cir. 1989).

³⁵ 367 So. 2d 952 (Ala. 1979).

³⁶ 55 Ala. App. 163, 314 So. 2d 83 (1975).

³⁷ *Starley v. Birmingham*, 377 So. 2d 1131 (Ala. Crim. App. 1979).

to establish a constitutional violation.³⁸

2. Application to the Ethics Code

a. Core Enforcement Provisions (§ 36-25-27)

The statute governing penalties and enforcement contains several provisions that raise selective enforcement concerns:

i. Discretionary Resolution Authority

The statute grants broad discretion in choosing between administrative resolution and criminal prosecution without establishing clear decision-making criteria. This discretionary authority could potentially violate the *Greenbriar* standard if exercised arbitrarily.

ii. Administrative Resolution Process

The requirement for unanimous commission vote and subsequent prosecutorial approval creates multiple discretionary decision points without standardized criteria, potentially enabling inconsistent treatment of similarly situated cases.

iii. Preclusion Effect

The provision that administrative resolution precludes criminal prosecution creates significant consequences for discretionary decisions, magnifying the impact of potential selective enforcement.

b. Confidentiality Requirements (§ 36-25-4, 4.1)

The statutory confidentiality framework presents substantial barriers to detecting and

³⁸ *De Shazo v. Huntsville*, 416 So. 2d 1100 (Ala. Crim. App. 1982).

challenging selective enforcement:

i. Limited Public Access

The prohibition against public disclosure of dismissed complaints or those lacking probable cause creates an information asymmetry that would protect and encourage selective enforcement.

ii. Restricted Information Availability

The limitation to disposition-only disclosure in dismissed cases also protects and encourages selective enforcement and impedes evaluation of enforcement patterns under *Swann*'s similar treatment requirement.

iii. Structural Opacity

The statutory framework creates systemic barriers to public disclosure and transparency, protecting and encouraging selective enforcement.

c. Informal Opinion System (Rule 340-X-1-.04)

The informal opinion framework creates additional selective enforcement vulnerabilities:

i. Confidentiality Requirements

Mandatory confidentiality of informal opinions protects and enables selective and disparate treatment of similarly situated parties.

ii. Limited Legal Effect

The lack of binding effect creates the risk of inconsistent treatment of similarly situated persons.

iii. Prospective-Only Application

The limitation to prospective effect creates potential for temporal inconsistencies in enforcement.

d. Pre-certification Process (Rule 340-X-1-.05)

The pre-certification system provides a contrasting model of transparency:

i. Public Disclosure

Required posting of applications and dispositions demonstrates feasibility of transparency measures, ensures transparency and protects against selective treatment.

ii. Standardized Procedures

Clear application requirements and timelines show potential for structured decision-making reducing the risk of arbitrary exercise of discretion and selective enforcement.

The current Ethics Code enforcement framework contains significant structural vulnerabilities to selective enforcement. While individual provisions may serve legitimate purposes, their cumulative effect creates barriers to consistent, non-discriminatory enforcement.

D. 14th Amendment Due Process: Void for Vagueness

1. Rule of Law

The void for vagueness doctrine, stemming from the Due Process Clause of the Fourteenth Amendment,³⁹ safeguards against laws that are unclear and ambiguous. Vague laws violate due process by failing to provide individuals with clear advanced notice of prohibited conduct, leading to arbitrary or discriminatory enforcement.

³⁹ The right to due process is also guaranteed to the citizens of Alabama under the Alabama Constitution. Ala. Const. art. I, §§ 6, 13.

A statute can be void for vagueness if it either:

- (1) fails to give ordinary people fair notice of the conduct it regulates or prohibits, or
- (2) is so standardless that it authorizes or encourages seriously discriminatory enforcement.⁴⁰

The doctrine encompasses two distinct, yet interrelated requirements. First, the “fair notice” requirement ensures that individuals can reasonably determine whether their contemplated conduct falls within the scope of the statute’s restrictions. Second, laws must establish clear standards for enforcement to prevent arbitrary and discriminatory application by government officials. This requirement protects against the risk that vague laws might delegate basic policy matters to law enforcement, judges, and juries for resolution on an ad hoc and subjective basis.

The U.S. Supreme Court’s application of the vagueness doctrine in *Connally v. Gen. Constr. Co.* exemplifies these principles.⁴¹ There, the Court examined an Oklahoma statute requiring contractors to pay the “current rate of wages” in the relevant “locality.” The Court found both terms constitutionally deficient. The phrase “current rate of wages” failed the fair notice requirement because it provided no fixed standard, leaving contractors unable to determine compliance with any reasonable certainty. The term could mean the minimum, maximum, or average wage paid in the area. Similarly, “locality” lacked defined geographical boundaries, creating uncertainty about the relevant area for wage determination. These ambiguities not only failed to provide fair notice ,but also enabled arbitrary enforcement by allowing officials to interpret the terms subjectively.

⁴⁰ *Federal Communications Commission v Fox Television Stations, Inc*, 567 US 239, 253 (2012) (citation omitted).

⁴¹ 269 U.S. 385 (1926).

Alabama courts have addressed vagueness challenges in several cases. In *Hughes v. State*, the defendant challenged § 13A-11-241(a), Alabama's animal cruelty statute, as unconstitutionally vague.⁴² The statute prohibits "inhumane treatment" or "gross physical abuse" of dogs. The Court rejected the vagueness challenge, finding that the statute provided sufficient context to give a person of ordinary intelligence notice of what conduct is prohibited. The Court reasoned that an average person would understand that intentionally withholding food, water, shelter, and medical treatment from a dog constitutes inhumane treatment or gross physical abuse. The court upheld the animal cruelty statute against a vagueness challenge, finding terms like "inhumane treatment" provided sufficient context for reasonable understanding.

The void for vagueness analysis of a statute requires the court to consider not only the vagueness of the main provision but also whether any statutory safe harbor, exception or exclusion is vague. If one is, the whole provision is vague and unconstitutional.⁴³

2. Application to the Ethics Code

a. "Lobby or Lobbying" (§ 36-25-1(20))

Lobbying activity is at the heart of the First Amendment's protection of speech and petition. Here, the phrase "in any manner influencing or attempting to influence" is vague, since it lacks specificity and could encompass a wide range of activities, making it difficult for individuals to determine if their actions constitute lobbying. The definition doesn't provide clear thresholds or metrics for what constitutes "influencing," which could lead to inconsistent interpretations and

⁴² 315 So. 3d 1139 (Ala. Crim. App. 2020).

⁴³ *Gentile v. State Bar of Nevada*, 501 U.S 1030 (1991).

potentially arbitrary enforcement, which is exacerbated by “in any manner.” This vagueness has a chilling effect on constitutionally protected speech. While the definition excludes “providing public testimony,” it doesn’t address other common activities that might or might not be considered lobbying. And the U.S. Supreme Court has already declared the phrase “for the purpose of influencing an election” to be vague and overbroad,⁴⁴ also in a First Amendment context, which is materially indistinguishable from here.

Similarly, the terms “promoting” and “opposing” legislation has the lack of clear boundaries and potential for arbitrary enforcement, so these terms also raise vagueness concerns. Courts considering the matter have already found that, when applying these terms to speech by the general public, as here, they are unconstitutionally vague.⁴⁵

b. “Lobbyist” (§ 36-25-1(21))

The phrase “regular and usual part of employment” in (21)(a)(2) lacks clear metrics, potentially leading to inconsistent interpretations. The term “regularly communicates” in (a)(4) is also somewhat vague without specific frequency thresholds. On the positive side, the definition includes a comprehensive list of exclusions in part (b), which helps clarify who is not considered a Lobbyist. This list of exclusions significantly reduces the potential for arbitrary enforcement and provides clearer guidance to individuals.

⁴⁴ *Buckley v. Valeo*, 424 U.S. 1, 77 (1976).

⁴⁵ *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-665 (5th Cir. 2006); *North Carolina Right to Life v. Leake*, 525 F.3d 274, 285-86 (4th Cir. 2008). However, the Court upheld these terms when used to regulate political party speech, not at issue here. *McConnell v. FEC*, 540 U.S. 93, 170 n. 64 (2003).

c. “Minor violation” (§ 36-25-1(22))

While part (a) provides a clear monetary threshold, part (b) introduces several vague elements that could lead to arbitrary enforcement and lack of fair notice. The phrase “as determined in the discretion of the commission and the Attorney General or the district attorney” grants broad discretion without clear guidelines, potentially enabling arbitrary enforcement. Several terms lack clear definitions or thresholds, such as “substantial or full restitution,” “great monetary gain,” “great monetary loss,” “high degree of sophistication or planning,” and “lengthy period of time.” The consideration of factors like sophistication, planning, and duration introduces subjective elements that could be interpreted inconsistently. The definition doesn’t specify how these factors should be weighed or what combination of factors would constitute a minor violation. These vague elements could make it difficult for Public Employees to understand what conduct would be considered a minor violation, potentially violating the fair notice requirement of due process. Additionally, the broad discretion and lack of clear standards could lead to arbitrary and discriminatory enforcement.

d. Economic Development Professionals (§ 36-25-1.3)

The phrase “above and beyond, or in addition to, the then current statutory or constitutional authorization” in subsection (a) could be seen as somewhat vague. It may not be immediately clear what constitutes going “above and beyond” current authorizations. The definition covers a wide range of entities, from businesses to nonprofit organizations to government bodies, which could potentially lead to inconsistent application. The term “good faith” in subsection (b) introduces a subjective element that could be open to interpretation and potentially lead to

inconsistent enforcement.

e. Use of Official Position (§ 36-25-5)

The phrase “materially affect his or her financial interest” in subsection (c) is not precisely defined, which could lead to differing interpretations. The phrase “ordinary course of business” in subsection (e) is not clearly defined, potentially leading to inconsistent application. The concept of a business being “uniquely affected” by legislation in subsection (f) may be open to interpretation.

f. Lobbyist Registration (§ 36-25-18)

The ambiguity surrounding what constitutes an “undertaking” that triggers registration could result in inadvertent non-compliance or strategic delays in registration. Similarly, the lack of guidance on the specificity required for “categories of subject matters” might lead to overly broad or excessively narrow reporting, potentially undermining the statute’s transparency goals. The undefined threshold for a “substantial change” necessitating supplemental registration introduces subjectivity into compliance, potentially allowing for manipulation or inconsistent enforcement.

E. 14th Amendment Due Process: Notice and Opportunity to be Heard

1. Rule of Law

Procedural due process requires the government to provide notice and an opportunity to be heard before depriving an individual of life, liberty, or property. As the Alabama Supreme Court stated, “procedural due process, protected by the Constitutions of the United States and this State, requires notice and an opportunity to be heard when one’s life, liberty, or property

interests are about to be affected by governmental action.”⁴⁶

The U.S. Supreme Court has clarified that a procedural due process violation “does not occur unless and until the State fails to provide due process” in connection with the deprivation.⁴⁷ In other words, the mere act of depriving someone of a protected interest does not violate due process if the state provides adequate procedural safeguards, such as notice and a chance to respond, in relation to the deprivation.

Alabama courts have applied these procedural due process principles in various contexts. For example, the Alabama Supreme Court found that a police officer was entitled to due process protections, including notice and an opportunity to be heard, before being suspended from his job.⁴⁸ The key inquiry is whether the state has provided sufficient procedural safeguards when taking actions that affect protected interests.

2. Application to the Ethics Code

Several provisions raise potential procedural due process concerns:

a. The Ethics Commission’s Subpoena Power (§ 36-25-4(h))

§ 36-25-4(h) grants the Ethics Commission broad authority to issue subpoenas compelling witness testimony and the production of evidence. While this subpoena power serves the important goal of facilitating ethics investigations, it also implicates witnesses’ liberty and property interests in being free from unreasonable demands on their time and resources.

⁴⁶ *Brown’s Ferry Waste Disposal Ctr., Inc. v. Trent*, 611 So. 2d 226 (Ala. 1992).

⁴⁷ *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

⁴⁸ *Carter v. City of Haleyville*, 669 So. 2d 812 (Ala. 1995).

The current provision appears to lack certain procedural safeguards that could lead to due process challenges. For instance, it does not expressly require the Commission to provide witnesses with adequate notice of the subpoena and the matters to be investigated. It also seems to omit any clear mechanism for witnesses to challenge a subpoena before complying with it, such as by asserting objections or moving to quash.

Without these types of procedural protections, the Commission's subpoena authority may be vulnerable to attack on due process grounds. A witness could argue that an unexpected subpoena deprived them of protected interests without proper notice or chance to respond.

b. The Ethics Commission's Complaint Procedures (§ 36-25-4(i))

The Ethics Code's complaint procedures also implicate due process principles, as an ethics complaint can impair a respondent's reputational and professional interests even before a final determination of wrongdoing. § 36-25-4(i) imposes a strict 180-day timeline for the Ethics Commission to determine probable cause after receiving a complaint, with limited provision for extension.

Due process issues could arise if this compressed timeline prevents the Commission from providing adequate notice to the respondent and opportunity to be heard during the probable cause phase. For example, if a respondent first learns of a complaint close to the 180-day deadline, they may lack sufficient chance to present their side before the Commission makes its determination.

F. Summary and Conclusions from Constitutional Analysis of the Ethics Code

While the Ethics Code serves important interests in promoting government integrity,

several key provisions are highly vulnerable to constitutional challenge on First Amendment, Equal Protection, and Due Process grounds. The identified deficiencies related to prohibiting speech and petition and to vagueness, overbreadth, and insufficient procedural safeguards which threaten to chill protected conduct, allow arbitrary enforcement, and deprive individuals of liberty and property without adequate process. Targeted amendments to allow speech and petition, clarify terms, narrow coverage, and strengthen notice and hearing rights could mitigate these infirmities and help protect the Ethics Code against constitutional invalidation.

1. Major Provisions of the Ethics Code that Have Significant Constitutional Deficiencies

a. Constitutional Deficiencies Related to the First Amendment

Petition and Speech Rights

i. The Ethics Commission Prohibition on Speech Related to the Complaint Procedure (§ 36-25-4(c))

The broad secrecy requirement in § 36-25-4(c) regarding ethics complaints and proceedings raises serious First Amendment concerns. While confidentiality protections for respondents are justified, the provision's prohibitions violate free speech in numerous ways by applying to Complainants and to Respondents without waiver authority and to others in specific circumstances when the prohibition is not justified.

ii. Restrictions on Public Officials' Right to Petition (§§ 36-25-1.1, 36-25-13(b), 36-25-13(f))

Several Ethics Code provisions improperly burden public officials' own right to petition the government. § 36-25-13(b)'s post-term ban on representing businesses before former government

bodies, § 36-25-23(a) prohibition against elected officials acting as a lobbyist or representing clients before any state or local government body, and § 36-25-13(f)'s restriction on assisting others on issues they dealt with as public servants all require a compelling state interest. An across-the-board ban on legislators petitioning for their own business interests is insufficiently tailored and imposes too great a burden on their First Amendment rights.

iii. Mandatory Lobbyist Training (§ 36-25-4.2)

The mandatory ethics training program under § 36-25-4.2 imposes an unconstitutional burden on petition rights. Those who fail to attend within 90 days of registering are completely barred from engaging in lobbying activities. While the state has a legitimate interest in ensuring Lobbyists understand the ethics laws that govern them, prohibiting all petitioning activity is a disproportionate penalty for non-attendance at a training program.

Overbreadth

iv. Definition of “Principal” (§ 36-25-1(24))

The definition of Principal applies to anyone who hires a Lobbyist and then the Lobbyist Gift ban prohibits gifts to all Public Servants. This is substantially overbroad. A Principal should be limited to persons or entities that hired a Lobbyist to lobby particular Public Servants that would exercise of law-making power that would effect the entity. The Lobbyist Gift ban would only restrict gifts by that entity to that particular Public Servant.

v. Definition of Public Employee (§ 36-25-1(26))

The definition of Public Employee includes any person employed by any unit of government, excepting only health care employees and is overbroad by including many government

employees with virtually no discretionary governmental authority, for example, Public School Teachers, Public Safety, Law Enforcement and Correctional Officers, and Administrative and Support Staff. These should be exempted as well as other categories of Public Employees who have virtually no discretionary governmental authority.

vi. Definition of Public Official (§ 36-25-1(27))

The definition of Public Officials includes political party chairs, who have no government power, and judges whose exercise their government power is carefully circumscribed and subject to their own judicial code of ethics. Political party chairs and judicial officers should be excluded from the Public Officials since including them abridges First Amendment freedoms, in the case of political party chairs, and is overbroad in the case of both.

i. Prohibition on Lobbyist Gifts (§ 36-25-5.1)

The Ethics Code's restrictions under § 36-25-5.1 present severe overbreadth problems through its expansive scope of both Prohibited Recipients and Prohibited Sources. The provision creates an intricate web of prohibitions affecting both those who provide anything of value and those who receive it, based purely on status rather than any connection to corruption or improper influence.

The treatment of Prohibited Recipients demonstrates particularly significant overbreadth by creating restrictions based solely on a relationship to Public Official. Family Members of Public Officials face severe restrictions on legitimate business activities simply due to their relationships, restricting countless innocent transactions with no connection to corruption. Judicial officers face identical restrictions despite their unique role and existing safeguards

against improper influence. Legislative officials are restricted even during periods when they cannot take official action. Education employees, Public Safety personnel, and administrative staff face the same restrictions as high-level officials despite lacking any meaningful governmental authority.

On the Prohibited Sources side, the provision unfairly restricts legitimate business and social activities. Traditional Lobbyists face restrictions even in contexts entirely removed from their lobbying work. The provisions extend to all subordinates working under Lobbyists regardless of their actual duties. Principals face restrictions applicable to all Public Servants when lobbying just one, creating substantial compliance uncertainty.

ii. Corruptly Influence Statute (§ 36-25-7)

The Corruptly Influence statute presents additional overbreadth concerns when analyzed under *McDonnell*. The Supreme Court's narrowed interpretation of "official acts" requires a concrete decision or action on a specific matter involving the formal exercise of government power. However, these statutes, combined with the Ethics Code's broad definitions,⁴⁹ could restrict routine constituent service and legitimate advocacy lacking any improper quid pro quo arrangement or undue influence.

b. Constitutional Deficiencies Related to Equal Protection

i. Potential for Selective Enforcement in Core Ethics Commission Procedures (§§ 36-25-4, 36-25-27)

The broad discretion granted to the Ethics Commission and prosecutors under §§ 36-25-4

⁴⁹ Particularly, the current broad definition of Family Member of a Public Official, § 36-25-1(15),

and 36-25-27, without clear decision-making criteria to guide choices between administrative resolution and criminal referral, creates significant risk of selective or arbitrary enforcement in violation of equal protection principles. The lack of transparency into the Ethics Commission's non-public actions exacerbates this concern by shielding potential patterns of disparate treatment from scrutiny.

c. Constitutional Deficiencies Related to Due Process Vagueness

i. Definition of "Things of Value" (§ 36-25-1(34))

The term "other item of monetary value" in § 36-25-1(34)(a) likely fails to meet constitutional standards for clarity and specificity. This catch-all provision does not provide fair notice about what conduct is prohibited, leaving individuals unable to reasonably determine what items might trigger a violation of the Ethics Code. The term "other item of monetary value" appears at the end of a carefully structured list of prohibited items that fall into four distinct categories: intangible benefits (gifts, benefits, favors, services, and gratuities); entertainment items (tickets or passes to entertainment, social, or sporting events); financial instruments (unsecured loans, except those made in ordinary business); and future or promised benefits (rewards, promises of future employment, and honoraria). Unlike the preceding specific categories in the list which provide clear boundaries, "other item of monetary value" provides no meaningful limiting principle beyond the requirement that an item can be valued in monetary terms. This broader scope makes it fundamentally different from the specific enumerated items, as it serves to close potential loopholes rather than define particular categories of value. The term's boundless nature also enables arbitrary and discriminatory enforcement for determining

Ethics Code violations.

ii. Definition of “Lobby or Lobbying” (§ 36-25-1(20))

The “promoting or opposing” clause in § 36-25-1(20) fails to provide fair notice of what activities will be deemed “lobbying.” Without clear boundaries on what efforts qualify as “promoting,” this language could chill engagement in a wide range of political advocacy out of caution. The exception for “providing public testimony” helps mitigate this risk but does not fully cure the vagueness deficiency.

iii. Definition of “Minor Violation” (§ 36-25-1(22))

§ 36-25-1(22)(b)’s open-ended list of mitigating factors that may qualify an ethics violation as “minor” lacks clear guidelines for the relative weight or combination of each element. While the Ethics Commission has discretion to assess penalties, the absence of explicit standards for how these highly subjective factors interact creates vagueness issues that could lead to arbitrary treatment of comparable violations.

d. Constitutional Deficiencies Related to Due Process Notice and Opportunity

i. The Ethics Commission’s Subpoena Power (§ 36-25-4(h))

The Ethics Commission’s subpoena authority in § 36-25-4(h) lacks explicit procedural safeguards necessary to protect witnesses’ due process rights. Without clear provisions requiring advance notice and an opportunity to challenge a subpoena before compliance, this broad investigative power risks depriving individuals of their liberty and property interests in freedom from unreasonable legal demands.

II. Comparative Analysis to the American Law Institute Principles of the Law, Government Ethics

The American Law Institute (“ALI”) is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The ALI’s mission is “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” The ALI publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education, since they reflect the best thinking about the current national legal consensus on questions of law.

ALI’s Principles of the Law are primarily addressed to legislatures, administrative agencies, or private actors since they suggest best practices for these institutions within particular areas of law. Fortunately, the ALI is just completing its Principles of the Law, Government Ethics project (“ALI Principles”), which will soon be finalized and published, but its approved Tentative Drafts are available.

ALI Principles enunciates best practices that reflect the national consensus on the emerging law of government ethics. Focused on the legislative and executive branches of government, topics include Public Employee participation and use of public resources in election campaigns and partisan activities, gifts to Public Officials, conflicts of interest involving the private activities of Public Officials, the political uses of public office, post-employment restrictions, and administration and enforcement mechanisms. Many, if not all, of these topics are dealt with

by the Ethics Code so the Ethics Code can be compared to ALI Principles legal analysis and recommendations to see whether the Ethics Code reflects the national consensus and uses the best practices for government ethics, which we do below.

A. Gifts from and Financial Relationships with Prohibited Sources

1. ALI Principles

a. ALI Principles § 201. Restrictions on Gifts, Financial Transactions, and Financial Relationships

i. Purpose

ALI Principles suggests an objective standard for prohibiting or allowing gifts, meaning that the intent of the gift-giver is irrelevant. Some jurisdictions apply a subjective analysis that considers intent, but that approach is more difficult to administer and inconsistent with protecting public confidence in government.

ii. Ethics Principles, Criminal Laws, and Other Regulations

Even gifts that are technically permissible under ethics rules can be prosecuted as a bribe or gratuity under criminal law if a quid pro quo exists.

iii. Disclosure

Robust disclosure requirements for permitted gifts have several advantages, including making it easier to monitor compliance with gift rules. Disclosure may also make a Public Servant more cautious when a gift may violate the rules and give the public more insight into the use of exceptions to gift rules.

iv. Circumstances Suggesting an Improper Gift or Financial Transaction

A reasonable person would likely infer a gift could affect a Public Servant's judgment if the gift comes from or the transaction is with someone who is trying to influence the agency or is regulated by it. ALI Principles defines "Prohibited Source" in subsequent sections.

v. Gifts Motivated by Official Position

ALI Principles suggests prohibiting Public Servants from soliciting gifts if it could be inferred the gift is motivated by the Public Servant's official position.

vi. Scope of Gift Restriction

Restricted gifts include free admission to events and free travel, meals, or lodging provided by a Prohibited Source.

vii. Scope of Restriction on Financial Transactions and Financial Relationships

Public Servants may engage in financial transactions such as purchases, borrowing, lending, investing, and providing services only on the same terms available to the general public or in an arm's-length transaction.

viii. Gifts from and Transactions with Friends and Family

Gifts based on personal relationships should be scrutinized if the gift-giver is also a Prohibited Source.

ix. Gifts to and Transactions Involving Spouses and Dependents of Public Servants

Public Servants should discourage spouses and dependents from accepting gifts the Public Servant should not accept.

x. Gifts Between Public Servants

Gifts between Public Servants who work in the same agency should only be permitted if there is no risk of favoritism or distorted decision-making.

xi. Campaign-Finance Practices Not Covered

Campaign contributions and expenditures are protected by the First Amendment and are generally regulated separately from other gifts.

xii. Legislative and Executive Branches

ALI Principles do not distinguish between gifts to members of the legislative and executive branches.

xiii. Part-Time and Advisory Public Servants

Jurisdictions may choose less restrictive gift rules for part-time employees and advisors.

xiv. Solicitation of Gifts to Charities, Relief Efforts, and Similar Causes

Public Servants should not solicit gifts to charities from Prohibited Sources if the Public Servant also benefits substantially.

b. ALI Principles § 211. Definitions

i. Definition of “Gift”- Any Form

ALI Principles defines gift as encompassing anything of more than nominal value given to the Public Servant or at the Public Servant’s request, including money, loans, travel, entertainment, discounts, and favors.

ii. Definition of “Prohibited Source”

ALI Principles' definition of "Prohibited Source" is broad and includes anyone who is seeking to influence or is regulated by the Public Servant's agency.

iii. Ethics Authority

An ethics authority may designate additional individuals and entities as Prohibited Sources.

iv. Acceptance

A gift is accepted if a Public Servant receives it or derives a personal benefit from it that is not shared by a large group of people who are not Public Servants.

v. Solicitation

Some jurisdictions may want to impose stricter restrictions on the solicitation of gifts than on the acceptance of gifts.

vi. Nominal Value

ALI Principles suggests a jurisdiction may impose a specific maximum dollar amount on the value of gifts from Prohibited Sources.

vii. Timing

If a person or entity becomes a Prohibited Source at any point before a gift is complete, that person or entity is considered a Prohibited Source for that gift.

c. ALI Principles § 211A. Gifts Solicited Because of Official Position

i. Gift Solicited Because of Official Position

A Public Servant should not solicit a gift when it could be inferred the gift is motivated by their official position.

**ii. No Exception for Solicitation of Gifts from Family and Friends or for
Solicitation of Gifts of Free Attendance at Widely Attended Gatherings**

There is no exception to this rule for gifts from family and friends or for free attendance at widely attended gatherings.

d. ALI Principles § 212. Gifts from Prohibited Sources

i. Purpose

Restrictions on gifts from Prohibited Sources are intended to prevent impropriety, avoid actual influence on Public Servants, and protect Public Servants from allegations of bribery.

ii. Prohibition Regardless of Whether Gift Influences Public Servant

ALI Principles recommends using an objective standard for prohibiting gifts from Prohibited Sources to promote public confidence, as subjective criteria are difficult to assess and may vary between a Public Servant and the public.

iii. Disclosure

The restriction on gifts is separate from any financial disclosure rules that may apply.

iv. Gifts Paid for by a Prohibited Source

ALI Principles suggests Public Servants should not accept a gift if they know or should know it is paid for by a Prohibited Source.

v. Partial Payment to Reduce the Value of a Gift

Public Servants may not make partial payment on a gift from a Prohibited Source to reduce its value to nominal value.

vi. Duty to Inquire

The Public Servant's duty to inquire into the source of a gift depends on the circumstances, such as the nature of the gift, the identity of the gift-giver, and the context in which the gift is offered.

e. ALI Principles § 212A. Solicitation of Gifts to Charities from Prohibited Sources

i. Substantial Personal Benefit for the Public Servant Bars Solicitation of the Gift

A Public Servant may not solicit a gift to a charity from a Prohibited Source if the Public Servant also receives a substantial personal benefit. The benefit to the Public Servant must be disproportionate to the benefit to the intended beneficiaries of the gift to be prohibited.

ii. No Use of Public Resources Even for a Permitted Charitable Solicitation

Even when a Public Servant is permitted to solicit gifts to charities from Prohibited Sources, they may not use public resources to do so.

f. ALI Principles § 213. Financial Transactions and Financial Relationships with Prohibited Sources

i. Purpose

This Section addresses concerns about Public Servants obtaining favorable treatment through financial transactions and relationships with Prohibited Sources. ALI Principles suggests permitting such transactions only on the same terms available to the general public to prevent the appearance of the Public Servant currying favor.

ii. Loans

Loans are particularly concerning, as they may create indebtedness to a Prohibited Source. However, ALI Principles suggests permitting loans from Prohibited Sources as long as the terms are the same as those offered to the general public. ALI Principles also notes that a Public Servant may need to comply with additional state laws and regulations regarding loans.

iii. Professional Services and Employment Relationships

ALI Principles suggests professional services provided by or to a Public Servant should be at fair market value. Additionally, ongoing employment relationships between Public Servants and Prohibited Sources should be at arm's length. Some jurisdictions may want to prohibit employment relationships between Public Servants and Prohibited Sources entirely.

iv. Professional Services by Part-Time Legislators

Part-time legislators who provide professional services, such as legal representation, are not permitted to provide services that are different in nature or at different rates than they would charge clients who are not Prohibited Sources.

g. ALI Principles § 214. Gifts and Financial Transactions between Prohibited Sources and Family Members of a Public Servant

i. Discouraging Gifts and Financial Transactions by Spouses and Dependents

Public Servants should make reasonable efforts to discourage spouses and dependents from accepting gifts or entering into transactions with Prohibited Sources unless it would harm family relationships. If the Public Servant cannot dissuade their Family member, they should disclose the gift or transaction to their agency.

ii. Long-Term Relationships

People in long-term relationships should be treated similarly to spouses and dependents in regard to gifts and transactions with Prohibited Sources.

iii. Other Family Members

The Public Servant is not obligated to discourage other Family members from accepting gifts or entering into transactions with Prohibited Sources but should consult with their agency about remedial action if it could call their impartiality into question.

iv. Trusts and Similar Entities

Gifts to trusts and similar entities that include a Public Servant's spouse or dependents as beneficiaries should be treated as gifts given directly to them.

h. ALI Principles § 215. Prohibited Sources Who Are Also Family Members or Personal Friends of Public Servants

i. Rationale - Gifts from Family Members

ALI Principles recommends allowing Public Servants to receive gifts of unlimited value from Family members even if they are Prohibited Sources, as long as there is no appearance that the gift is motivated by something other than the family relationship.

ii. Rationale - Limitation on Gifts from Personal Friends

ALI Principles recommends limiting gifts from personal friends who are Prohibited Sources to prevent the exception from being abused to allow extravagant gifts.

iii. Disclosure May Be Required

ALI Principles recommends jurisdictions require Public Servants to disclose gifts from

family and personal friends, as this is needed to justify having the exception.

iv. The Gift Must Be Paid for by the Family Member or Friend

If a Prohibited Source pays for a gift that is given to a Public Servant by someone who is not a Prohibited Source, that gift is considered to be from the Prohibited Source.

v. The Gift Must Appear to a Reasonable Person to Be Motivated Primarily by the Family Relationship or Other Personal Relationship

If a gift is connected to the Public Servant's official functions, the exception for gifts from family and friends does not apply.

vi. Gifts of Substantial Value from Friends Who Are Not Family Generally Prohibited

The personal friend exception does not apply to gifts given to commemorate a Public Servant's assumption of office, as such gifts could be construed as thanking the Public Servant for past or future official action.

vii. Appearances Can Be Problematic

Public Servants should be aware of how a large gift from a Family member or friend may appear and should consider recusing themselves from government functions that directly impact the gift-giver.

i. ALI Principles § 216. Gifts of Complimentary Attendance at Events

i. Rationale for the Event Exception

The exception for complimentary attendance at events is intended to allow Public Servants to interact with members of the community and hear different viewpoints. The value of these gifts

is usually modest.

ii. Charitable Fundraisers

Public Officials are permitted to accept free attendance at charitable and political fundraisers from event sponsors, as they are widely attended events.

iii. Political Fundraisers

ALI Principles suggests prohibiting or limiting complimentary admission from sponsors to small charitable and political fundraisers, as they raise concerns about impropriety.

iv. The Gift Must Be from the Event Sponsor, Not from a Third Party That Pays or Donates to the Event Sponsor

A Public Servants may not accept a gift of complimentary attendance from a non-sponsor if the sponsor is a Prohibited Source.

v. Widely Attended Events

The “widely attended event” exception does not apply to events focused on entertainment rather than social interaction, such as sporting events, movie screenings, and concerts. Trade-association events may be widely attended events if the criteria in the section are met.

vi. Spousal Invitations

Public Servants may accept invitations to events sponsored by a spouse’s employer or volunteer organization if spouses of other Public Servants or volunteers receive the same benefits.

vii. No Special Treatment of Public Servants at the Event

The complimentary attendance exception does not apply if a Public Servant is offered

benefits at an event that are not available to all attendees.

j. ALI Principles § 217. Payments for Travel, Meals, and Lodging

i. Rationale for the Travel and Lodging Exception

ALI Principles acknowledges the value to Public Servants of attending conferences and meetings and the need for sponsorships to cover the cost of attendance. However, ALI Principles also suggests scrutinizing the travel and lodging provided, as it could provide an appearance of Prohibited Sources gaining preferential access to Public Servants.

ii. Scope

A supervisor or ethics official should approve a Public Servant's attendance at conferences, meetings, or events related to their official duties. Government agencies may have additional rules for accepting these invitations and payments for travel that must be followed.

iii. Government Entities, Accredited Colleges and Universities, and Professional Associations Are Allowed to Pay for Travel, Meals, and Lodging

ALI Principles suggests allowing sponsorships of travel, meals, and lodging from government entities, accredited colleges and universities, and professional associations. Jurisdictions may choose to include other sponsors, such as think tanks or religious organizations.

iv. Other Entities Allowed to Pay for Travel, Meals, and Lodging

Public Servants may accept payment for travel, meals, and lodging from sponsors of meetings, inspections, or other functions related to their official duties, as long as their agency

approves.

v. Costs Must Be Reasonable

Agencies should consider whether the cost of travel, meals, and lodging offered is reasonable when deciding whether to accept a sponsorship.

vi. Political Candidate and Party Reimbursement

ALI Principles recommends that the exception allowing payment and reimbursement for travel from political candidates and parties only apply to elected officials and candidates.

k. ALI Principles § 218. Other Exceptions

i. Rationale

These exceptions apply to situations that have a low risk of a gift influencing a Public Servant's official actions or are necessary for practical considerations.

ii. Discounts for Broad Categories of Persons

Discounts on goods and services offered to broad categories of people, such as veterans or police officers, should be publicly disclosed and approved by the Public Servant's agency.

l. ALI Principles § 219. Agency Specific Variations

i. Rationale

ALI Principles recommends that agencies with heightened ethical concerns, such as law enforcement, implement more restrictive rules on gifts. Additionally, agencies may choose to designate additional individuals and entities as Prohibited Sources.

m. ALI Principles § 220. Gifts, Financial Transactions, and Financial

Relationships between Public Servants

i. Rationale

ALI Principles suggests treating gifts, transactions, and relationships between Public Servants with the same scrutiny as those between a Public Servant and a Prohibited Source to prevent the appearance of impropriety and favoritism within an agency or department.

ii. Scope

The effectiveness of restrictions on gifts between Public Servants is increased by rules in other areas, such as civil service and anti-nepotism.

iii. Lower Nominal Value May Be Appropriate

ALI Principles suggests a jurisdiction may choose to set a lower limit for gifts from a subordinate to a superior than for gifts from outside sources.

iv. Personal-friend Exception Should Not Apply

Exceptions for gifts from personal friends should not apply to gifts between Public Servants who work in the same agency.

v. Exception for Travel, Meals, and Lodging Should Not Apply

The exception for travel, meals, and lodging paid for by a Prohibited Source should not apply to gifts between Public Servants.

vi. Retirement Gifts

Retirement gifts should only be given immediately before or after the retirement and should be from Public Employees collectively to prevent the appearance of impropriety or an attempt to

influence the retiring Public Servant's decisions.

vii. Gifts at Ceremonial Events Permitted

The exception allowing gifts between Public Servants at ceremonial events only applies to events such as weddings and births, and the value of the gift should be similar to that given by guests who are not Public Servants.

n. ALI Principles § 221. Legal-Defense Funds

i. Rationale

This Section addresses the potential for gifts to Public Servants through the payment of their legal expenses. Public Servants should not accept benefits from a legal-defense fund if they could not accept a gift of the same value from a donor to the fund.

ii. Scope

ALI Principles suggests that Public Servants should conduct due diligence to determine who is contributing to a legal-defense fund before accepting any benefit from it.

iii. Anonymous Donors Not Appropriate

ALI Principles suggests prohibiting anonymous donations to legal-defense funds because of the appearance of impropriety and the likelihood a Public Servant could discover the donor's identity.

iv. Higher Nominal Value May Be Appropriate

ALI Principles suggests jurisdictions may allow contributions to legal-defense funds from Prohibited Sources as long as a specific exception to the gift rules is included.

v. Includes Legal-Defense Funds in Which Prohibited Sources Have a Significant Role

ALI Principles suggests that the legal-defense fund exception should apply when a Prohibited Source is involved with soliciting the gift from a third party. Some jurisdictions may choose to prohibit any contributions to legal-defense funds from sources other than family and friends.

vi. Does Not Apply to Payments by the Government for Legal Defense in Connection with Official Acts

This Section does not address legal defense funds that are paid for by a government entity.

vii. Discounted Legal Services

ALI Principles suggests jurisdictions may allow Public Servants to accept discounted legal services from lawyers and law firms that are not Prohibited Sources as long as the discount is not given because of the Public Servant's official position.

2. Comparing ALI Principles and The Ethics Code

a. Defining “Gift” or “Thing of Value”

i. Similarities

- (a) Both the ALI Principles and the Ethics Code use a broad definition of “gift” to encompass various benefits that could influence Public Servants.
- (b) Both regulatory frameworks aim to capture a wide range of potentially influential items that could compromise the integrity of public service.

ii. Differences

- (a) ALI Principles § 211(a) & (b)
 - i) The ALI Principles defines “gift” in comprehensive terms.
 - ii) The ALI Principles utilizes “nominal value” as a threshold for permissible gifts.
- (b) § 36-25-1(34) “Thing of Value,” Defined
 - i) The Ethics Code uses the term “thing of value” to capture all forms of benefits and compensation that might influence Public Officials.
 - ii) The Ethics Code provides a more specific and detailed list of exclusions:
 - a) Campaign contributions regulated by separate law
 - b) Gifts from family and friends for personal reasons
 - c) Items of De Minimis value
 - d) Discounts offered to general public or organization members
 - e) Benefits received during official duties or official travel

iii. Conclusion

- (a) The Ethics Code provides more specific guidance on permissible activities through detailed examples and definitions that help officials understand their obligations.
- (b) The comprehensive list of exceptions in the Ethics Code exceeds ALI Principles in clarity by offering concrete parameters for compliance with

ethical requirements.

b. Identifying “Prohibited Source”

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish comprehensive frameworks to identify individuals and entities who could potentially influence Public Servants.
- (b) Both frameworks recognize the critical need to regulate relationships that could compromise public service integrity.

ii. Differences

- (a) ALI Principles § 211(c)
 - i) ALI Principles offers a single, consolidated definition of “Prohibited Source” that encompasses all relevant parties.
 - ii) The definition specifically includes two main categories of individuals:
 - a) Those who are doing business or seeking to do business with the government agency.
 - b) Those who are seeking to influence official action or likely to be affected by official action.
- (b) § 36-25-1 Prohibited Source
 - i) The Ethics Code identifies potentially influential parties through

multiple separate categories including:

- a) “Business” and “Business with which the person is associated” establish commercial relationship parameters.
- b) “Candidate” and “Law Enforcement Officer” identify specific roles subject to regulation.
- c) “Legislative body,” “Lobby or Lobbying,” and “Lobbyist” address legislative influence activities.
- d) “Public Employee,” “Public Official,” and “Regulatory body” define the scope of regulated parties.

iii. Conclusion

- (a) The Ethics Code’s fragmented approach to defining Prohibited Sources falls short of the clarity and coherence as found in the ALI Principles’ unified framework.
- (b) The ALI Principles’ consolidated approach provides a more effective framework for identifying potentially influential parties, while the Ethics Code’s scattered definitions may create unnecessary complexity in compliance efforts.

c. “Financial Transaction or Financial Relationship”

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish frameworks to

address potential conflicts of interest arising from financial dealings between Public Servants and outside entities.

- (b) Both regulatory frameworks recognize that financial relationships require careful oversight to maintain public trust.

ii. Differences

- (a) ALI Principles § 211(d)
 - i) ALI Principles establishes a clear and direct definition of “financial transaction or financial relationship” that guides compliance.
 - ii) The definition creates specific parameters for evaluating potential conflicts.
- (b) § 36-25-1 “Definitions” Financial Transaction or Relationship
 - i) The Ethics Code does not offer a single, comprehensive definition of financial transactions.
 - ii) The Ethics Code disperses relevant concepts across various sections including:
 - a) The Ethics Code address conflicts of interest through multiple provisions.
 - b) The Ethics Code establishes restrictions on using official position for personal gain.
 - c) The Ethics Code creates prohibitions on financial dealings with

Lobbyists.

- d) The Ethics Code includes regulations on public contracts.

iii. Conclusion

- (a) The Ethics Code falls short of the ALI Principles in providing clear guidance on financial transactions.
- (b) The fragmented approach in the Ethics Code makes it difficult to determine when a financial interaction constitutes a prohibited conflict of interest.

d. “Acceptance” and “Solicitation” of Gifts

i. Similarities

- (a) Both the ALI Principles and the Ethics Code seek to prevent Public Servants from soliciting or accepting gifts that could undermine their impartiality.
- (b) Both regulatory frameworks recognize the importance of controlling gift-giving to maintain ethical standards.

ii. Differences

- (a) ALI Principles § 211(e) & (f)
 - i) The ALI Principles clearly defines what constitutes “acceptance of a gift” for regulatory purposes.
 - ii) The ALI Principles establishes specific parameters for what constitutes

“solicitation of a gift.”

- (b) § 36-25-5.1 Lobbyist Gifts Accepted and Solicited by Public Servants
 - i) The Ethics Code does not explicitly define acceptance or solicitation actions.
 - ii) The Ethics Code implies prohibitions within sections that restrict:
 - a) Lobbyists and their Principals are prohibited from offering things of value to Public Servants.
 - b) The Ethics Code prohibits offering, soliciting, or receiving anything to influence official action.

iii. Conclusion

- (a) The Ethics Code does not meet the level of clarity and directness established by the ALI Principles.
- (b) The reliance on implicit prohibitions in the Ethics Code could create uncertainty and weaken enforcement efforts.

e. Gifts from Family Members or Personal Friends

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize that gifts from family members and personal friends require special consideration in ethics regulations.
- (b) Both frameworks acknowledge the potential for conflicts of interest when

Public Servants receive gifts from family members or personal friends who are also Prohibited Sources.

ii. Differences

(a) ALI Principles § 215

- i) The ALI Principles specifically exempts gifts from family members or personal friends under defined conditions.
- ii) The ALI Principles implements a “reasonable person” test to determine if the gift was primarily motivated by the personal relationship.

(b) § 36-25-1(34)(b)(2) & (3) “Thing of Value” Family and Friends

- i) The Ethics Code excludes gifts from family and friends from the definition of “thing of value” without additional testing criteria.
- ii) The Ethics Code does not include the additional safeguard of a “reasonable person” standard for evaluating gift motivation.

iii. Conclusion

(a) The Ethics Code aligns with the ALI Principles in recognizing the need for exceptions based on personal relationships.

(b) The absence of a “reasonable person” test in the Ethics Code creates ambiguity and overbreadth in restricting gifts.

f. Complimentary Attendance at Events

i. Similarities

- (a) Both the ALI Principles and The Ethics Code recognize the necessity of allowing Public Servants to attend certain events without violating gift rules.
- (b) Both frameworks establish specific exceptions for event attendance to facilitate necessary public service functions.

ii. Differences

- (a) ALI Principles § 216
 - i) The ALI Principles lists specific exceptions for complimentary attendance including:
 - a) Charitable fundraising events are permitted under defined circumstances.
 - b) Political fundraising events are allowed for elected officials and candidates only.
 - c) Widely attended events are permitted with specific parameters.
- (b) § 36-25-1(34)(b)(12) “Things of Value,” Complimentary Events
 - i) The Ethics Code permits travel and lodging for educational functions under specific conditions.
 - ii) The Ethics Code allows attendance at widely attended events where:
 - a) The Public Servant must be a primary sponsor.

b) The attendee must meaningfully participate in the event.

iii) The Ethics Code does not specifically address charitable or political fundraising events.

iii. Conclusion

- (a) The Ethics Code partially meets the ALI Principles' framework regarding event attendance regulations.
- (b) The lack of specific provisions for charitable or political fundraising events in the Ethics Code creates potential gaps in regulation.

g. Payments for Travel Expenses

i. Similarities

- (a) Both the ALI Principles and The Ethics Code establish frameworks to regulate payments for travel, meals, and lodging expenses.
- (b) Both regulatory systems recognize the need to allow certain necessary travel-related expenses while maintaining ethical standards.

ii. Differences

- (a) ALI Principles § 217
 - i) The ALI Principles permits payments for travel, meals, and lodging for specific activities including:
 - a) Conference attendance requires proper agency authorization.
 - b) Official meetings must serve agency interests.

- c) Official duties must benefit the agency's mission.
- ii) The ALI Principles requires agency determination that the travel serves the public interest.
- (b) § 36-25-1(34)(b)(12) & (13) "Thing of Value," Travel Expenses
 - i) The Ethics Code specifically permits payments for:
 - a) Travel and lodging expenses for educational functions must meet defined criteria.
 - b) Expenses related to economic development functions must serve public purposes.
 - ii) The Ethics Code does not include a general provision for agency authorization of travel payments from Prohibited Sources.

iii. Conclusion

- (a) The Ethics Code partially aligns with the ALI Principles' framework in regulating travel-related expenses.
- (b) The absence of a general provision for agency authorization of travel payments may limit flexibility in serving legitimate public interests.

h. Other Exceptions

i. Similarities

- (a) Both the ALI Principles and The Ethics Code recognize the need for various practical exceptions to gift regulations.

(b) Both frameworks aim to ensure ethical standards while avoiding overly restrictive rules that could hinder legitimate government operations.

ii. Differences

(a) ALI Principles § 218

- i) The ALI Principles specifically permits:
 - a) Items paid for by government entities are allowed.
 - b) Rewards and prizes from public contests are permitted.
 - c) Ceremonial items may be accepted.
 - d) Goods and services available to the general public are allowed.
 - e) Food and beverages shared in office settings are permitted.
 - f) Discounts available to all Public Servants are acceptable.
 - g) Gifts received by spouses through their own employment are permitted if not regifted.

(b) § 36-25-1(34)(b) “Thing of Value”

- i) The Ethics Code allows:
 - a) Government-paid items are permitted.
 - b) Public contest rewards are acceptable.
 - c) Ceremonial items may be received.
 - d) Generally available goods and services are allowed.
 - e) Meals under certain monetary limits are permitted.

- ii) The Ethics Code does not address:
 - a) Office-shared food and beverages lack specific provisions.
 - b) Spouse-received gifts are not explicitly covered.

iii. Conclusion

- (a) The Ethics Code substantially aligns with the ALI Principles in providing practical exceptions.
- (b) The absence of specific provisions for certain scenarios may create regulatory gaps that require clarification.

i. Agency-Specific Variations

i. Similarities

- (a) Both the ALI Principles and the Ethics Code acknowledge that individual agencies may require stricter rules than the general code.
- (b) Both frameworks recognize the need for flexibility in addressing agency-specific ethical concerns.

ii. Differences

- (a) ALI Principles § 219
 - i) The ALI Principles explicitly permits agencies to impose additional restrictions on gifts.
 - ii) The ALI Principles allows agencies to create stricter rules for conflicts of interest when necessary.

(b) The Ethics Code Agency-Specific Variations

- i) The Ethics Code does not explicitly state provisions for agency-specific rules.
- ii) The Ethics Code implicitly allows agencies to adopt more stringent rules when:
 - a) The rules remain consistent with the overall Ethics Code framework.
 - b) The additional restrictions serve legitimate agency purposes.

iii. Conclusion

- (a) The Ethics Code aligns with the ALI Principles by allowing agency-specific variations.
- (b) The implicit rather than explicit nature of this allowance may create uncertainty about agencies' authority to implement stricter rules.

j. Gifts Between Public Servants

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize potential ethical issues in gift exchanges between Public Servants.
- (b) Both frameworks acknowledge that gifts between Public Servants can create conflicts of interest.

ii. Differences

(a) ALI Principles § 220

- i) The ALI Principles focuses on supervisory relationships in gift-giving situations.
- ii) The ALI Principles treats gifts between Public Servants similarly to those from Prohibited Sources when:
 - a) One servant supervises the other servant.
 - b) One servant can influence the employment of the other servant.

(b) The Ethics Code Gifts Between Public Servants

- i) The Ethics Code relies on general ethical principles to govern these situations.
- ii) The Ethics Code applies broad prohibitions that may affect inter-servant gifts:
 - a) General restrictions on using official positions for personal gain may apply.
 - b) Overall ethical principles guide gift-giving between Public Servants.

iii. Conclusion

- (a) The Ethics Code falls short of the ALI Principles by not directly addressing Public Servant gift exchanges.
- (b) The reliance on general principles rather than specific guidelines may lead

to inconsistent interpretations.

k. Gifts to Legal Defense Funds and Legal Services

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize potential conflicts in legal defense fund contributions.
- (b) Both frameworks acknowledge ethical implications of providing legal services to Public Servants.

ii. Differences

- (a) ALI Principles § 221
 - i) The ALI Principles establishes specific rules for legal defense funds including:
 - a) Anonymous donations to legal defense funds are prohibited.
 - b) Discounted legal services are permitted from non-Prohibited Sources.
 - ii) The Ethics Code Legal Defense Funds
 - i) The Ethics Code does not address legal defense funds contributions.
 - ii) The Ethics Code does not provide guidance on:
 - a) The acceptance of discounted legal services lacks specific regulation.
 - b) The management of legal defense funds remains unaddressed.

iii. Conclusion

- (a) The Ethics Code fails to meet the ALI Principles' standard in regulating legal defense funds and services.
- (b) The absence of specific guidelines creates potential ethical vulnerabilities in legal assistance situations.

B. Conflicts of Interest and Outside Activities of Public Servants

1. ALI Principles

a. ALI Principles § 301. Public Office for the Public Good, Not Private Gain

i. Public Servants Should Not Use Public Office for Private Gain

They are given access to government authority, property, and resources to be used on behalf of the public. Using these for private benefit is an abuse of public office. Private gain includes that of family members, personal friends, business associates, and others with whom the Public Servant has a personal or financial relationship.

b. ALI Principles § 302. Duty to Avoid Financial Conflicts of Interest

i. To Ensure Public Confidence in Government Decision-making, Public Servants must Avoid Financial Conflicts of Interest

Conflict of interest standards minimize the impact of private interests on government decision-making. Many government positions are part-time or offer little compensation, so the public benefits when individuals who are not full-time Public Employees serve.

Conflict-of-interest standards should not place an undue burden on Public Servants or their families. The requirement to avoid financial conflicts of interest applies whenever a Public

Servant participates in a government matter.

c. ALI Principles § 303. Duty to Avoid Bias in Particular Matters Involving Specific Parties

i. Public Servants Owe the Public Impartial Service, Without Bias For or Against a Party

They should ensure that all persons are treated according to the standards applicable to their situation. This Section does not apply when the Public Servant is acting more generally—such as by writing or voting on rules or policies that affect broad categories of individuals. Similarly, appropriations measures do not generally affect the rights of specific parties. The requirement in ALI Principles § 303 that Public Servants act impartially is limited to actions affecting the legal rights of specific parties and does not apply to government actions of broader scope.

d. ALI Principles § 311. Prohibition on Participation in Particular Matters that Involve Financial Conflict of Interest

i. Scope and Cross-References

This Section sets out the prohibition on financial conflicts of interest.

ii. Comparison with Federal Law

ALI Principles § 311 is similar to the financial conflict of interest prohibition that applies to federal executive branch employees.

iii. The General Prohibition on Financial Conflicts of Interest

This Section prohibits a Public Servant from participating in a particular matter where that matter is likely to have a direct and predictable effect on a financial interest of the Public Servant including the business affiliations of the Public Servant, or someone closely associated with the

Public Servant.

iv. Household

This Section applies conflict of interest restrictions to the Household of a Public Servant, but does not impute the financial interests of such persons to Public Servants simply because they live in the same residence, so long as each pays their fair share of the rent and related expenses and have no other family, romantic, or economic relationship with each other.

v. Minor Children and Adult Children

This Section imputes to a Public Servant the financial interests of the Public Servant's minor children. It is appropriate to impute a minor child's financial interests to the child's parent because parents generally control a minor child's finances. In most instances, this Section does not impute the financial interests of an adult child to a parent because parents are less likely to control their adult child's finances, unless the adult child is a dependant.

vi. Sexual Relationships Without Cohabitation

§ 311 does not include the financial interest of romantic or sexual partners with whom the Public Servant is not sharing a residence.

vii. The Need for Exceptions and Waivers

Imposing a financial conflict of interest prohibition without any exceptions would be both impractical and unnecessary to protect the public's trust in government.

viii. More Intense Ethics Regulation as Matter Narrows in Scope

The ALI Principles conform to the prevailing practice in ethics regulation of applying more

rigorous ethics standards to matters that are more narrow in scope.

ix. Part-Time Public Servants Representing Interest Groups and Serving on Advisory or Professional Licensing or Discipline Agencies, Boards, Commissions, and Advisory Committees

Strict prohibitions on financial conflicts of interest would seriously impede the work of part-time Public Servants on bodies intended to include representatives of designated professions, industries, or interest groups.

e. ALI Principles § 312. Prohibition on Acquisition or Retention of Certain Financial Interests

i. Rationale

ALI Principles § 312 prohibits a Public Servant from participating in a matter that is likely to affect the Public Servant's financial interest. It does not require a Public Servant to divest any financial interests.

ii. Comparison with Federal Law

ALI Principles § 312 is similar to, but narrower than, the federal provision on restricting financial interests.

iii. Spouses and Other Persons Associated with the Public Servant

This provision does not cover financial interests acquired by the spouse of a Public Servant or other persons associated with a Public Servant because the government employer cannot prohibit such persons from making or retaining investments or other financial interests.

f. ALI Principles § 313. Duty to Avoid Bias in Particular Matters Involving Specific Parties

i. Scope and Cross-References

This Section requires that Public Servants who participate substantially in a particular matter involving a specific party or specific parties be free from bias, whether for or against any of the parties.

ii. Comparison with Due Process Standards

The standards set forth here go further than the minimum standards required by procedural due process.

iii. Application to the Legislative Branch

Recusal by legislators from voting on legislation that affects their financial interests is often impractical.

iv. Appearance of Bias

Impartiality is an internal mental state that may be difficult or impossible for an observer to discern.

v. Application to All Public Servants

The prophylactic standard set forth here — requiring recusal when a reasonable observer is likely to question the Public Servant's impartiality — should apply to all Public Servants, including those in the legislative branch.

vi. Particular Matters Involving Specific Parties

Impartiality means the absence of an actual or perceived preference for or hostility toward a party or person representing a party in a particular matter. Financial interest, as addressed in ALI

Principles § 311, is just one source of partiality or its appearance.

vii. Comparison to Standards for Judges

Separate ethics rules apply to judges, but governments have the option of imposing rules on other Public Officials that are similar to judicial codes of conduct.

viii. Definition of Close Relative

This definition is similar to the relationships that trigger recusal for federal judges.

ix. Definition of Pecuniary Relationship

This term is defined broadly to reach a wide range of financial relationships. It excludes routine consumer transactions and routine transactions with financial institutions.

x. Definition of Sexual Relationship

ALI Principles § 313 looks to the general understanding of that term.

xi. Definition of Active Participant

Questions about impartiality can arise when a Public Servant is closely connected to an organization that is a party to or represents a party in a particular matter involving specific parties. This Section requires recusal if a Public Servant “actively participates” in such an organization.

g. ALI Principles § 314. Waiver

i. Rationale

This Section sets forth when an ethics agency can waive conflicts of interest and impartiality requirements.

ii. Comparison with Federal Law

Subsection (a) is similar to the federal provision that authorizes the Office of Government Ethics to issue regulations exempting financial interests that are inconsequential.

iii. Comparison with Federal Waiver Authority

Subsection (b) authorizes a jurisdiction's ethics agency to issue waivers, while the federal statute authorizes the government official responsible for appointing the employee to issue waivers.

iv. Regulatory Waivers

An ethics agency should promulgate generally applicable waivers.

v. Best Practices Regarding Individual Waivers

This Section does not set out specific waiver procedures, but best practices include the following:

- (a) Contents of a written waiver application
- (b) Timeliness of application
- (c) Truthfulness of application
- (d) Factors to consider in evaluating a waiver application
- (e) Written determination
- (f) Public availability of waiver

vi. Invalid Waivers

A waiver that is not issued in accordance with the procedures and standards in this Section,

including where there has been a failure of disclosure to the person granting the waiver, is not a valid waiver.

h. ALI Principles § 315. Prohibition on Use or Disclosure of Nonpublic Government Information for Private Financial Benefit

i. Scope

This Section sets out prohibitions on the Public Servant's use or disclosure of nonpublic government information. The prohibition on use is limited to investment transactions by the Public Servant. The prohibition on disclosure applies to disclosure to persons who the Public Servant knows or reasonably should know will use that information for financial benefit.

ii. Use of Nonpublic Information in Investment Transactions

A Public Servant may not use nonpublic government information to buy or sell securities or to make any other investment transactions.

iii. Disclosure

A Public Servant may not disclose nonpublic information to persons who will use it for financial benefit.

iv. Financial Benefit

This Section defines financial benefit as a monetary benefit obtained through an investment transaction, a government contract, permit or license, or a business transaction.

v. Disclosure Authorized by Law

In some cases, disclosure of nonpublic government information to private parties is required or authorized by law, particularly in connection with law enforcement or regulatory matters.

vi. Other Applicable Laws and Regulations

Public Servants may be subject to other ethics restrictions on the use and disclosure of nonpublic information.

i. ALI Principles § 316. Prohibition on Use of Public Resources for Private Benefit (“Private Gain”)

i. Purpose

As explained in ALI Principles § 301, the prohibition on the use of public resources for private benefit is a fundamental principle of government ethics. Public Servants are entrusted with public resources to serve the public interest.

ii. Scope: Private Benefit of Public Servant and Those Closely Associated

The prohibition applies broadly to a Public Servant, a close relative (ALI Principle § 313 (“**Close Relative**”)), and a person associated with the Public Servant (ALI Principle § 311 (“**Associated Business**”)). Close Relatives include the Public Servant’s spouse, their parents, children, and siblings, and their grandparents, grandchildren, nephew and nieces, aunts and uncles and first cousins. Associated Business include any entity where the Public Servant is an officer, director, agent, attorney, or employee.

iii. Scope: Entire Range of Resources Available to a Public Servant

ALI Principles § 316 is intended to apply broadly to the entire range of resources available to a Public Servant by virtue of that Public Servant’s public position.

iv. Private Benefit Not Limited to Financial Benefit

The prohibition on use of public resources for private benefit applies to any personal

advantage.

v. Exception for Limited Personal Use of Government Time and Office Resources

Given the amount of time most Public Servants spend at their jobs during the typical business day, it would be unnecessarily burdensome if Public Servants could not attend to some of the ongoing tasks of daily life while at the office.

vi. Applicability of Other Ethical Restrictions

Even when a Public Servant is making permissible use of public resources, the Public Servant remains subject to all other ethical restrictions.

j. ALI Principles § 317. Prohibition of Nepotism

i. Purpose

The anti-nepotism principle is, in a sense, just a particular application of the general principles against bias and conflict of interest, but a specific rule dealing with nepotism in government employment is a long-standing and widespread component of ethics codes.

ii. Scope

The ban on nepotism in employment applies to both the initial hiring decision and, should the Other Close Relative or Household member be hired, to any subsequent decisions affecting the employment of that person.

iii. Application When Employment Precedes the Public Servant's Service

When the employment of the Other Close Relative or Household member predates the Public Servant's service, the Public Servant must recuse from the decision-making process.

iv. Recusal and Other Remedies

One means of complying with the nepotism ban is for the Public Servant to recuse when that is feasible.

k. ALI Principles § 318. Representation of Private Interests Before the Government

i. Purpose

This Section addresses a common ethics issue: when a Public Servant can represent or appear before the government in a matter involving the interests of someone other than the government.

ii. Scope

Most ethics codes address Public Servants' representations of or appearances on behalf of private clients or interests.

iii. Representations and Appearances Against the Government's Interest

Representing or appearing on behalf of a private interest against one's own government is the clearest violation of the duty of loyalty, and, with two limited exceptions, such a representation or appearance, whether or not compensated, is prohibited.

iv. Uncompensated Appearances or Representations That Are Not Against the Government's Interest

Public Servants are also citizens who may possess knowledge and have opinions on matters of public concern. ALI Principles § 318(a) balances these competing concerns by permitting uncompensated appearances or representations of private matters that are not hostile to the government's position.

v. Part-time and Uncompensated Public Servants

Some Public Servants serve the public in a limited capacity.

vi. Ministerial Exception

Some governmental actions consist of administrative acts, such as the issuance of a license or permit, following prescribed criteria that do not involve administrative discretion.

vii. Own-Behalf Exception

Public Servants may get into conflicts with their own governments.

viii. Representing Other Public Servants

The own-behalf exception is extended to representing other Public Servants who are involved in legal disputes with their governments.

ix. Expert-Witness Service

Ethics rules generally place restrictions or impose notice requirements on paid expert-witness service by Public Servants.

x. Notice To, but Not Permission From, the Government Employer

Rather than proposing a broad limit on expert-witness service, ALI Principles § 318(e) calls only for advance notice to the government employer. That is unlikely to cause a First Amendment problem.

I. ALI Principles § 319. Fundraising

i. Rationale

This Section prohibits Public Servants from using public resources to solicit funds from

anyone and from soliciting funds on behalf of private entities.

ii. Official Fundraising for Designated Not-for-profit Entities

This exception recognizes that Public Servants, like other members of the community, may appropriately be involved in philanthropic activity.

iii. Fundraising

This Section does not define “fundraising,” but is intended to cover both the actual solicitation of donations and participation in events at which fundraising occurs.

iv. Targets of Official Fundraising

Official fundraising may not target persons who have particular matters before the Public Servant’s agency.

v. Beneficiaries of Official Fundraising

Official fundraising may be undertaken only on behalf of not-for-profit entities that are designated by the Public Servant’s agency or government as having a clear and direct connection to the agency or government.

2. Comparing the ALI Principles and the Ethics Code

a. Public Office for the Public Good, Not Private Gain

i. Similarities

(a) Both the ALI Principles and the Ethics Code establish the fundamental principle that public service must prioritize public good over personal gain.

- (b) Both frameworks create regulatory structures to ensure Public Servants maintain their commitment to public interests.
- (c) The Ethics Code translates principles into concrete rules through multiple sections § 36-25-5, 7, 8:
 - i) § 36-25-5 Private Gain prohibits using public resources for private benefit.
 - ii) § 36-25-7 Corruptly Influencing addresses Corruptly Influencing official actions.
 - iii) § 36-25-8 protects against exploitation of confidential information.
 - iv) § 36-25-8 prohibits gifts to members of a regulatory body from a regulated business.

ii. Differences

- (a) ALI Principles § 301
 - i) The ALI Principles provides an aspirational statement emphasizing public service integrity.
 - ii) The ALI Principles establishes more specific guidelines against using positions for private gain.
 - iii) While § 36-25-5 Personal Gain appropriately applies broadly to a Public Servant, Household member, and Associated Business of a Public Servant, § 36-25-1(2), it goes even farther by including any

Associated Business of not just the Public Servant, as ALI Principles § 316 recommends, but of every Associated Business with Household member.

iii. Conclusion

- (a) The Ethics Code effectively implements the principles through specific prohibitions and penalties.
- (b) While lacking a direct counterpart to ALI Principles § 301, the Ethics Code creates practical enforcement mechanisms.

b. Conflict of Interests

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize the need for managing conflicts of interest in public service.
- (b) Both frameworks establish guidelines for handling situations where personal interests may conflict with public duties.

ii. Differences

- (a) ALI Principles § 302
 - i) The ALI Principles recommends recusal when a Public Servant's financial interests could be directly affected.
 - ii) The ALI Principles establishes predictability standards for determining when recusal is necessary.

(b) §§ 36-25-5(f); 36-25-9 Conflict of Interest

- i) The Ethics Code defines conflicts of interest broadly in § 36-25-1(8):
 - a) Encompasses actions affecting personal financial interests.
 - b) Includes actions affecting family financial interests.
 - c) However, the definition applies not only to a Public Servant, Household members, and Associated Business of the Public Servant, as ALI Principles § 316 recommends, but Associated Businesses of every Family member.
- ii) The Ethics Code creates specific restrictions in § 36-25-5(f) and § 36-25-9:
 - a) Legislative body members are prohibited from voting on matters with substantial financial interests.
 - b) Restrictions apply to serving on boards overseeing businesses with personal connections.

iii. Conclusion

- (a) The Ethics Code lacks the explicit recusal requirement suggested by ALI Principles.
- (b) The Ethics Code relies on prohibiting specific actions rather than mandating recusal procedures.

c. Avoidance of Bias in Government Matters Affecting Specific Parties

i. Similarities

- (a) Both the ALI Principles and the Ethics Code acknowledge the importance of maintaining impartiality in government decisions.
- (b) Both frameworks seek to prevent bias from influencing official actions.

ii. Differences

- (a) ALI Principles § 303
 - i) The ALI Principles emphasizes impartiality when specific parties' legal rights are at stake.
 - ii) The ALI Principles advocates for recusal when:
 - a) A reasonable observer might question neutrality.
 - b) Prior expressed views might affect impartiality.
- (b) §§ 36-25-5(e); 36-25-9 Avoidance of Bias
 - i) § 36-25-5(e) creates specific prohibitions:
 - a) Prohibits soliciting things of value from subordinates.
 - b) Restricts interactions with those under official oversight.
 - ii) §§ 36-25-9(c); 36-25-12 addresses financial bias:
 - a) Prohibits participation in matters involving financial interests.
 - b) Creates restrictions for regulatory board members.

iii. Conclusion

- (a) The Ethics Code contains elements related to avoiding bias but lacks a

dedicated comprehensive provision.

- (b) The Ethics Code relies primarily on prohibiting specific actions rather than establishing general principles of impartiality.

d. Prohibition on Participation in Matters Involving Financial Conflict of Interest

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize the need to regulate participation in matters involving financial conflicts.
- (b) Both frameworks establish restrictions to prevent Public Servants from acting on matters affecting their financial interests.

ii. Differences

- (a) ALI Principles § 311
 - i) The ALI Principles apply to the Public Servant and Public Servant's Household.
 - ii) The ALI Principles prohibits "substantial participation" in matters that directly impact financial interests.
 - iii) The ALI Principles provides specific exceptions:
 - a) Emergency situations may warrant necessary action.
 - b) The impact must be direct and predictable to trigger prohibition.
- (b) §§ 36-25-1(8); 36-25-5(f); 36-25-9(c) Conflicts of Interest

- i) The Ethics Code defines and restricts conflicts through § 36-25-1(8):
 - a) Creates comprehensive definition of conflict of interest.
 - b) Applies well beyond members the financial interests of a Public Official's Household to apply to the broadly defined Family Members of the Public Official, § 36-25-1(15), and Associated Business of every Family Member. § 36-25-1(2).
 - c) Establishes situations where participation is prohibited.
- ii) The Ethics Code provides specific restrictions in § 36-25-5(f) and § 36-25-9(c):
 - a) Legislators must abstain from voting on legislation with financial conflicts.
 - b) Board and commission members cannot participate in matters involving financial interests.

iii. Conclusion

- (a) The Ethics Code focuses on specific actions rather than broad participation restrictions.
- (b) The Ethics Code is substantially overbroad by extending way beyond Household members.
- (c) The Ethics Code lacks the comprehensive “substantial participation” standard found in the ALI Principles.

e. Prohibition on Acquisition or Retention of Financial Interests

i. Similarities

(a) Both the ALI Principles and the Ethics Code seek to prevent conflicts arising from financial interests.

(b) Both frameworks acknowledge the need to regulate Public Servants' financial holdings.

ii. Differences

(a) ALI Principles § 312

- i) The ALI Principles allows government restriction of acquiring financial interests that could create conflicts.
- ii) The ALI Principles enables preventive measures before conflicts arise.

(b) The Ethics Code Financial Interests

- i) The Ethics Code does not specifically restrict acquiring potentially conflicting interests.
- ii) The Ethics Code relies on general conflict provisions rather than preventive measures.

iii. Conclusion

(a) The Ethics Code lacks the proactive approach to conflict prevention found in ALI Principles.

(b) The absence of specific acquisition restrictions may limit The Ethics

Code's effectiveness in preventing conflicts.

f. Duty to Avoid Bias in Particular Matters Involving Specific Parties

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize the importance of maintaining impartiality in official decisions.
- (b) Both frameworks seek to prevent both actual and perceived bias in government actions.

ii. Differences

- (a) ALI Principles § 313
 - i) The ALI Principles mandates recusal when:
 - a) A party or their representative has association with the Public Servant.
 - b) Circumstances raise reasonable doubts about impartiality.
 - ii) The ALI Principles addresses both actual and perceived bias situations.
- (b) §§ 36-25-5(e); 36-25-9(c) Avoiding Bias in Particular Matters
 - i) § 36-25-5(e) creates specific restrictions:
 - a) Prohibits soliciting value from those under oversight.
 - b) Addresses potential bias through financial restrictions.
 - ii) § 36-25-9(c) establishes board member limitations:

- a) Prohibits participation when financial interests exist.
- b) Creates specific guidelines for regulatory bodies.

iii. Conclusion

- (a) The Ethics Code lacks a comprehensive framework for addressing perceived bias.
- (b) The Ethics Code's focus on specific actions may not adequately address all forms of potential bias.

g. Waivers of Financial Conflicts of Interest and Impartiality Restrictions

i. Similarities

- (a) Both the ALI Principles and the Ethics Code acknowledge that conflict situations require regulatory guidance.
- (b) Both frameworks seek to balance ethical requirements with practical governance needs.

ii. Differences

- (a) ALI Principles § 314
 - i) The ALI Principles allows ethics agencies to grant waivers when:
 - a) General situations warrant broad exemptions.
 - b) Individual cases demonstrate public interest priority.
 - ii) The ALI Principles balances public interest against conflict concerns.
- (b) The Ethics Code Waivers

- i) The Ethics Code relies solely on predefined exceptions.
- ii) The Ethics Code provides no mechanism for case-by-case assessment.

iii. Conclusion

- (a) The Ethics Code's lack of waiver provisions may create unnecessary rigidity.
- (b) The absence of flexibility mechanisms could hinder participation in essential matters.

h. Prohibition on Use and Disclosure of Nonpublic Government Information

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize the importance of protecting nonpublic government information misuse or personal gain.
- (b) Both frameworks establish safeguards against misuse of confidential information.

ii. Differences

- (a) ALI Principles § 315
 - i) The ALI Principles prohibits using nonpublic information for personal financial gain.
 - ii) The ALI Principles prohibits disclosure of nonpublic information to any person that the Public Servant knows will use the nonpublic information for Personal Gain.

- (b) § 36-25-8 Confidential Information
 - i) The Ethics Code prohibits use or disclosure of confidential information for any private financial gain.
 - ii) The Ethics Code encompasses a wider range of potential misuse scenarios:
 - a) Includes all forms of financial benefit from confidential information.
 - b) Extends protection beyond investment transactions.
 - c) But is overbroad by prohibiting disclosure that “could result in financial gain” to “any other person or business.”

iii. Conclusion

- (a) The Ethics Code is broader than the ALI Principles which raises overbreadth concerns.

i. Prohibition on Use of Public Resources for Private Benefit

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish clear restrictions on using public resources for private gain.

- (b) Both frameworks emphasize the importance of preserving public resources for public purposes.

ii. Differences

- (a) ALI Principles § 316
 - i) The ALI Principles prohibits personal use of public resources.
 - ii) The ALI Principles extends prohibition to benefit of associates.
- (b) § 36-25-5(c) Use of Public Resources for Private Benefit
 - i) The Ethics Code specifically prohibits using public resources for private benefit.
 - ii) The Ethics Code creates enforceable standards for resource protection.

iii. Conclusion

- (a) The Ethics Code fully aligns with the ALI Principles' recommendations.
- (b) Both frameworks effectively protect public resources from private misuse.

j. Prohibition of Nepotism

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize the need to address familial relationships in public service.
- (b) Both frameworks acknowledge that nepotism can create conflicts of interest.

ii. Differences

- (a) ALI Principles § 317
 - i) The ALI Principles restricts involvement in employment decisions concerning:

- a) Other Close Relatives must be excluded from hiring decisions.
- b) Domestic partners receive equal restriction consideration.
- c) Household members are included in prohibited relationships.

ii) The ALI Principles aims to prevent favoritism in all hiring processes.

(b) The Ethics Code Nepotism

- i) The Ethics Code contains no dedicated nepotism regulations.
- ii) The Ethics Code relies on general conflict of interest rules to address family-related issues.

iii. Conclusion

- (a) The Ethics Code's lack of specific nepotism provisions represents a significant gap.
- (b) The reliance on general conflict rules may not adequately address nepotism concerns.

k. Appearance on Behalf of Private Parties Before Government Agencies

i. Similarities

- (a) Both the ALI Principles and the Ethics Code address representation of private interests before government bodies.

- (b) Both frameworks recognize potential conflicts in such representations.

ii. Differences

- (a) ALI Principles § 318

- i) The ALI Principles prohibits compensated representation before government agencies.
- ii) The ALI Principles provides limited exceptions:
 - a) Matters concerning personal interests may be permitted.
 - b) Specific circumstances may warrant representation.
- (b) § 36-25-10 Public Servant Appearance before Government Agencies
 - i) The Ethics Code requires disclosure of paid representation before boards or agencies.
 - ii) The Ethics Code does not implement complete prohibition:
 - a) Allows representation with proper disclosure.
 - b) Emphasizes transparency over restriction.

iii. Conclusion

- (a) The Ethics Code takes a less restrictive approach than the ALI Principles.
- (b) The focus on disclosure rather than prohibition may create different ethical safeguards.

I. Fundraising

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize the need to regulate fundraising activities.
- (b) Both frameworks acknowledge potential conflicts in Public Servants'

fundraising activities.

ii. Differences

(a) ALI Principles § 319

- i) The ALI Principles permits nonprofit fundraising with restrictions:
 - a) Activities must occur during personal time.
 - b) Public resources cannot be used.
 - c) Solicitation from subordinates is restricted.
 - d) Prohibited Sources face additional limitations.
- ii) The ALI Principles aims to manage potential conflicts while allowing charitable activities.

(b) The Ethics Code Fundraising

- i) The Ethics Code contains no dedicated fundraising regulations.
- ii) The Ethics Code relies on general ethical principles to govern fundraising activities.

iii. Conclusion

- (a) The Ethics Code's lack of specific fundraising provisions may create regulatory gaps.
- (b) The absence of clear guidelines could increase risks of conflicts and ethical concerns in fundraising activities.

C. Restrictions on Leaving or Entering Public Service

1. ALI Principles

a. ALI Principles § 501. Avoidance of Conflict of Interest On and After Leaving Public Service

i. Conflicts on Entering Public Service

The “revolving door” is a common occurrence in the United States. Public Servants frequently leave public service for the private sector, and new Public Servants are often hired from the private sector. This benefits the government by allowing them to access private expertise and increasing citizen participation in government. However, ethical concerns arise with the “revolving door” because a Public Servant’s actions may be influenced by a desire to curry favor with potential employers. Additional concerns include the possibility that a former Public Servant may misuse information they acquired while in government service or take advantage of relationships with former colleagues still in government.

ii. Conflicts on Entering Public Service

The “reverse revolving door.” Concerns arise when Public Servants enter positions in which they will regulate, oversee, or have official responsibility for their former private-sector employers or clients. The “reverse revolving door” presents concerns that differ from the traditional revolving door because there is not the same possibility of misuse of confidential government information or taking advantage of relationships with former colleagues in government for private benefit. The main concern with the “reverse revolving door” is improper favoritism or bias toward the Public Servant’s former employers, clients, or business associates.

b. ALI Principles § 511. Seeking Post-Government Employment

i. General Principle Restricting Dealings with Potential Future Employers

A Public Servant's pursuit of future private-sector employment with an individual, organization, or firm that has an interest that may be affected by the Public Servant's official actions presents a clear conflict of interest.

ii. Scope of the Restriction

The regulation of pursuing post-government employment varies. Some jurisdictions broadly prohibit seeking or accepting employment with any entity that does business with or is subject to regulation by the employee's agency or department, while others focus on situations in which the employee is directly involved in a matter involving the potential future employer. This section uses the narrower approach, tying the restriction to the Public Servant's direct involvement in a particular matter affecting the potential future employer. This addresses the concern of a possible conflict of interest without overly constraining the Public Servant's future employment options.

iii. Actions Restricted

Many restrictions on the pursuit of post-government employment only apply to negotiations, leading to questions about when a preliminary discussion with a potential employer constitutes a negotiation. This rule applies as soon as the Public Servant seeks post-government employment. If the potential future employer initiates the process, the Public Servant should reject the offer, treat discussions of the offer as a negotiation requiring a waiver, or neither reject nor discuss the offer while the offeror's business is pending. The Public Servant should notify their superiors about the offer so that the superiors can take appropriate measures. If the negotiation ends without an offer, the Public Servant should notify their superior and/or the appropriate agency to

determine if the Public Servant may resume working on the matter affecting the private employer. The restriction only applies when the Public Servant is in public service.

iv. Prohibition Versus Recusal

Restrictions on pursuing post-public-service employment are either a ban on pursuing a position with an employer who has a matter pending before the Public Servant, or a requirement that the Public Servant recuse themselves from all matters involving employers that are part of that job search, once the job search begins. This rule uses both concepts. A prohibition effectively prevents a conflict of interest from arising. However, in some situations, such as when a potential future employer initiates contact or when a Public Servant needs to find future employment due to their position's link to an elected official whose term is ending, an absolute ban may be too harsh. This rule allows a Public Servant to pursue a position with a potential employer who has a matter before the Public Servant's agency or department if the Public Servant advises the agency or department head, obtains consent from the agency, department head, and the jurisdiction's ethics agency, and recuses themselves from the matter.

v. Waiver

There may be situations in which the head of the Public Servant's agency and the jurisdiction's ethics agency conclude it is in the best interests of the jurisdiction for the Public Servant to continue working on the potential future employer's matter, such as when the Public Servant has technical expertise or when the relationship between the government agency and the potential future employer is collaborative. If the Public Servant is an agency or department head or a member of a board or commission that heads the agency, they would need the approval of

the head of the branch of government, as well as the ethics agency.

vi. Future Government Employment

The risk of conflict of interest is significantly reduced when the Public Servant is pursuing a position with another agency or department of the same government. This section only excludes the pursuit of future employment with another agency or department in the same government, but a jurisdiction could exclude all public-sector positions.

vii. Elected Officials

Elected officials may want to consider post-government employment options while still in office. This section treats elected officials differently. An elected official may seek, negotiate for, or accept post-government employment as long as they recuse themselves from all particular matters affecting the prospective employer once contact is established, and advises the ethics agency that they are in contact with the prospective employer about employment.

viii. Part-Time or Advisory Positions

This section does not exempt Public Servants in part-time or advisory positions. If the position allows the Public Servant to exercise discretion that could affect a matter, then the restriction applies. However, there may be situations in which the part-time or advisory position has a minimal role in resolving matters, or in which the government decided to include representatives of specific groups despite a potential conflict of interest. In those situations, an exemption may be appropriate. The jurisdiction's ethics agency may adopt special waiver rules for part-time or advisory Public Servants.

c. ALI Principles § 512. Restriction on Post-Employment Participation in

Particular Matters with Which the Former Public Servant Was Engaged as a Public Servant

i. Purpose and Scope

This section addresses the concerns of a former Public Servant appearing before, communicating with, or assisting with an appearance or communication with their former agency on a matter in which they were personally and substantially involved while in government service. As a result, this is a lifetime ban.

ii. Personal and Substantial Involvement

This section, like the restrictions in ALI Principles § 511, only applies when the Public Servant was personally and substantially involved in the matter while in government service. This requires the Public Servant to have been directly involved in the matter and to have taken some discretionary action that could have affected the matter. This section's scope is broader than § 511 because it would apply to work for a private-sector employer who was not involved with the particular matter when the Public Servant was involved while in government service.

iii. Particular Matter

“Particular matter” is defined broadly to include actions that focus on the interest of specific parties. It includes adopting a rule, regulation, or law if the measure focuses on specific parties, but not if the measure has broad applicability. Because the restriction is permanent, legislation or rulemaking would only be a “particular matter” concerning enacting or adopting the law or rule. This section only applies when the former Public Servant’s post-government employment involves the same matter the Public Servant worked on while in government. Determining if the

matters are the same will depend on the extent to which the matters involve the same facts, issues, parties, time elapsed, confidential information, and continued government interest.

iv. Waiver

A waiver may be granted upon the application of the former Public Servant's agency with the approval of the jurisdiction's ethics agency if they agree it's in the best interest of the jurisdiction. Waivers should be rare, only granted in situations where there is little risk to the public interest, and reserved for situations in which the former Public Servant has specialized skills or knowledge or the former Public Servant's private-sector employer partners or collaborates with the jurisdiction.

d. ALI Principles § 513. Restriction on Appearances Before or Communications with Former Agency or Department

i. Purpose and Scope

The restriction on appearances before or communications with a former Public Servant's agency or department addresses the concern that relationships with former colleagues or subordinates will affect the decisions of those still working for the government. This restriction is not limited to particular matters because the concern about favoritism goes beyond specific matters handled by the former Public Servant while in office. This restriction only applies for a limited time.

ii. Appearance or Communication

This section is also more limited than ALI Principles § 512 because it only applies to appearances or communications with former agencies or departments, and not behind-the-scenes

assistance.

iii. Duration of the Restriction

There is no set duration for the cooling-off period, but many jurisdictions adopt one. This section uses two cooling-off periods. For most Public Servants, the period is one year. For high-level officials, the period is two years.

iv. Exemptions and Waivers

This section exempts actions taken on behalf of government agencies and actions required by a court order. It also exempts uncompensated appearances at a public hearing conducted by a legislative committee or agency. A waiver, requiring a finding by the agency and the ethics agency that the waiver would be in the best interests of the jurisdiction, is available. Waivers should be rare and only granted in situations with little risk to the public interest, when the former Public Servant has specialized skills or knowledge or the former Public Servant's private-sector employer partners with the jurisdiction. Waivers are not authorized for former high-level officials or their staff.

e. ALI Principles § 514. Restriction on Participation in Particular Matters Concerning Former Employers, Clients, or Close Business Associates

i. Purpose

This restriction addresses concerns that new Public Servants will favor the interests of former employers or clients due to prior employment ties.

ii. Former Employer, Client, or Close Business Associate

The restriction applies to anyone the Public Servant worked for during the year before they

entered public service. It treats anyone the Public Servant personally worked for as an agent, attorney, consultant, or Lobbyist during the covered period as a client. A jurisdiction could consider a broader definition of “client.” The term “close business associate” is intended to include business relationships that could cause a conflict of interest or the appearance of one.

iii. Matters Covered

This restriction applies to participating in a matter involving specific parties that is likely to have a direct and substantial financial benefit for the former employer, client, or close business associate. It does not restrict participation in broad policy matters.

iv. Duration of Cooling-Off Period

The restriction on participating in particular matters involving former employers, clients, or close business associates is limited based on the assumption that the influence of those former ties, and the public’s perception of the influence of those ties, will decline over time. Jurisdictions may consider a longer restriction, especially for high-level positions and individuals entering public service after a longstanding connection to a private-sector entity.

v. Exemptions and Waivers

All public-sector entities are excluded from the definition of “former employer.” There may be specific situations in which a Public Servant should not participate in a matter in which they were personally involved for their former governmental employer, particularly if the positions of the current and former employers conflict. The restriction may be waived if the Public Servant’s agency or department, and the jurisdiction’s ethics agency, both agree that it would be in the jurisdiction’s best interests. Waivers should be rare and reserved for situations where the Public

Servant has unusual skills or knowledge, when the Public Servant would be difficult to replace, or when the Public Servant's relationship with the former employer, client, or close business associate was minimal. Any waiver should be in writing and publicly disclosed. This section recognizes that elected officials present special issues regarding recusal as a means of addressing a conflict of interest because there may be matters where there is no one legally capable of acting for a recusing elected official. If recusal is not required, the elected official should publicly disclose the facts requiring recusal.

vi. Additional Restrictions

Public Servants in certain fields or professions may be subject to additional restrictions.

f. ALI Principles § 515. Prohibition on Acceptance of Special Payment by a Former Employer

i. Purpose

Special payments may include bonuses, accelerated payments of stock options, or restricted stock options expressly contingent on the executive entering into government service. These "golden parachutes" raise concerns that the new Public Servant will be unduly attentive to the donor's interests. Requiring disclosure and recusal addresses these concerns.

ii. Scope

This section is intended to include any bonus, severance pay, or special compensation over a defined amount provided to a private-sector employee who accepts a public service position. This section does not cover payments that are not contingent upon the acceptance of public-service employment. There is no general practice of regulating or banning such payments.

A jurisdiction could choose to ban “golden parachutes.”

2. Comparing the ALI Principles and the Ethics Code

a. Restrictions on Seeking Post-Government Employment

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize potential conflicts when Public Servants seek employment with involved entities.
- (b) Both frameworks acknowledge the need to regulate transition from public to private employment.

ii. Differences

- (a) ALI Principles § 511
 - i) The ALI Principles prohibits actively seeking employment when:
 - a) Public Servants are personally involved in matters affecting potential employers.
 - b) Public Servants have substantial involvement with potential employers.
 - ii) The ALI Principles provides specific provisions:
 - a) Allows waivers with proper recusal procedures.
 - b) Addresses unique circumstances for elected officials.
- (b) § 36-25-13 Post-Government Employment
 - i) The Ethics Code lacks direct provisions for seeking employment.

- ii) The Ethics Code relies on broader restrictions:
 - a) Implements two-year restriction on lobbying.
 - b) Limits representation before former government entities.

iii. Conclusion

- (a) The Ethics Code does not provide comprehensive guidance on employment-seeking activities.
- (b) The reliance on general restrictions fails to meet the ALI Principles' standard of clarity.

b. Restrictions on Post-Employment Activities by Public Servants

i. Similarities

- (a) Both the ALI Principles and the Ethics Code aim to prevent former Public Servants from misusing their previous positions.
- (b) Both frameworks establish restrictions to protect against undue influence and personal gain after public service.

ii. Differences

- (a) ALI Principles §§ 512, 513
 - i) ALI Principles § 512 establishes specific communication restrictions:
 - a) Prohibits Public Servants from appearing before former agencies regarding prior involvement.
 - b) Restricts communication regardless of compensation.

- c) Provides exceptions for waivers, elected officials, and court orders.
- ii) ALI Principles § 513 creates graduated cooling-off periods:
 - a) One year for general positions requires restricted contact.
 - b) Two years for high-level positions demands longer separation.
 - c) Allows exceptions for uncompensated appearances and government representation.
- (b) § 36-25-13 Post-Employment Activities by Public Servants
 - i) The Ethics Code establishes a standard two-year restriction period:
 - a) Prohibits lobbying before former government entities.
 - b) Restricts client representation regardless of position level.
 - ii) Subsection (g) creates specific prohibitions:
 - a) Prevents representation of non-governmental parties in prior matters.
 - b) Allows self-representation and state representation as exceptions.

iii. Conclusion

- (a) The Ethics Code generally aligns with the ALI Principles in restricting post-employment activities.
- (b) The uniform two-year restriction differs from ALI Principles' more nuanced approach based on position influence.

c. Restrictions Related to Former Employers and Clients

i. Similarities

- (a) Both the ALI Principles and the Ethics Code acknowledge potential conflicts from prior private sector relationships.
- (b) Both frameworks seek to regulate interactions between Public Servants and their former employers.

ii. Differences

- (a) ALI Principles §§ 514, 515
 - i) ALI Principles § 514 establishes participation restrictions:
 - a) One-year prohibition on matters benefitting former employers.
 - b) Includes exceptions for waivers and elected officials.
 - c) Addresses former government employment situations.
 - ii) ALI Principles § 515 regulates special payments:
 - a) Prohibits accepting payments from former employers upon entering service.
 - b) Requires recusal from matters affecting payment sources.
- (b) § 36-25-13(d) Contracting Restriction
 - i) The Ethics Code creates two-year contracting restrictions:
 - a) Prohibits contracts with former government agencies.
 - b) Provides exceptions for retired directors and division chiefs.
 - ii) The Ethics Code lacks provisions for:

- a) Special payments from former employers remain unaddressed.
- b) General participation in matters affecting former employers lacks specific regulation.

iii. Conclusion

- (a) The Ethics Code's approach diverges significantly from the ALI Principles' recommendations.
- (b) The focus on government contracts rather than comprehensive former relationship regulation creates potential gaps in ethical oversight.

D. Disclosure

1. ALI Principles

a. ALI Principles § 601. Disclosure by High-Ranking Public Servants

i. Scope and Cross-References

The objective of disclosure is to promote compliance with government ethics principles and assure the public that Public Servants are abiding by those principles. Disclosure enables officials responsible for the administration and enforcement of ethics laws to review the financial interests and other commitments of Public Servants for possible conflicts. Disclosure requirements remind Public Servants of applicable ethics considerations.

ii. Which Positions Are Subject to Disclosure

The officials about whom the public is likely to be most concerned and who are most likely to be subject to potential conflicts of interest are those who hold elective or senior appointive

positions, or positions that enable them to exercise significant discretion. Elected officials, agency heads, and officials directly appointed by an elected official should be subject to disclosure requirements.

iii. Information Subject to Disclosure and Family Privacy

The information that must be disclosed will include information concerning the Public Servant's assets and income, liabilities, outside positions, outside employment, gifts, and transactions. In appropriate circumstances, a jurisdiction may choose to require the disclosure of financial information concerning the Public Servant's spouse, dependent children, and business entities controlled by the Public Servant. The only Family members who should regularly be subject to disclosure requirements are the Public Servant's spouse or spousal equivalent and the Public Servant's dependent children.

iv. When Disclosure Is Required

Public Servants subject to disclosure should make a filing upon entering office, annually thereafter, and upon leaving public service. Jurisdictions may choose to impose interim disclosure requirements upon certain categories of Public Servants in specific circumstances.

v. Where to File

Public Servants who are required to disclose should file disclosure forms either with their agency or with a government-wide ethics office.

vi. Defining Categories of Information to Be Disclosed

Each jurisdiction should define the categories of information that must be disclosed by

different categories of Public Servants depending on their decision-making authority and job description.

vii. Electronic Filing Systems

Disclosure is facilitated by an electronic filing system for a governmental unit of any considerable size. An electronic filing system makes relevant information about potential financial conflicts of interest easily accessible to ethics officers and supervisors. An electronic filing system needs to be secure.

b. ALI Principles § 602. Disclosure of Information Concerning Public Servants to the General Public

i. Balancing Transparency with Privacy

Disclosure to the public requires balancing the public's interest in transparency and accountability against Public Servants' right to privacy.

ii. Categories Subject to Public Disclosure

Each jurisdiction should weigh the costs and benefits of public disclosure. Elected officials, agency heads, and other senior appointees, and Public Servants charged with considerable policymaking discretion should be transparent about their finances.

iii. Information Exempt from Public Disclosure

Some information, such as a filer's home address, telephone number, banking information, and information concerning the filer's minor children, should be kept confidential.

iv. Process of Making Information Available

Jurisdictions vary as to the process of making non-confidential information available, with

some posting disclosure filings (with appropriate redactions) online and others making disclosure filings available only on request.

v. Factors for Determining Public Disclosure

Relevant factors for determining what information should be made public include the rank of a Public Official, whether the official is elected or appointed, whether the information relates to the Public Official or to the Public Official's family, the personal privacy interests of the Public Servant and the Public Servant's family, and the likelihood that the information entails a significant risk that a violation could adversely affect the public.

vi. Disclosure Beyond Annual Filings

Public disclosure need not apply to disclosure other than annual filings, such as information provided in response to a request by an ethics official.

vii. Risks of Over-Disclosure

Jurisdictions need to be cognizant of the risks inherent in over-disclosure, especially online.

c. ALI Principles § 611. Disclosure of Assets and Income

i. Assets Subject to Disclosure

Disclosure of assets should include real property, securities, partnerships, commodities, and contracts. Assets that are indirectly owned should be disclosed. Assets belonging to or beneficially owned by dependent children of the Public Servant should also be disclosed. The address of any residence of the Public Servant should be exempted from disclosure.

ii. Valuation of Assets

Disclosure of the value of an asset should include an estimate of the value of the asset within a certain range. In situations where an asset is difficult to value, a Public Servant should consult with agency ethics officials to determine an appropriate course of action, but a reasonable effort should be made to ascertain the value.

iii. Scope of Family Disclosure

The disclosure requirement is limited to assets owned and income earned by the Public Servant's spouse and dependent children.

iv. Disclosure of the Source of Income

The disclosure of income includes both earned income from employment and personal services and unearned income from investments, rental property, and other sources.

v. Duty of Confidentiality

Disclosure of client identity should not be required if it would breach a legal or ethical duty of confidentiality. Each jurisdiction will have to decide upon the appropriate balance between private-sector professional obligations and transparency obligations of Public Servants.

vi. Controlled Entities

Assets of and income earned by an entity must also be disclosed if the Public Servant or the Public Servant's spouse or minor child owns a controlling interest in the entity. "Control" means the ability to control the management of a business entity or to appoint persons who will control the management of that entity.

vii. De Minimis Assets and Income

Each jurisdiction should establish a threshold level below which assets and income need not be disclosed.

viii. Contractual Rights

Assets include contractual rights that are reasonably likely to generate future income.

d. ALI Principles § 612. Disclosure of Liabilities

i. Liabilities Subject to Disclosure

Liabilities subject to disclosure include those that are both directly and beneficially owed.

The purpose of this disclosure is to ensure that debts owed at the corporate or entity level are fully disclosed even if the Public Servant is not personally liable for payment of such debts.

ii. Nonpayment of Debts

If required payments on a debt are not made, the reason for nonpayment should be explained.

iii. Scope of Family Disclosure

This disclosure requirement does not extend to informal domestic partners of Public Servants, although a jurisdiction should apply the disclosure requirements to domestic partners in a legal relationship with a Public Servant that is substantially equivalent to a marriage.

iv. Ordinary Consumer Debt

Ordinary consumer debt should be excluded unless it reaches levels beyond the ordinary.

Jurisdictions should promulgate specific rules for disclosure of large amounts of credit card debt and other lines of credit with very high balances. Mortgages on primary residences and student loans should be excluded, although a jurisdiction might require disclosure if a Public Servant's

overall indebtedness reaches unusually high levels or if there is a default on payments for an extended period.

e. ALI Principles § 613. Disclosure of Outside Positions

i. Purpose of Disclosure

Disclosure of outside positions, which is focused solely on Public Servants who hold significant positions in an outside organization, facilitates compliance with conflicts-of-interest rules.

ii. Family Disclosure

This provision applies only to the Public Servant, not to the Public Servant's spouse and dependent children.

iii. Privacy Concerns

Jurisdictions should be sensitive to privacy concerns that arise with respect to religious and political organizations.

iv. Avoiding Conflicts of Interest

In situations in which a Public Servant's outside position is not disclosed, the Public Servant should take additional precautions to avoid conflicts of interest.

f. ALI Principles § 614. Disclosure of Outside Employment

i. Information Subject to Disclosure

Disclosure should include the identity of the employer and the amount of income received. If the Public Servant expects a benefit from the employment other than compensation, information

about that expected benefit should be disclosed.

ii. Commitments for Future Employment

Disclosure is also required concerning commitments for future employment. Disclosure is required when the Public Servant is seeking employment with an individual, firm, or organization that is directly affected by a particular matter pending before the Public Servant's government, and the Public Servant is personally and substantially involved in the disposition of the matter. A jurisdiction may go further and require disclosure of all negotiations for outside employment.

iii. Duty of Confidentiality

A Public Servant should not disclose information about outside employment if doing so would breach a duty of confidentiality.

iv. Disclosure of Client Identity

A jurisdiction could require Public Servants to disclose information concerning the identity of those clients who are the source of their compensation, but a jurisdiction should make an exception for situations in which the very fact of the representation of a client is particularly sensitive. In some situations, it will be appropriate to require disclosure of a client's identity to an agency ethics official with the client's permission in order to determine whether representation of that client presents a conflict of interest. The nature of the Public Servant's position may also be relevant in determining the extent to which disclosure of information concerning the underlying source of the outside income is necessary.

g. ALI Principles § 615. Disclosure of Gifts

i. Definition of “Gift”

Gifts for the purposes of this section are defined by ALI Principles §211(a). Gifts other than gifts from Household members and Other Close Relatives and gifts of nominal value must be disclosed.

ii. Family Members

Gifts received from Family members, as defined in ALI Principles § 215(a), are excluded to allow for personal privacy in estate planning and other matters. Gifts from a person about to become a spouse of the Public Servant are also excluded.

iii. Gifts to Avoid Conflicts of Interest

This Section requires disclosure of gifts by the Public Servant or the Public Servant’s spouse to family members if the gift avoids conflicts of interest principles applicable to the Public Servant. Disclosure of gifts to family members is limited to transfers of assets likely to create conflicts of interest, not gifts of conflict-free assets such as cash, mutual funds, and most residential real estate.

h. ALI Principles § 616. Disclosure of Transactions

i. Scope of Transaction Disclosure

Disclosure should include the date of the transaction, the parties to the transaction, and the amount and type of consideration on both sides of the transaction. If one of the parties to the transaction is seeking action from the Public Servant’s agency or is substantially affected by the work of the Public Servant’s agency, that information should also be disclosed.

ii. Advance Approval of Transactions

This section doesn't require advance approval for transactions by Public Servants, but jurisdictions or agencies can choose to require it.

iii. Exclusions

A jurisdiction may set a threshold level below which disclosure is not required. Disclosure should not be required for the purchase or sale of a primary residence, for financial transactions with financial institutions on the same terms offered to the general public, or for ordinary consumer transactions. An ordinary consumer transaction is a routine purchase or sale between a consumer and a commercial vendor.

i. ALI Principles § 617. Disclosure of Additional Information

i. Information Subject to Disclosure

This Section provides for disclosure of information that is not already subject to disclosure if the information is material to determining whether a Public Official is complying with the ALI Principles. Such disclosures could include romantic relationships involving the Public Servant or a family member, planned financial transactions, a partisan political candidacy or management of political campaigns by the Public Servant or a Family member, investigations and litigation involving the Public Servant or a family member, and assets, income, or employment of a family member.

ii. Confidential Disclosure

Ordinarily such disclosure would be made to agency ethics officials, but disclosure could

also be made to supervisors, lawyers representing the agency, ethics officials outside the agency, or to other persons responsible for ensuring compliance.

iii. Purpose of Disclosure

This provision is designed as a catch-all for addressing conflicts of interest and appearances of impropriety not contemplated by specific provisions in the ALI Principles. This provision gives the agency ethics official and supervisors of the Public Servant an opportunity to advise the Public Servant on the appropriate course of action.

iv. Disclosure of New Information about past Actions

Disclosure under this Section includes new information about past actions by the Public Servant that could lead a reasonable person to conclude that the Public Servant violated a provision of the ALI Principles or other laws and regulations.

2. Comparing the ALI Principles and the Ethics Code

a. Disclosure by High-Ranking Public Servants

i. Similarities

(a) Both the ALI Principles and the Ethics Code recognize financial and other disclosures from high-ranking Public Servants as essential tools for preventing conflicts of interest.

(b) Both frameworks emphasize these disclosures as crucial mechanisms for promoting public confidence and ensuring compliance with ethics rules.

ii. Differences

- (a) ALI Principles § 601
 - i) The ALI Principles suggests jurisdictional flexibility in determining which Public Servants must disclose.
 - ii) The ALI Principles recommends including elected officials, agency heads, senior appointees, and those with significant policymaking discretion.

(b) § 36-25-14 Disclosure of Financial Interests

- i) The Ethics Code establishes specific criteria including officials earning \$75,000 or more annually, adjusted for inflation.
- ii) The Ethics Code mandates disclosure for members of specific boards, commissions, police chiefs, and school superintendents.
- iii) The Ethics Code includes requirements for those involved in financial management or procurement.

iii. Conclusion

- (a) The Ethics Code implements a comprehensive approach through specific listing of covered individuals.
- (b) While the ALI Principles offers jurisdictional flexibility, the Ethics Code's specific criteria ensures clear application and consistent enforcement.

b. Disclosure of Information to the Public

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish the public's fundamental right to access disclosed information.
- (b) Both frameworks recognize this access as essential for maintaining transparency and accountability in government.

ii. Differences

- (a) ALI Principles § 602
 - i) The ALI Principles advocates for broad public access to disclosed information.
 - ii) The ALI Principles includes specific provisions for protecting sensitive personal information.
- (b) §§ 36-25-4(a)(7) & (b); 36-25-21 Disclosure of Reports
 - i) § 36-25-21 explicitly designates Lobbyist registration and reporting documents as public records.
 - ii) § 36-25-4(a)(7) & (b) establishes regulations governing public access to reports and statements.
 - iii) The Ethics Code includes restrictions related to secrecy and non-disclosure but lacks explicit provisions for protecting personal information.

iii. Conclusion

- (a) The Ethics Code provides strong mechanisms for public access to

disclosure documents.

- (b) The Ethics Code could be enhanced by adding explicit protections for sensitive personal information, balancing transparency with privacy rights.

c. Disclosure of Assets and Income

i. Similarities

- (a) Both the ALI Principles and the Ethics Code mandate comprehensive disclosure of assets and income as potential sources of conflicts of interest.
- (b) Both frameworks recognize the importance of including Family members' financial interests in disclosure requirements.

ii. Differences

- (a) ALI Principles § 611
 - i) The ALI Principles requires disclosure of both identity and specific value of assets.
 - ii) The ALI Principles mandates reporting of exact income amounts from the Public Servant, spouse, and dependent children.
 - iii) The ALI Principles addresses confidentiality obligations for client-based earned income.
- (b) § 36-25-14(b) Disclosure of Income and Business Assets
 - i) The Ethics Code implements categorical ranges for income reporting

rather than exact figures.

- ii) The Ethics Code requires detailed disclosure of real estate holdings, particularly emphasizing rental income from government agencies.
- iii) The Ethics Code includes specific provisions for reporting various types of business income and assets.

iii. Conclusion

- (a) The Ethics Code implements a distinct approach using categorical ranges to balance transparency with privacy.
- (b) The Ethics Code exceeds the ALI Principles' requirements in certain areas, particularly regarding government-sourced income and real estate holdings.

d. Disclosure of Liabilities

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize liabilities as potential influences on Public Servant decision-making.
- (b) Both frameworks establish threshold requirements for liability reporting.

ii. Differences

- (a) ALI Principles § 612
 - i) The ALI Principles requires disclosure of creditor identity, amount, interest rate, and payment details.

- ii) The ALI Principles provides exemptions for consumer debt, mortgages, and family loans unless significantly high.
- iii) The ALI Principles includes provisions for reporting defaulted payments.

(b) § 36-25-14(b)(7) Disclosure of Debts

- i) The Ethics Code focuses specifically on indebtedness to businesses operating within Alabama.
- ii) The Ethics Code implements categorical amounts for debt reporting.
- iii) The Ethics Code provides exemptions specifically for homestead-related indebtedness.

iii. Conclusion

- (a) The Ethics Code takes a more geographically focused approach by emphasizing in-state business relationships.
- (b) The Ethics Code's categorical reporting system and narrower scope create a different framework than the ALI Principles' comprehensive approach.

e. Disclosure of Outside Positions

i. Similarities

- (a) Both the ALI Principles and the Ethics Code acknowledge the need to identify potential conflicts arising from outside positions.
- (b) Both frameworks establish mechanisms to capture information about

additional professional activities.

ii. Differences

- (a) ALI Principles § 613
 - i) The ALI Principles mandates disclosure of all leadership, directorial, and management positions.
 - ii) The ALI Principles distinguishes between ordinary membership and significant organizational roles.
 - iii) The ALI Principles emphasizes positions that could influence public service duties.
- (b) § 36-25-14(b)(2) Disclosure of Outside Positions
 - i) § 36-25-14(b)(2) focuses on time-based occupation disclosure rather than position type.
 - ii) The Ethics Code requires reporting occupations consuming substantial working time.
 - iii) The Ethics Code lacks specific provisions for distinguishing leadership or management roles.

iii. Conclusion

- (a) The Ethics Code implements a time-based approach that differs fundamentally from the ALI Principles' position-based framework.
- (b) The Ethics Code's focus on time commitment may not capture all relevant

leadership positions that could create conflicts of interest.

f. Disclosure of Outside Employment

i. Similarities

- (a) Both the ALI Principles and the Ethics Code require disclosure of outside employment to prevent conflicts of interest.
- (b) Both frameworks recognize the importance of understanding Public Servants' additional professional commitments.

ii. Differences

- (a) ALI Principles § 614
 - i) The ALI Principles requires disclosure of all employment within the past year.
 - ii) The ALI Principles addresses future employment commitments, particularly with entities having pending matters.
 - iii) The ALI Principles allows agencies to request additional conflict assessment information.
- (b) §§ 36-25-14(b)(2); 36-25-14(b)(4) Disclosure of Outside Employment
 - i) § 36-25-14(b)(2) addresses occupational disclosure through time-based reporting.
 - ii) § 36-25-14(b)(4) requires detailed reporting of business income.
 - iii) The Ethics Code mandates specific disclosures for government

employment of officials and spouses, including job descriptions and compensation.

iii. Conclusion

- (a) The Ethics Code implements a detailed approach to government employment disclosure.
- (b) The Ethics Code's framework differs from the ALI Principles by focusing on current occupations rather than past and future employment relationships.

g. Disclosure of Gifts

i. Similarities

- (a) Both the ALI Principles and the Ethics Code recognize gifts as potential sources of undue influence requiring disclosure.
- (b) Both frameworks establish exemptions for family-based gifts and items of minimal value.

ii. Differences

- (a) ALI Principles § 615
 - i) The ALI Principles requires disclosure of gifts exceeding nominal value.
 - ii) The ALI Principles includes gifts to spouses and dependent children from Prohibited Sources.

- iii) The ALI Principles emphasizes motivation behind gifts related to Public Servant positions.
- (b) §§ 36-25-1(14); 36-25-19 Disclosure of Gifts
 - i) The Ethics Code provides a broad definition of “thing of value” encompassing various benefits and gratuities.
 - ii) The Ethics Code implements detailed reporting requirements for Lobbyist and Principal gifts to Public Servants and their Households.

iii. Conclusion

- (a) The Ethics Code implements broader provisions than the ALI Principles through its expansive definition of “thing of value” and detailed requirements for Lobbyist expenditures.
- (b) While the ALI Principles focuses on nominal value thresholds, the Ethics Code creates more specific categories of regulated gifts and explicit exemptions.

h. Disclosure of Transactions

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish requirements for disclosing financial transactions that could create conflicts.
- (b) Both frameworks recognize the need to monitor significant financial relationships.

ii. Differences

- (a) ALI Principles § 616
 - i) The ALI Principles requires disclosure of transactions above certain thresholds with Prohibited Sources.
 - ii) The ALI Principles exempts family member transactions, primary residence purchases, and standard financial dealings.
 - iii) The ALI Principles includes transactions involving spouses and dependent children.
- (b) § 36-25-19(2) Disclosure of Transactions
 - i) The Ethics Code focuses specifically on transactions with Lobbyists or Principals exceeding \$500.
 - ii) The Ethics Code includes transactions involving Household members.
 - iii) The Ethics Code emphasizes relationships with specific categories of individuals rather than all Prohibited Sources.

iii. Conclusion

- (a) The Ethics Code takes a more limited approach than the ALI Principles by focusing primarily on transactions with Lobbyists and Principals.
- (b) While the ALI Principles addresses all Prohibited Sources and includes broad exemptions, The Ethics Code establishes a narrower but more specific regulatory framework.

i. Disclosure of Additional Information

i. Similarities

- (a) Both the ALI Principles and the Ethics Code acknowledge the need for supplemental information beyond standard reports.
- (b) Both frameworks establish mechanisms for reporting potential ethics violations.

ii. Differences

- (a) ALI Principles § 617
 - i) The ALI Principles promotes disclosure of any information relevant to ethical compliance.
 - ii) The ALI Principles emphasizes confidentiality protection for additional disclosures.
 - iii) The ALI Principles creates broad mechanisms for voluntary disclosure.
- (b) § 36-25-17(a) Report Violations
 - i) The Ethics Code requires agency heads to report potential violations.
 - ii) The Ethics Code focuses on mandatory reporting rather than voluntary disclosure.
 - iii) The Ethics Code lacks explicit provisions for confidential submission of additional information.

iii. Conclusion

- (a) The Ethics Code provides less flexibility than the ALI Principles by focusing on mandatory reporting rather than voluntary disclosure mechanisms.
- (b) While the ALI Principles emphasizes confidential voluntary reporting, the Ethics Code implements a more rigid structure centered on agency head obligations to report violations.

E. Administration and Enforcement of Government Ethics

1. ALI Principles

a. ALI Principles § 701. Administration and Enforcement of Ethics Provisions

i. Education and Training

Education and training are crucial for promoting compliance with ethics principles. The ethics agency should inform Public Servants about ethics rules and requirements, and aid their understanding. This could involve developing materials for new employees, conducting periodic reviews for staff, providing FAQs, and posting summaries of rules on key topics. The ethics agency should collaborate with other government units to develop tailored ethics training.

ii. Counseling, Advice, and Rulemaking

Compliance increases when an agency with ethics expertise provides informal counseling to Public Servants on specific issues. Advice should be based on the individual's specific situation, provided confidentially, and limited to that situation. The agency can respond to formal requests

for advisory opinions, which can be made public to provide further guidance. The agency should adopt and publish rules and regulations that interpret and apply ethics principles in greater detail than the ethics code.

iii. Enforcement

Every jurisdiction should have a mechanism for receiving complaints alleging violations of ethics rules, including disclosure requirements. Complaints should be investigated and adjudicated, with penalties for noncompliance. An independent ethics agency should play a central role in the enforcement process, with possible involvement from other agencies. The agency should be able to refer complaints to law enforcement agencies for criminal prosecution or to professional licensing bodies.

iv. Penalties

Penalties for ethics violations may range depending on the violation. Serious violations governed by criminal law may result in criminal penalties like incarceration and fines. Jurisdictions should provide alternative penalties for less serious offenses, like misdemeanors and disciplinary sanctions. The independent ethics agency should impose or recommend sanctions like civil fines and employment-based discipline.

b. ALI Principles § 702. Independent Agency for Ethics Administration and Enforcement

i. The Need for an Ethics Agency

Implementing government ethics principles involves applying general norms to specific settings, tailoring standards to particular contexts, developing and reviewing forms for reporting

financial and other information, providing advice, guidance, education, and training, investigating compliance, and imposing penalties for violations. A specialized ethics agency is best equipped to handle these tasks, given the specialized knowledge required.

ii. The Need for Independence

Ethics agencies oversee and take action with respect to the officials who appointed them or Public Servants closely allied with those officials. To carry out their responsibilities and assure the public that ethics principles are enforced, the agency's decision-making should be insulated from control by those with appointing authority.

iii. Agency Jurisdiction and Separation of Powers

Ethics agencies should have authority over both the executive and legislative branches of government. However, separation-of-powers law may preclude giving the agency implementation and enforcement authority over some legislative actions. In such cases, the legislature should create an independent legislative-branch agency to administer and enforce ethics rules within the legislature.

iv. Local Governments

States should assume responsibility for the administration and enforcement of ethics principles within smaller local governments lacking the resources for their own ethics agencies. This can be done by entrusting oversight to the state's ethics agency or giving a county's ethics agency jurisdiction over smaller local governments within that county.

v. Resources

Effective administration and enforcement of ethics rules require adequate legal and financial resources, including staffing, equipment, and technology. Jurisdictions should consider measures to protect the agency's budget.

c. ALI Principles § 711. Promoting Ethics-Agency Independence

i. Promoting Ethics-Agency Independence

The ethics agency's independence from political control is critical for its effectiveness and public perception that it will fairly enforce ethics requirements. Multiple means of promoting independence exist, with nearly all state or municipal ethics agencies utilizing one or more of these options.

ii. For-Cause Removal

Requiring that the head of an ethics agency be removable only for cause is particularly important. This protects chief ethics officers from retaliation when the agency seeks to enforce standards against those in power. Mandating that the term of a governing body member is longer than the appointing officer's also provides independence.

iii. Term Limits

The value of limiting board members or the head of the ethics agency to a single term is debatable. A one-term limit eliminates the possibility of decisions being made with reappointment in mind, but also reduces the knowledge and experience of agency heads. A two-term limit could be a compromise, developing agency capacity while limiting the incentive for actions aimed at reappointment.

iv. Other Options

Most state and local ethics agencies are headed by multimember commissions, which offer a wider range of perspectives and experiences. Multiple appointing officers reduce the perception of the body being part of a single appointing officer's administration. Multiple appointing officers may also make it easier to give the body jurisdiction over the legislature and executive branches. Multi-member bodies also facilitate discussion and deliberation. However, members appointed by different officers may represent their respective appointing officers' interests, and administration by a multi-member body may lead to delays and deadlock.

d. ALI Principles § 712. Ethics-Agency Jurisdiction

i. Ethics-Agency Jurisdiction

In many states and large cities, the ethics agency has jurisdiction over both the executive and legislative branches, promoting consistent interpretation and application of standards and providing for ethics training and oversight of the legislative branch. However, constitutional obstacles may exist in giving enforcement powers to an entity governed by a body with many executive-branch appointees. This could be seen as a threat to the legislature's independence from the executive.

e. ALI Principles § 713. Ethics-Agency Duties and Powers

i. Education and Training

One of the most widespread responsibilities of an ethics agency is to educate Public Servants about ethics rules, requirements, and how those apply in practice. Many jurisdictions mandate ethics training for new Public Servants, including plain-language written and oral materials.

Jurisdictions should require all Public Servants to take ethics training upon entering public service and periodically thereafter. The agency should consult with departments and agencies to develop specialized training.

ii. Advice

Agency ethics advice can be informal or formal. The agency should develop procedures for Public Servants to obtain informal guidance and assistance. Such advice should be based on specific facts and circumstances, does not have precedential effect, may be sought and provided confidentially, and may be recorded for consistent code implementation. If the information suggests a violation has already occurred, the agency may take action. The agency should also be able to issue formal advisory opinions. These opinions address proposed future conduct or action, are based on facts in the request, and protect Public Servants who reasonably rely on them. The agency should publish formal advisory opinions with redactions to avoid disclosing identities.

iii. Rulemaking

The ethics agency should have the power to adopt, amend, or repeal rules and procedures to elaborate on, clarify, or implement ethics laws. This includes rules governing advisory opinions, financial disclosure, complaints, and investigations. They may address waivers, monetary thresholds for accepting gifts, and reporting financial information.

iv. Financial Disclosure

Implementing and enforcing financial-disclosure requirements is central to ethics administration. This includes preparing, disseminating, and reviewing forms, and determining

which Public Servants need to complete which forms. The agency should guide Public Servants on completing forms, may require additional financial information, and determine what information is subject to public disclosure.

v. Complaints, Investigations, and Resolution of Complaints

There is significant variation in how agencies handle complaints, investigations, and resolution of possible ethics law violations. Some agencies are responsible for all three functions, while others share these responsibilities with other entities. The jurisdiction may allow De Minimis violations to be handled internally without referral to the ethics agency. The ethics agency should create and publicize procedures for receiving and reviewing complaints, initiating preliminary investigations, and dismissing insufficient complaints or handling minor violations with private warnings. The agency should refer evidence of criminal violations to law enforcement. If another agency investigates a complaint, the ethics agency should independently assess the facts and recommend penalties. The enforcement process must balance protecting the rights of Public Servants and assuring the public that ethics laws are enforced. The agency should maintain confidentiality during the investigation, protect the identity of the complainant, and keep the complaint and investigation, confidential until a Public Servant is formally charged with a violation. The confidentiality requirement, however, does not apply to the Complainant, or Respondent if the Respondent wants to publicly comment on the matter. The formal charge and the result of any formal proceeding should be made public. The investigative and enforcement process must provide due process protections for those under investigation. The investigating entity must have appropriate powers, including subpoena power, and proceed

timely. The individual under investigation must be informed of the complaint or allegations and allowed to respond. If the investigation concludes that a violation occurred, the Public Servant must have the opportunity to contest the conclusion. Formal proceedings must comply with due process requirements. The standard of proof should be a preponderance of the evidence, but a higher standard may be required depending on the potential penalties. Jurisdictions should make it unlawful to obstruct or fail to cooperate with ethics violation investigations.

vi. Reports and Recommendations

The agency should submit an annual public report to the chief executive and legislature, summarizing its proceedings and activities, education and training programs, formal advisory opinions, rules promulgated, complaints received, and their dispositions. It should include recommendations for legislative and administrative changes to improve ethics laws, and recommendations for changes in the rules, procedures, organization, or policies of other agencies to address recurring ethics issues.

f. ALI Principles § 714. Penalties, Orders, and Other Dispositions

i. A Broad Range of Penalties

A broad range of penalties is needed to address the wide range of possible ethics violations. Serious violations may warrant criminal prosecution. However, a range of lesser penalties is necessary for less serious offenses, and the ethics agency should have the power to impose or recommend them.

ii. Agency Sanctions

Possible agency sanctions include fines, restitution, public or private reprimand. The agency

should be able to recommend employment discipline, including loss of pay, suspension, demotion, or discharge. The agency should be able to recommend voiding official actions taken in violation of an ethics law. For licensed professionals, the agency could provide its findings to the licensing board.

iii. Agency Orders

In addition to penalties, the agency should be authorized to issue orders requiring the divestment of financial interests, the cessation of outside activities causing conflicts of interest, recusal from certain official activities, or conditions on waivers allowing the retention of investments or outside positions that cause conflicts of interest. The agency should be able to order recusal when a conflict of interest exists. The agency should be authorized to seek injunctive relief when necessary.

g. ALI Principles § 715. Whistleblower Protection

i. Whistleblower Protection Is Essential

Protecting whistleblowers from reprisal is essential to enforcing ethics laws, as they are an important source of information about violations. Public Servants should be educated on reporting ethics violations. Former Public Servants, contractors, and others who come into contact with government should feel safe coming forward with information about potential ethics violations. This section protects individuals who report information about ethics violations and those who provide information during an inquiry. Whistleblower protection, along with confidentiality guarantees, is crucial for ethics enforcement. Retaliation against whistleblowers should be considered a serious offense.

2. Comparing the ALI Principles and the Ethics Code

a. Administration and Enforcement of Ethics Provisions

i. Similarities

- (a) Both the ALI Principles and the Ethics Code emphasize the importance of having rules, procedures, and enforcement mechanisms for ethics provisions.
- (b) Both frameworks mandate the existence of a body to create and enforce ethics rules.

ii. Differences

- (a) ALI Principles § 701
 - i) The ALI Principles offers general guidelines for ethics administration.
- (b) § 36-25-4(a) Duties of Ethics Commission
 - i) The Ethics Code outlines specific duties of the Ethics Commission.

iii. Conclusion

- (a) The Ethics Code meets the ALI Principles' recommendations by establishing a specific agency.
- (b) The Ethics Code provides a concrete framework for the administration and enforcement of ethics provisions.

b. Independent Agency for Ethics Administration and Enforcement

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish requirements for creating an independent body to handle ethical matters.

ii. Differences

- (a) ALI Principles § 702
 - i) The ALI Principles stresses insulating the agency's decision-making from political influence.
 - ii) The ALI Principles recommends authority over both executive and legislative branches.
- (b) § 36-25-3(a) Creation of Ethics Commission
 - i) The Ethics Code emphasizes the composition and appointment process of commission members.

iii. Conclusion

- (a) While the Ethics Code establishes a commission, its emphasis on the appointment process raises concerns about potential political influence.
- (b) The Ethics Code's approach differs from the ALI Principles' explicit caution against political influence.

c. Promoting Ethics-Agency Independence

i. Similarities

- (a) Both the ALI Principles and the Ethics Code aim to ensure the independence of the ethics body by limiting political actors' influence.

ii. Differences

- (a) ALI Principles § 711
 - i) The ALI Principles provides multiple mechanisms for achieving independence.
 - ii) The ALI Principles establishes fixed-term appointments and limitations on appointments.
- (b) § 36-25-3(a) Independence of Ethics Commission
 - i) The Ethics Code specifies term limits and appointment processes.
 - ii) The Ethics Code allows gubernatorial appointment for commission vacancies.

iii. Conclusion

- (a) The Ethics Code incorporates some measures to promote independence but doesn't adopt the comprehensive approach recommended by the ALI Principles.

d. Ethics-Agency Jurisdiction

i. Similarities

- (a) Both the ALI Principles and the Ethics Code emphasize ethics body oversight over executive and legislative branches.

ii. Differences

- (a) ALI Principles § 712

- i) The ALI Principles recommends comprehensive oversight while acknowledging separation of powers limitations.
- (b) §§ 36-25-3(a); 36-25-4(b) Jurisdiction of Ethics Commission
 - i) The Ethics Code directly establishes the Ethics Commission's jurisdiction over both branches.

iii. Conclusion

- (a) The Ethics Code clearly defines the Ethics Commission's jurisdiction over both branches.
- (b) The Ethics Code effectively meets the ALI Principles' framework for comprehensive oversight.

e. Ethics-Agency Duties and Powers (Education and Training)

i. Similarities

- (a) Both the ALI Principles and the Ethics Code underscore the role of education and training in ensuring ethical conduct.

ii. Differences

- (a) ALI Principles § 713(a)
 - i) The ALI Principles broadly recommends providing education.
- (b) § 36-25-4.2(a) Ethics Commission Training
 - i) The Ethics Code mandates specific training programs for legislators and Public Officials.

- ii) The Ethics Code requires training for county commissioners and certain Public Employees.

iii. Conclusion

- (a) The Ethics Code surpasses the ALI Principles' framework through mandatory training programs.
- (b) The Ethics Code ensures a more proactive approach to ethics education.

f. Ethics-Agency Duties and Powers (Advice)

i. Similarities

- (a) Both the ALI Principles and the Ethics Code allow the ethics body to provide guidance through formal, public opinions.

ii. Differences

- (a) ALI Principles § 713(b)
 - i) The ALI Principles explicitly addresses providing formal advisory opinions, which should be made public.
- (b) § 36-25-4(a)(9) Ethics Commission Advisory Opinions
 - i) The Ethics Code provides for advisory opinions.
 - ii) The Ethics Code provides protection from liability when relying on advisory opinions in good faith.

iii. Conclusion

- (a) The Ethics Code meets the core of the ALI Principles' framework for

providing formal opinions.

g. Ethics-Agency Duties and Powers (Rulemaking)

i. Similarities

- (a) Both the ALI Principles § 713(c) and § 36-25-4(a)(11) grant rulemaking authority to the ethics body.
- (b) Both frameworks require adherence to state administrative procedure laws.

ii. Differences

- (a) No significant differences exist between the frameworks' approaches to rulemaking.

iii. Conclusion

- (a) The Ethics Code meets the ALI Principles' framework through empowering the Ethics Commission.
- (b) The Ethics Code effectively enables rule creation for ethical standards enforcement.

h. Ethics-Agency Duties and Powers (Financial Disclosure)

i. Similarities

- (a) Both the ALI Principles and the Ethics Code emphasize transparency through public access to financial disclosure reports.

ii. Differences

- (a) ALI Principles § 713(d)
 - i) The ALI Principles provides broader responsibilities for enforcement and form management.

- (b) § 36-25-4(a)(5) Reports Disclosure

- i) The Ethics Code focuses on public accessibility including internet availability.

iii. Conclusion

- (a) The Ethics Code fulfills the ALI Principles' framework for public access to financial disclosure reports.

i. Ethics-Agency Duties and Powers (Complaints, Investigations, and Resolution)

i. Similarities

- (a) Both the ALI Principles and the Ethics Code establish procedures for investigations.

- (b) Both frameworks guarantee due process rights to the respondent.

ii. Differences

- (a) ALI Principles § 713(e)

- i) The ALI Principles presents broader principles for complaint handling.
 - ii) The ALI Principles require confidentiality of complaint proceedings but the confidentiality does not apply to the Complainant or

Respondent, if the Respondent wants to publicly comment on the matter.

(b) § 36-25-4(c-d)

- i) The Ethics Code provides specific timelines and requirements for complaints.
- ii) The Ethics Code explicitly prohibits investigation of anonymous complaints.
- iii) The Ethics Code confidentiality requirement applies to the Complainant and Respondent, even if the Respondent wants to publicly comment on the matter.

iii. Conclusion

- (a) The Ethics Code meets the ALI Principles' framework regarding complaint proceedings, due process, and fair investigation measures
- (b) The Ethics Code confidentiality requirement is too restrictive since it applies to the Complainant and Respondent.

j. Ethics-Agency Duties and Powers (Reports and Recommendations)

i. Similarities

- (a) Both the ALI Principles and the Ethics Code require annual reports detailing activities and recommendations.

ii. Differences

- (a) ALI Principles § 713(f)
 - i) The ALI Principles explicitly requires redaction of confidential information.

- (b) § 36-25-3(c) Annual Reports

- i) The Ethics Code mandates annual reports without explicitly addressing confidentiality redaction.

iii. Conclusion

- (a) The Ethics Code fulfills the ALI Principles' framework for annual reporting and recommendations.

k. Penalties and Remedies

i. Similarities

- (a) Both the ALI Principles and the Ethics Code suggest a range of penalties including criminal penalties.

- (b) Both frameworks allow administrative resolution for minor violations.

ii. Differences

- (a) ALI Principles § 714

- i) The ALI Principles provides general guidance on penalty types.

- (b) § 36-25-27(a-b) Penalties and Remedies

- i) The Ethics Code specifies penalty classifications and amounts.
 - ii) The Ethics Code establishes maximum administrative penalties of

\$6,000.

iii. Conclusion

- (a) The Ethics Code meets and exceeds the ALI Principles' framework.
- (b) The Ethics Code provides well-defined structures for addressing different violation levels.

I. Whistleblower Protection

i. Similarities

- (a) Both the ALI Principles and the Ethics Code protect whistleblowers from retaliation.
- (b) Both frameworks require good faith belief in violations.

ii. Differences

- (a) ALI Principles § 715
 - i) The ALI Principles classifies retaliatory actions as serious violations.
- (b) § 36-25-24 Whistleblower Protection
 - i) The Ethics Code prohibits retaliation without explicitly classifying violation severity.
 - ii) The Ethics Code permits unrelated disciplinary actions.

iii. Conclusion

- (a) The Ethics Code meets ALI Principles' recommendations for whistleblower protection.

(b) The Ethics Code could be strengthened by reclassifying retaliatory actions as serious offenses.

F. Summary and Conclusions from Comparative Analysis of the ALI Principles to the Ethics Code

The Ethics Code demonstrates both strengths and areas for improvement when measured against the ALI Principles. The Ethics Code aligns favorably with the ALI Principles in several areas, including comprehensive financial disclosure requirements, appropriate post-employment restrictions with a two-year cooling-off period, broad Ethics Commission enforcement authority, and robust whistleblower protections. However, notable gaps exist where the Ethics Code falls short of ALI Principles, particularly in its lack of a clear statement of purpose regarding public trust, fragmented approach to defining Prohibited Sources, insufficient pre-employment restrictions, limited safeguards for Ethics Commission independence, overbroad confidentiality requirements for complaint proceedings, inadequate protocols for proactive conflict disclosure, weaker penalties for whistleblower retaliation, and less detailed complaint and investigation procedures compared to ALI's Principles. To strengthen the Ethics Code and better serve the public interest, the Legislature should consider adopting the ALI Principles' more comprehensive guidelines, particularly in areas of structural independence, procedural clarity, and proactive conflict management.

1. Major Provisions of the Ethics Code that Compare Favorably to the ALI Principles

a. Financial Disclosure Requirements

The Ethics Code's financial disclosure provisions are largely consistent with the ALI

Principles. §§ 36-25-14 and 36-25-19 require Public Officials, candidates, and Public Employees above a certain salary threshold, to file annual statements of economic interests. These reports cover income, gifts, debts, and other financial information in a manner that generally tracks ALI Principles §§ 611-616 guidance on the scope of disclosure.

b. Post-Employment Restrictions

§ 36-25-13 constrains former Public Servants' ability to represent private interests before their prior government employers. The Ethics Code's two-year "cooling-off" period aligns with the duration ALI Principles § 513 recommends for most public officials. The provision appropriately balances the need to prevent undue influence with the goal of attracting qualified individuals to public service.

However, the Ethics Code's approach could be fine-tuned by calibrating restrictions based on officials' rank and authority, as ALI Principles § 513 suggests. Imposing longer prohibitions on high-level decision-makers while providing targeted exceptions for those in more limited roles would better tailor the system to risks of impropriety.

c. Ethics Commission Authority

§ 36-25-4 vests the Ethics Commission with broad powers to administer and enforce the Ethics Code. The Ethics Commission's authority to issue advisory opinions, conduct investigations, refer cases for prosecution, and recommend legislation substantially mirrors the core powers ALI Principles § 713 advises for ethics agencies.

d. Whistleblower Protections

§ 36-25-24 offers important protections for Public Employees who report ethics violations in

good faith. Prohibiting retaliation and preserving confidentiality as this provision does is essential to encourage reporting and ferret out misconduct. These safeguards are a crucial component of the ALI Principles.

2. Major Provisions of the Ethics Code that Compare Unfavorably to the ALI Principles

a. Statement of Purpose

Unlike ALI Principles § 301's direct articulation that public office is a public trust that should not be used for private gain, the Ethics Code lacks an explicit statement of this fundamental principle. The absence of this provision misses an opportunity to anchor the framework conceptually.

b. Prohibited Sources

In contrast to ALI Principles § 211's clear consolidated definition in a unified framework, the Ethics Code addresses Prohibited Sources and gift exclusions through scattered sections. This more fragmented structure creates unnecessary complexity compared to the streamlined model approach.

c. Pre-Employment Restrictions

The Ethics Code emphasizes post-employment restrictions in § 36-25-13 but provides insufficient proactive guidance on conflicts arising from seeking outside employment during public service. It does not match the ALI Principles § 511 recommendations on regulating job-seeking activities to prevent improper influence.

d. Ethics Commission Independence

§ 36-25-3 provisions on commissioner appointments and vacancies raise concerns about political influence that ALI Principles § 711 cautions against. The statute lacks explicit constraints on removal and term lengths to insulate commissioners as thoroughly as the ALI Principles advise.

e. Conflicts of Interest Definition

§ 36-25-1(8) applies conflict of interest restrictions well beyond the financial interests of a Public Official, their Households, and the business interests of the Public Official, as recommended by ALI Principles § 311, to apply to the broadly defined Family Member of the Public Official, § 36-25-1(15), and all Associated Business, § 36-25-1(2), with every Household member.

f. Personal Gain Prohibition

While § 36-25-5 appropriately applies to a Public Servant and Family Members,⁵⁰ it goes even farther by including Associated Business of not just the Public Servant, but every Associated Business of every Family member. This is substantially broader than what the ALI Principles recommend.

g. Disclosure of Potential Conflicts

The Ethics Code focuses on mandatory reporting of violations in § 36-25-17 rather than providing clear protocols for officials to confidentially disclose additional information suggesting potential conflicts to ethics officers. It does not proactively encourage surfacing

⁵⁰ The ALI term Close Relative is closely related to Family Member of the Public Official, § 36-25-1(15), which may be appropriate regarding Personal Gain.

issues as ALI Principles § 617 recommends.

h. Penalties for Whistleblower Retaliation

Although § 36-25-24 prohibits retaliation against whistleblowers, the Ethics Code does not expressly classify such conduct as a serious offense when imposing penalties under § 36-25-27. This contrasts with the ALI Principles § 715 guidance on categorizing retaliatory actions.

i. Complaint and Investigation Procedures

Compared to the extensive ALI Principles § 713 criteria on ethics complaint and investigation protocols, §§ 36-25-4 and 36-25-27 provide less precise guidance on standards of proof, due process safeguards, and progressive sanctions and overbroad confidentiality requirements for the complaint procedure. The ALI Principles offer clearer procedural guardrails.

III. National Survey Analysis

To understand the structure and effectiveness of the Ethics Code, it is essential to examine how other states enforce their ethics laws through their respective ethics commissions. Ethics commissions play a critical role in maintaining transparency, accountability, and public trust in government by overseeing compliance with ethics laws, investigating violations, and imposing penalties when necessary. This part of the report will evaluate Alabama's approach to ethics enforcement in comparison to national trends and practices. By analyzing these comparisons, we can better assess the strengths and weaknesses of Alabama's ethics enforcement framework and identify opportunities for improvement.

A. § 36-25-1 - Definitions

1. (2) Business with which the person is associated

a. National Survey

States' definitions generally fall into three categories based on their scope: strictly business-focused definitions, definitions including immediate family, and definitions including household members.

Many states maintain a strictly business-focused approach that emphasizes direct financial and professional relationships. Alaska employs a comprehensive definition centered on tangible business connections, encompassing consulting arrangements, advisory positions, membership status, and financial interests in business entities. Kansas takes a more limited approach, restricting its definition to formal business structures including partnerships, limited partnerships, associations, and professional service corporations. Rhode Island maintains a streamlined definition focused solely on business associates and employment or representation relationships. Delaware distinguishes itself by establishing a specific monetary threshold, defining association as receiving \$5,000 or more in income for services rendered as an employee, officer, director, trustee, or contractor. Florida's definition emphasizes specific business arrangements, including partnerships, joint ventures, non-public corporate shareholders, and property co-ownership.

A second group of states expands the definition to include immediate family members. Connecticut's definition encompasses not only business relationships but also extends to immediate family members, including spouses, children, and dependent relatives residing in the

household. Massachusetts similarly includes immediate family members but specifically limits the scope to spouses and dependent children within the household. Mississippi's definition is notably broad, including all "relatives" defined as spouses, children, parents, siblings, and their respective spouses. Missouri takes a more restricted approach, including only spouses and dependent children in custody. Nebraska's definition covers immediate family members, specifically including spouses or domestic partners, relatives residing in the same household, and dependent relatives. North Carolina and Pennsylvania both employ comprehensive family definitions, with North Carolina including parents, siblings, children, spouses, grandparents, and grandchildren, while Pennsylvania includes parents, spouses, children, and siblings. South Carolina focuses on household-based relationships, including household children, spouses, and tax dependents.

The third category, represented by the District of Columbia and Wisconsin, extends coverage to household members beyond immediate family. The District of Columbia's definition includes household members, specifically addressing spouses or domestic partners and their parents, siblings, and children. Wisconsin takes the broadest approach, including not only immediate family members but also any individuals who either receive or provide majority support within the household.

b. Application to the Ethics Code

Alabama's definition of "business with which the person is associated" represents a significant departure from national norms, establishing an exceptionally broad scope that creates potential compliance challenges and oversight complications.

The definition combines two concerning elements that, when taken together, create the most expansive interpretation in the nation. First, it encompasses any business where either the person or a family member holds virtually any position of significance, including officer, owner, partner, board member, or employee. Second, it sets a remarkably low threshold of just five percent ownership of fair market value to trigger association status. This combination means that even minimal business involvement by extended family members could create an associational relationship under the law.

The definition becomes particularly problematic when considered alongside Alabama's expansive family member definitions. For public officials, the family definition extends to adult children and their spouses, parents, spouse's parents, siblings and their spouses. This creates a complex web of potential business associations that extends far beyond the person's direct control or even knowledge. Even for public employees, while the family definition is more limited to spouses and dependents, the breadth of business roles that trigger association remains problematic.

2. (8) Conflict of interest

a. National Survey

An analysis of state conflict of interest definitions reveals consistent patterns in how states define covered relationships. The majority of states have adopted definitions that focus on two key categories: immediate family members (typically defined as household members including spouse, children, and dependents) and business associations where the legislator has a direct interest or significant control.

The predominant national approach limits family coverage to immediate family members within the household. States including California, Louisiana, Maine, Pennsylvania, Utah, and West Virginia explicitly use “immediate family member” terminology. This standard typically encompasses only the legislator's spouse, children, and dependents residing in the household. While some states use broader terms like “relative” or “family,” the practical application generally focuses on immediate household relationships to maintain clear implementation standards.

The majority of states (eighteen) extend conflict of interest provisions to business associations, primarily focusing on enterprises where legislators have significant control or financial interest. The most common approach, adopted by states like Arkansas, California, and Idaho, addresses “business with which they are associated.” This standard typically requires substantial involvement rather than casual or minor business connections.

b. Application to the Ethics Code

Alabama's conflict of interest definition significantly exceeds national standards in both breadth and specificity. The state's definition of family members for public officials extends well beyond the household to include:

This expansive definition creates potential conflicts from relationships that most states do not consider sufficiently close to warrant restriction. Furthermore, Alabama's definition of “business with which the person is associated” encompasses any business where the person or any family member serves as an officer, owner, partner, board member, employee, or holds more than five

percent ownership. This broad scope creates potential conflicts from even minor business relationships or employment of extended family members.

The current expansive definitions risk creating conflicts from remote relationships that have minimal potential to influence legislative judgment. Adopting the majority national approach would provide sufficient protection against genuine conflicts.

3. (14) Family member of the public employee; (15) Family member of the public official

a. National Survey

There is a clear predominance of the term “immediate family member” across jurisdictions, though the specific definitions vary significantly. The most common approach among states is to define immediate family members through a combination of three key factors: spousal relationship, dependent children, and residency requirements. States such as Connecticut, Michigan, Nebraska, and South Carolina explicitly include spouses and dependent children in their definitions, with many adding the specific requirement that these family members reside in the same household. This residency requirement appears to be a crucial distinguishing factor in numerous jurisdictions.

A secondary pattern emerges in states that expand beyond the core nuclear family to include parents and siblings. New Jersey, for instance, defines immediate family members as spouses, children, parents, or siblings, provided they reside in the same household. North Carolina takes an even broader approach, extending the definition to include grandparents and grandchildren, regardless of residency status. This represents a minority but significant variation in how states

conceptualize family relationships. Several states have adopted more nuanced approaches that incorporate economic dependencies. For example, Nevada's definition is particularly comprehensive, encompassing not only traditional family relationships but also domestic partnerships and relationships within the third degree of consanguinity or affinity. This approach reflects a modern understanding of family structures while maintaining clear boundaries for ethical purposes.

It is noteworthy that some jurisdictions, including Florida, New York, Ohio, and Washington, either do not specifically define family members or use broader, less precise terms like "relatives" or "close relatives." This regulatory gap potentially creates ambiguity in the application of gift and ethics rules in these states.

Tax dependency serves as another common criterion in several jurisdictions. States such as Michigan, Nebraska, and South Carolina incorporate federal tax dependency status as a determining factor in their definitions. This approach provides an objective standard for establishing family relationships while potentially capturing non-traditional family structures.

b. Application to the Ethics Code

Alabama's statutory framework creates a significant departure from the national standard in its treatment of family member definitions, establishing a concerning two-tiered system that applies different standards to public employees versus public officials. For public employees, Alabama maintains alignment with the prevalent national approach by defining family members narrowly as "the spouse or a dependent of the public employee." This definition reflects the common elements found across most jurisdictions, focusing on immediate household

relationships and economic dependencies. However, Alabama's definition for public officials markedly diverges from this standard, creating an expansive network of covered relationships that extends well beyond the immediate family unit. For public officials, family members include: the spouse, dependents, adult children and their spouses, parents, spouse's parents, siblings and their spouses. This broader definition encompasses both vertical family relationships (across generations) and horizontal relationships (including siblings), while also extending to in-laws through both adult children and siblings.

This divergence from national norms raises several significant concerns. First, the disparate treatment between public employees and officials creates potential confusion in application and enforcement, particularly in situations where individuals might transition between employee and official status. Second, the expansive definition for officials extends ethical obligations and restrictions to a much wider circle of relationships than typically contemplated by gift and ethics regulations in other states. The breadth of Alabama's definition for public officials particularly stands out when compared to states like Michigan, Nebraska, and South Carolina, which typically limit their definitions to household members and tax dependents. Even states with broader definitions, such as Nevada or Oregon, generally maintain more uniform standards across different categories of public service. This expansive approach potentially creates significant compliance challenges and may inadvertently capture legitimate transactions that would not raise ethical concerns in other jurisdictions. The inclusion of adult children's spouses and siblings' spouses, in particular, extends ethical considerations to individuals who may have minimal connection to the public official's governmental duties.

4. (20) Lobby or Lobbying

a. National Survey

The fundamental core of lobbying definitions across states centers on the concept of communication with public officials to influence governmental action. This communication element is universally present, though states vary in how they characterize it. For instance, Arizona, Arkansas, and Connecticut explicitly reference “directly communicating” or “communicating directly,” while other states like Tennessee acknowledge both “direct and indirect” communications in their definitions.

States generally focus on three primary spheres of influence: legislative action, administrative action, and executive action. Massachusetts provides one of the more comprehensive approaches, defining “legislative lobbying” to include any act to promote, oppose, or influence legislation, including the governor's approval or veto thereof. This approach is mirrored in various forms across other jurisdictions, with states like Idaho expanding their definitions to encompass rulemaking, procurement, and even bond issues.

A significant number of states incorporate the element of intent in their definitions. North Carolina's statute is particularly noteworthy in this regard, as it extends beyond immediate influence to include “developing goodwill” and “building relationships” with the intention of influencing current or future legislative or executive action. This broader conceptualization of lobbying activities reflects a sophisticated understanding of how influence operates in political environments.

The scope of covered activities varies significantly among jurisdictions. While some states

maintain relatively narrow definitions focused on direct communication with officials, others adopt more expansive approaches. Vermont, for example, includes not only direct communication but also “solicitation of others to influence” and activities sponsored by lobbyists to enable communications with legislators. Similarly, Louisiana explicitly includes “preparation or research” specifically intended to support lobbying communications.

States have also adapted their definitions to address modern governance complexities. New York's definition encompasses attempts to influence not only traditional legislative actions but also administrative rulemaking, rate-making proceedings, and governmental procurement. This broader approach reflects the evolving nature of governmental decision-making processes.

Many states have incorporated specific exclusions from their lobbying definitions to protect legitimate activities. Common exceptions include communications by public officials acting in their official capacity, news media reporting, attorneys representing clients in administrative proceedings, and citizens communicating on their own behalf. These exceptions help distinguish between regulated lobbying activities and protected forms of civic engagement or professional practice.

The temporal aspect of lobbying activities is addressed differently across jurisdictions. While some states focus solely on active communication, others like Maine include time spent preparing and submitting proposals for legislative action. This recognition of preparatory activities demonstrates an understanding that lobbying encompasses more than just direct interactions with officials.

b. Application to the Ethics Code

Alabama's approach diverges from other states primarily in its expansive language regarding influence activities. While most states, such as Connecticut and Michigan, emphasize "direct communication" as the cornerstone of lobbying activity, Alabama adopts the more encompassing phrase "promoting, opposing, or in any manner influencing." This broader language potentially captures a wider range of activities beyond direct communications, creating a more extensive regulatory framework than found in most other jurisdictions.

The definition's structure regarding legislative and regulatory actions is particularly noteworthy. Alabama's statute addresses three distinct spheres: legislative action (introduction, defeat, or enactment of legislation), executive action (approval, veto, or amendment of legislation), and regulatory action (enactment, promulgation, modification, or deletion of regulations). While this tripartite approach appears in other states, Alabama's definition lacks the qualifying language commonly found elsewhere. For instance, unlike Maine, which specifically ties lobbying activities to reimbursement or compensation, Alabama's definition applies regardless of compensation status.

A significant omission in Alabama's definition is the absence of a monetary threshold for triggering lobbying registration requirements. This contrasts sharply with states like Arkansas (\$400 per quarter) and Connecticut (\$3,000 annually), which use financial benchmarks to determine when advocacy activities constitute regulated lobbying. The absence of such thresholds in Alabama potentially subjects a broader range of activities to regulation, regardless of their scale or economic impact.

The definition's sole explicit exclusion - "providing public testimony before a legislative

body or regulatory body or any committee thereof" - is notably narrow compared to other states' approaches. States like Kansas and Montana provide extensive exemptions for various categories of communication and actors, including citizens advocating on their own behalf and certain types of business communications. Alabama's limited exclusionary language suggests a more comprehensive regulatory approach.

This regulatory framework creates potential compliance challenges. The broad language regarding "in any manner influencing" could encompass activities that other states explicitly exclude, such as informational communications or technical assistance. Furthermore, the absence of specific thresholds or detailed exemptions may create uncertainty about when ordinary advocacy activities cross into regulated lobbying territory.

5. (24) Principal

a. National Survey

The definition of "Principal" consistently centers on the entity that either employs or authorizes a lobbyist to conduct lobbying activities. However, jurisdictions vary significantly in their specific approaches to defining the term.

Several jurisdictions, including Missouri, Montana, and Wisconsin, define a principal primarily through the employment relationship with lobbyists. These definitions focus on the entity that "employs, contracts for pay, or otherwise compensates" a lobbyist.

Nebraska and North Carolina emphasize the authorization aspect, defining a principal as one who authorizes lobbying activities on their behalf, regardless of the specific compensation arrangement.

Minnesota takes a unique approach by incorporating specific monetary thresholds. Under Minnesota law, principal status is triggered by either spending more than \$3,000 to engage lobbyists or spending at least \$50,000 to influence various official actions.

Several jurisdictions provide specific guidance on how the definition applies to different organizational structures. The District of Columbia uniquely focuses on senior officers within business entities, specifically excluding academic deans from educational institutions. Ohio explicitly excludes individual members of various organizational structures from the definition. Wisconsin specifically excludes officers, employees, members, shareholders, or partners of organizations that engage lobbyists from being considered principals themselves.

b. Application to the Ethics Code

Alabama's definition aligns with the basic employment-based approach seen in states like Missouri and Wisconsin. However, it lacks the additional qualifying elements that other states use to create more precise regulatory frameworks. Unlike Kentucky, which specifies that a principal is one "in whose behalf the lobbyist promotes, opposes, or acts," Alabama's definition does not address the purpose of the lobbying relationship. This omission creates potential ambiguity about the scope of regulated relationships. In contrast to Minnesota's specific expenditure thresholds (\$3,000 for lobbyist engagement or \$50,000 for influence activities), Alabama's definition contains no monetary floor. This absence could unnecessarily capture minor or incidental lobbying relationships. While jurisdictions like North Carolina and Ohio provide detailed guidance on how their definitions apply to various organizational structures,

Alabama's definition lacks clarity on complex organizational relationships. Unlike Pennsylvania and Wisconsin, which explicitly state certain exclusions (e.g., association membership alone not constituting principal status), Alabama's definition lacks specific exclusions that could help prevent overreach. While it captures the basic employment relationship aspect of lobbying, it lacks the specificity and limiting factors common in other jurisdictions.

6. (26) Public employee

a. National Survey

General state government employees represent the broadest category of public employee definitions. Connecticut, for example, defines public employees as individuals employed by any state agency, including executive, legislative, and judicial branches, though notably excluding judges. Maryland adopts a similar approach but extends coverage to quasi-public agencies and higher education institutions, while maintaining judicial exclusions. Washington state's definition encompasses all state agency employees but specifically carves out elected officials and judicial officers.

Several states focus their definitions on the policy-making authority of the position. Massachusetts, for instance, defines public employees based on their decision-making capacity and policy influence, explicitly excluding those who receive only expense reimbursements. Utah takes a similar approach but adds specificity by excluding employees who neither occupy policy-making positions nor make purchasing or contracting decisions.

Local government employee definitions vary significantly by jurisdiction. Montana's definition encompasses employees of counties, municipalities, and other political subdivisions.

Nebraska extends this coverage to include employees of local government entities but maintains specific exclusions for volunteer positions. West Virginia's approach is particularly comprehensive, including both state and local government employees while maintaining distinctions between full-time and part-time status.

Legislative branch employees receive distinct treatment in several states. Iowa's definition specifically addresses legislative staff while excluding elected officials. Minnesota provides detailed coverage for legislative employees but carefully delineates between permanent staff and temporary appointments. New Jersey has developed a comprehensive framework for legislative employees that includes specific provisions for committee staff and research personnel.

Special consideration is given to employees of specific state entities. Florida maintains detailed provisions for employees of state universities and authorities. New York's definition encompasses employees of various state commissions and boards while excluding volunteer positions such as civil defense volunteers. North Carolina provides specific coverage for employees of state institutions while maintaining distinct categories for different types of state entities.

Contract relationships and volunteer status present particular challenges in public employee definition. Colorado explicitly includes certain independent contractors within its definition, while the District of Columbia specifically excludes individuals performing services under personal services contracts. Virginia addresses volunteer status by including volunteers who exercise sovereign power while excluding advisory board members who do not.

b. Application to the Ethics Code

i. Healthcare Exclusion

Alabama's definition contains a rare and significant carve-out for healthcare employees, specifically excluding employees of hospitals and healthcare corporations, including contract employees, even when these entities receive state, county, or municipal funding. This stands in marked contrast to most other states, which typically include healthcare workers employed by public institutions within their definition of public employees. For instance, states like Maryland and Washington explicitly include employees of public healthcare facilities in their definitions.

This healthcare exclusion has substantial implications for ethics oversight. Healthcare employees in Alabama's public institutions are not subject to the same ethics regulations, gift restrictions, or conflict of interest provisions that govern other public employees. This creates a unique regulatory environment in the healthcare sector, particularly noteworthy given the significant public funds often involved in healthcare operations.

ii. Part-Time Employment Provisions

Alabama's treatment of part-time employees also diverges from common state approaches through its specific income threshold requirement. The state excludes part-time employees who provide professional services (excluding lobbying) when such work constitutes less than 50% of their income. This creates a more precise threshold than found in most other states, which typically rely on hours worked or general compensation levels rather than percentage-based income calculations. This income-based approach to part-time classification presents distinct administrative challenges, particularly in verification and monitoring. It also creates a unique situation where an employee's status as a "public employee" could change based on their income

from other sources, rather than their actual role or responsibilities within the government entity.

The combination of these exclusions creates a distinctive regulatory framework that differs significantly from the more inclusive approaches found in most other states. While states commonly exclude certain categories of employees (such as judges or advisory board members), Alabama's sectoral exclusion of healthcare workers represents a unique approach to public employee classification.

7. (27) Public official

a. National Survey

Most state definitions of “public official” encompass both elected and appointed positions across various levels of government. The definitions typically share several core elements that establish the scope of who qualifies as a public official. States consistently include elected officials in their definitions, though the specific scope varies. At the state level, this typically encompasses constitutional officers such as governors, lieutenant governors, attorneys general, secretaries of state, and treasurers. State legislators are uniformly included across jurisdictions. At the local level, definitions typically extend to county commissioners, mayors, city council members, and other municipal officers. Many states also explicitly include school board members within their definition of public officials. State definitions generally encompass appointed positions across various governmental levels. This includes: department and agency heads at the state level; members of state boards and commissions; municipal agency officers appointed to specified offices; county and local appointed positions.

A number of states specifically exclude judicial officers from their definition of public official. South Carolina specifies the definition of “public official” does “not include a member of the judiciary.” Connecticut specifies that “judge(s) of any court, whether elected or appointed” are excluded as public officials. Iowa “excludes judges standing for retention in a judicial election” in defining candidates for public office.

b. Application to the Ethics Code

i. Judicial Inclusion Through Silence

Alabama's definition notably departs from the prevailing state practice regarding judicial officers in two ways: First, by broadly encompassing “any person elected to public office” without a judicial carve-out, Alabama implicitly includes judges within its ethics framework. This approach contrasts sharply with states like Connecticut and South Carolina, which explicitly exclude judges from their definitions of public officials, particularly in the context of ethics regulations.

Second, this silence creates potential conflicts with judicial independence principles. Most states separate judicial ethics governance from general public official oversight to maintain clear boundaries between branches and preserve judicial autonomy. Alabama's approach potentially subjects judges to the same ethics restrictions as executive and legislative officials, which may not adequately account for the unique role and responsibilities of the judiciary.

ii. Unprecedented Inclusion of Political Party Leadership

The Ethics Code's extension to “chairs and vice-chairs or the equivalent offices of each state political party” represents a striking departure from all other state ethics codes. This provision

raises several concerns. The inclusion of party leadership extends ethics code jurisdiction beyond traditional governmental boundaries to regulate private political organizations. This is unprecedented among state ethics frameworks. *No other state* has attempted to subject internal party leadership to governmental ethics restrictions. The provision creates complex questions about how ethics rules designed for government officials should apply to party leaders who may simultaneously hold other positions or engage in private political activities.

These departures warrant careful consideration, particularly given the lack of similar provisions in other state ethics codes.

8. (34) Thing of value

a. National Survey

i. Core Definition of “Gift”

Most states define “gift” very broadly, typically as “anything of value”. This is intended to encompass a wide range of benefits that could potentially influence public officials. A key element of this definition is the transfer of something of economic value without receiving equal consideration in return.

Many states specify what is included in the definition, such as:

- (a) Money, loans, and advances.
- (b) Services and favors.
- (c) Entertainment, hospitality, and recreation.
- (d) Travel and lodging.

- (e) Food and beverages.
- (f) Tickets to events.
- (g) Discounts and special pricing.
- (h) Honoraria (payments for speaking or services).

ii. Common Exceptions and Exclusions

Campaign Contributions

Almost all states exclude properly reported campaign contributions, recognizing that these are regulated by campaign finance laws.

Family and Friend Gifts

Many states exclude gifts motivated by personal relationships rather than the recipient's official position.

Informational Materials

Many states exclude informational items like books, reports, and pamphlets.

De Minimis Items

Many states have exceptions for items of minimal value:

- (a) Connecticut: Gifts less than \$10, with a total of less than \$50 per year from a single source.
- (b) Illinois: Cumulative total value of less than \$100 from any one prohibited source during any calendar year.

- (c) Kansas: Gifts must have an aggregate value of \$40 or more in a calendar year to be restricted.
- (d) South Dakota: \$100 annual limit, adjusted annually.
- (e) Washington: Gifts with an aggregate value over \$50 from a single source in a calendar year are generally prohibited.

Food and Beverages

Many states exclude food and beverages under certain conditions, such as:

- (a) Alaska: Food and non-alcoholic beverages for immediate consumption with a value of \$15 or less.
- (b) Indiana: Food or drink consumed at a public meeting with at least 25 invitees.
- (c) North Dakota: Food or beverage with a value of ten dollars or less at informal social/educational events.
- (d) Oregon: Certain food and beverages at events.

Publicly Available Items

Items available to the general public at no cost are typically excluded.

Items Related to Official Duties

Some states exclude items or services directly related to performing official duties.

Awards and Plaques

Many states exclude or have higher thresholds for personalized awards, plaques, or trophies

given in recognition of public service.

Travel and Lodging Expenses

Many states provide exceptions for travel and lodging expenses for official business, educational purposes, or speaking engagements.

Meal Limits

Many states do not have specific meal limits. However, they may have exceptions for meals at certain events or under certain conditions, such as meetings, speaking engagements, or the donor being present.

Some states have specific meal limits:

- (a) Oklahoma: \$20 or less per occasion, up to \$50 per year from a giver, with higher limits for legislative liaisons and lobbyists.
- (b) Louisiana: \$50 limit on food, drink, or refreshment for a single event, with CPI adjustments.
- (c) Ohio: \$75 per year for meals and beverages.

Gift Aggregation Rules

States use different periods for gift aggregation.

- (a) California: \$10 aggregate limit per month from a lobbyist or lobbying firm.
- (b) New Jersey: \$250 annual aggregate limit from a single lobbyist or governmental affairs agent.

- (c) South Carolina: \$50 daily and \$400 annual aggregate limit on certain items from a lobbyist's principal.
- (d) Washington: Gifts with an aggregate value over \$50 from a single source in a calendar year are generally prohibited.

Exemptions

Many states offer exemptions based on the context or purpose of the gift.

- (a) Colorado exempts food and beverages consumed at a reception where the recipient is a speaker.
- (b) Maryland exempts meals consumed with the donor.
- (c) New York allows complimentary attendance at charitable or political events, and food/beverage valued at \$15 or less.
- (d) Oregon excludes tokens under \$25 and food consumed on official business from the definition of a gift.
- (e) Texas exempts necessary expenditures for transportation and lodging for fact-finding trips.

b. Application to the Ethics Code

Alabama's regulations regarding gifts and expenditures for public officials and employees present some notable differences compared to the majority of states.

While most states primarily use the term "gift," Alabama uses "thing of value" as the core term. Alabama's definition of a "thing of value" is broad, encompassing gifts, benefits, favors,

services, gratuities, tickets to events, unsecured loans, promises of future employment, or honoraria. While many states also have broad definitions, the inclusion of unsecured loans is specific to Alabama, highlighting a potential area of concern for financial influence. In contrast, some states like Connecticut specify that a “commercially reasonable loan” is not considered a gift, and other states like Texas specify that loans from certain lending institutions are excluded.

Alabama sets a de minimis amount of \$32 or less per occasion and an aggregate of \$64 or less in a calendar year from a single provider. Many other states also have de minimis exceptions, but the specific amounts and aggregation rules vary. States like Washington and South Dakota set a single annual limit of \$50 and \$100 respectively, while others such as New Mexico have much higher annual limits of \$250 or more. This shows that Alabama is more restrictive in terms of de minimis amounts than many other states.

Alabama has specific meal limits: \$25 per meal with a \$150 annual limit from a lobbyist and \$50 per meal with a \$250 annual limit from a principal. This is distinct from many states that either do not specify meal limits, or they are included as a part of a larger gift limit. For example, states such as Oregon limit a single source to \$50 annually, and other states such as Ohio with a limit of \$75 per year for meals and beverages. Also, the meal limits for lobbyists and principals do not count against each other in Alabama.

Furthermore, Alabama's list of exceptions includes items given by family members or friends based on relationship, greeting cards, promotional items, opportunities and benefits available to the public, rewards and prizes, and anything paid by a government entity except sporting event tickets. While other states also exclude family gifts, or items available to the general public, the

specific combination and breadth of exemptions are unique to Alabama. Many states may not explicitly call out greeting cards as an exception.

Finally, Alabama specifies that payments for travel and lodging for educational or economic development functions are exempt, especially if the official participates in the event or attendance is appropriate for their duties. While similar exemptions exist in other states , the details surrounding 'meaningful participation' and 'appropriate to the performance of duties' in Alabama's exemptions demonstrate a different approach to regulating travel and lodging expenses. Other states such as Texas specify that necessary expenditures for fact finding and informational trips are allowed but not ceremonial or pleasure trips.

9. Public Servant

a. National Survey

Several states use the term “public servant” in their ethics and gift laws, each with a slightly different scope, and some states provide more specific definitions. For example, Louisiana defines a “public servant” broadly, encompassing both a public employee and an elected official. This definition creates a wide-reaching category subject to ethics laws. The advantage of this is its clarity and comprehensiveness, ensuring consistent standards of ethical conduct for all individuals acting on behalf of the state.

Missouri's definition is more specific and nuanced, particularly when it comes to “decision-making public servants”. A decision-making public servant is an official, appointee, or employee who exercises supervisory authority over contract negotiations, can adopt rules and regulations, or has primary responsibility over purchasing decisions. Missouri's law designates

specific officials or entities responsible for identifying who within their purview constitutes a decision-making public servant. This includes the governing body of a political subdivision with a budget over \$1 million, department directors, judges, interstate compact commissions, statewide elected officials, the speaker of the house, the president pro tem of the senate, and presidents or chancellors of state universities. Missouri's approach emphasizes the level of authority and responsibility, focusing ethics regulations on those with direct influence over crucial functions like contracting and rule-making. The Missouri definition is more specific than those like Louisiana because it focuses on decision-making authority and includes a mechanism for identifying these roles.

b. Application to the Ethics Code

While Alabama's current definitions of "public employee" and "public official" serve a similar function by identifying those subject to the state's ethics regulations, the use of a single term like "public servant" can promote consistency and clarity.

B. § 36-25-5(a)

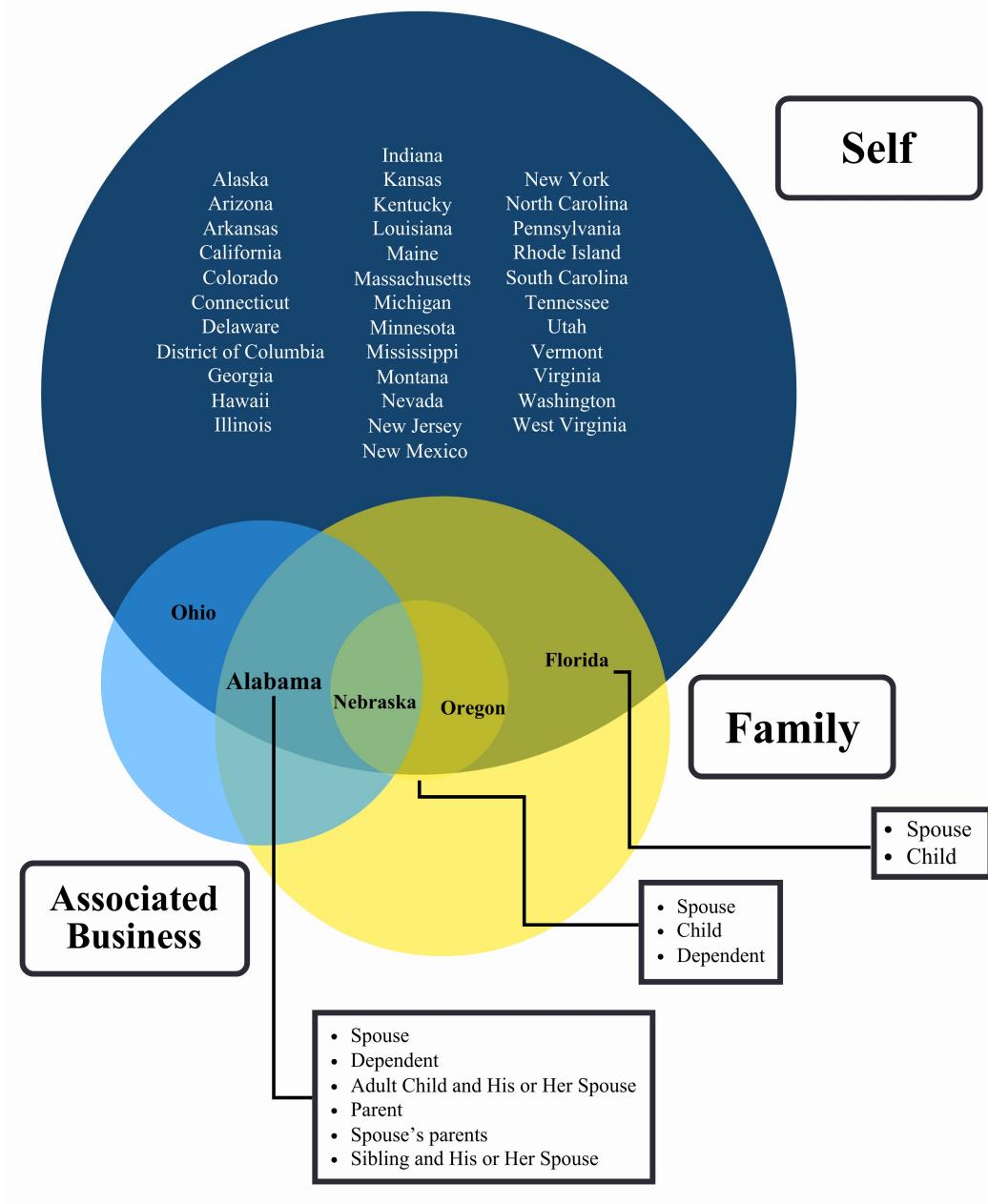
1. National Survey

State ethics laws begin at a basic level of restricting direct personal gain by public officials. The majority of states start with fundamental prohibitions on using government resources, misusing nonpublic information, and deriving direct financial benefits from official positions. These basic provisions typically expand first to cover spouses and dependent children, as seen in Oregon, extend to immediate family members and certain business relationships. However, most state definitions remain relatively narrow in scope, focusing primarily on nuclear family

relationships and direct business interests.

2. Application to the Ethics Code

Alabama's approach stands as a stark outlier, extending far beyond typical boundaries to create what many consider an onerous compliance burden on public officials. The section's reach is remarkably expansive, covering not just immediate family but extending to siblings' spouses, adult children and their spouses, and even business associations with ownership interests as low as 5%. This sweeping scope creates significant practical challenges for public officials who must track and monitor potential conflicts across an extensive network of family and business relationships. The trend among states shows movement toward more expansive ethics provisions, though none have approached the extraordinary breadth of Alabama's framework, which remains uniquely comprehensive in both its family relationship definitions and business association restrictions.



C. § 36-25-5.1 - Limitation on actions of lobbyists, subordinates of lobbyists, and principals

1. National Survey

a. Regulated Parties

i. Recipients

Many states include public officials, state employees, legislators, and judges as recipients of prohibited gifts. For example, Massachusetts law applies to public officials and employees.

Some states extend restrictions to family members of public officials or employees. For instance, Nebraska includes officials/staff in the executive/legislative branch and their immediate family members. Some states also include candidates for public office and their staff as recipients.

Connecticut includes candidates for public office and their staff or immediate family members.

Some states include members and employees of regulatory bodies, those in the executive and legislative branches, local government officials, and procurement officials. For example, Illinois includes officers, members, and state employees, including those in the executive and legislative branches. Some states specify that the restrictions extend to any person acting on behalf of the public servant or employee. For instance, Georgia includes state employees and any person acting on their behalf.

ii. Prohibited Sources

Lobbyists and their principals are commonly identified as Prohibited Sources. For example, California restricts gifts from lobbyists and lobbying firms. Some states include those

associated with regulated businesses, those seeking official action, or vendors. For example, Illinois includes prohibited sources, including those seeking official action or doing business with the recipient. Some states have broader restrictions applying to “any person” or “any person acting on their behalf”. For instance, Nebraska includes principals, lobbyists, or persons acting on their behalf. Some states specify persons subject to the public servant's jurisdiction, those with business relationships with the recipient, those with contracts with the recipient's agency, and those who are affected by the recipient's performance. For example, Montana includes persons subject to the public servant's jurisdiction.

b. Prohibited Acts

i. Recipient Prohibitions

- Soliciting or accepting gifts, or anything of value. For example, Minnesota prohibits public officials from accepting gifts.
- Accepting expenditures, honorariums, and loans. For example, South Carolina prohibits public officials from soliciting or receiving lodging, transportation, entertainment, food, meals, beverages, money, or any other thing of value.
- Accepting gifts with monetary value exceeding a certain limit annually, per event, or in aggregate. For example, New Mexico prohibits state officers/employees from accepting gifts exceeding \$250.
- Accepting travel or lodging, meals or beverages, or transportation. For example, Ohio prohibits members of the General Assembly from accepting payment for travel/lodging, meals/beverages exceeding \$75 annually.
- Soliciting gifts from a restricted donor, or regulated entities, or if the purpose is to influence their official duties. For example, New Mexico prohibits state officers/employees from soliciting gifts for a charity from regulated entities or if the purpose appears to influence the officer's duty.

ii. Source Prohibitions

- Offering, providing, or giving gifts or anything of value. For example, Nevada prohibits lobbyists from giving any gift.
- Making expenditures, or monetary gifts. For example, Florida prohibits lobbyists from making, directly or indirectly, any expenditure.
- Providing or paying for travel or lodging expenses, or using credit. For example, Tennessee prohibits employers of a lobbyist from paying the lodging expenses of an official.
- Making campaign contributions or loans. For example, Tennessee prohibits lobbyists from making campaign contributions.
- Offering or giving a gift with the intent to influence an official or those related to them, or gifts that exceed a certain amount annually or in aggregate. For example, New Jersey prohibits lobbyists from offering or giving anything of value totaling more than \$250 annually.

c. Mental State (Knowing)

i. Explicit “Knowing” Requirement

Most states explicitly require that a recipient “knowingly” or “willfully” accept a gift to violate the law. For example, North Carolina requires that public servants knowingly accept gifts from lobbyists. Some states explicitly require that a giver “knowingly” give a gift to violate the law. For instance, Connecticut prohibits registrants from knowingly giving a gift.

ii. Implied “Knowing” Requirement

In some states the “knowledge” of a specific fact can be inferred from other circumstances that should put a “prudent person” on inquiry. For example, in Nevada “knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry”.

iii. No Explicit Mental State Requirement

Some states do not explicitly state any mental state requirement, but may have safe harbor provisions that allow members to avoid violations by returning excess payments. For example, Ohio does not specify a mental state requirement, but has a safe harbor provision.

2. Application to the Ethics Code

a. Extended Family Application

The lobbyist gift restrictions include a wide range of family members, specifically “the spouse, a dependent, an adult child and his or her spouse, a parent, a spouse’s parents, a sibling and his or her spouse, of the public official” as discussed above. Not every state explicitly includes family members in their lobbyist gift restrictions. Among states that do include family members, the scope is generally narrower than the Ethics Code. None of the other states include the extended definition of family that is present in the Ethics Code to lobbyist gift restrictions.

By including such an expansive definition of family, Alabama's restrictions capture a wide circle of individuals, extending the potential for violations and creating a complex regulatory environment. The broad definition could lead to unintended consequences, such as penalizing public officials for actions of family members over which they have limited control or awareness. A wider net for regulation increases the burden on public officials, requiring them to monitor and control the actions of a broader group of individuals, thus creating a compliance challenge. The definition in Alabama differs significantly from what is typical across the nation, which suggests it is an outlier. Most states that do include family members focus more narrowly on immediate family.

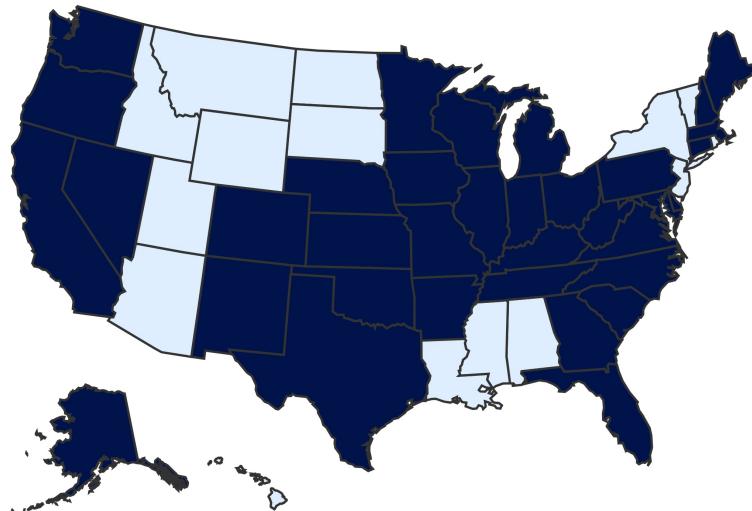
b. Lack of Knowledge Requirement

Unlike many other states, the Ethics Code does not explicitly state that a recipient must “knowingly” or “willfully” violate the gift restrictions. The absence of an explicit “knowing” requirement suggests a stricter standard, possibly approaching strict liability, where a violation can occur even if the recipient was unaware that **they were receiving a prohibited gift**. Without a knowledge requirement, there is a greater potential for public officials to be penalized for inadvertently accepting gifts, even if they did not know they were in violation of the law, or did not know the gift was being given to them. This lack of a knowledge element places a higher burden on public officials to be aware of every gift, regardless of their knowledge of its origin or intention.

D. § 36-25-3 - State Ethics Commission; General (Membership Qualifications)

1. National Survey

a. Political Party Balance



37 commissions require a balance of political party affiliation among their members.⁵¹

In some cases, a specific number of members from the same party is prohibited, such as in California where no more than three members may be from the same party, or in Colorado where no more than two members may be affiliated with the same political party. Some commissions require that no more than half of the members can be from the same party, as is the case in Iowa.

⁵¹ Alaska Public Offices Commission, Alaska Stat. §15.13.020(b); Arkansas Ethics Commission, Ark. Code Ann. § 7-6-217(a)(1); California Fair Political Practices Commission, Cal. Gov't Code § 83100; Colorado Independent Ethics Commission, Colo. Const. Art. XXIX, § 5(2)(b); Several commissions require geographic representation; Connecticut Office of State Ethics Citizen's Ethics Advisory Board, Conn. Gen. Stat. § 1-80(a); Delaware State Public Integrity Commission, Del. Code Ann. tit. 29, § 5808(b); District of Columbia Board of Ethics and Government Accountability, D.C. Code § 1-1162.03(a); Florida Commission on Ethics, Fla. Stat. § 112.321(1); Georgia Government Transparency and Campaign Finance Commission, Ga. Code Ann. § 21-5-4(b); Illinois Executive Ethics Commission, 5 Ill. Comp. Stat. Ann. § 430/20-5(b); Indiana State Ethics Commission, Ind. Code Ann. § 4-2-6-2(c); Iowa Ethics & Campaign Disclosure Board, Iowa Code §§ 68B.32(1), 69.16; Kansas Governmental Ethics Commission, Kan. Stat. Ann. § 25-4119a(b); Kentucky Legislative Ethics Commission, Ky. Rev. Stat. Ann. § 6.651(2); Maine Commission on Governmental Ethics and Election Practices, Me. Rev. Stat. Ann. tit. 1, § 1002(1-A)(C); Maryland State Ethics Commission, Md. Code Ann., Gen. Provisions § 5-202(a)(2)(i); Massachusetts State Ethics Commission, Mass. Gen. Laws Ch. 268B, § 2(a); Michigan State Board of Ethics, Mich. Comp. Laws § 15.344(1); Minnesota Campaign Finance and Public Disclosure Board, Minn. Stat. § 10A.02(1); Missouri Ethics Commission, Mo. Rev. Stat. § 105.955(3); Nebraska Accountability and Disclosure Commission, Neb. Rev. Stat. § 49-14,106; Nevada Commission on Ethics, Nev. Rev. Stat. § 281A.200(4); New Hampshire Executive Branch Ethics Committee, N.H. Rev. Stat. Ann. § 21-G:29(III)(a); New Mexico State Ethics Commission, N.M. Stat. Ann. § 10-16G-3(B); North Carolina State Ethics Commission, N.C. Gen. Stat. § 138A-7(a); Ohio Ethics Commission, Ohio Rev. Code Ann. § 102.05; Oklahoma Ethics Commission, Okla. Const. Art. 29, § 1(B); Oregon Government Ethics Commission, Or. Rev. Stat. Ann. § 244.250(2); Pennsylvania State Ethics Commission, Pa. Cons. Stat. Ann. § 1106(a); South Carolina Ethics Commission, S.C. Code Ann. § 8-13-310(A)(1)(a); Tennessee Bureau of Ethics and Campaign Finance, Tenn. Code Ann. § 3-6-103(c)(1); Texas Ethics Commission, Tex. Const. Art. III, 24a(a); Virginia Conflict of Interest and Ethics Advisory Council, Va. Code Ann. § 30-355(B); Washington Executive Ethics Board, Wash. Code Rev. § 42.52.350(3); Washington Legislative Ethics Board, Wash. Code Rev. § 42.52.310(3); West Virginia Ethics Commission, W. Va. Code § 6B-2-1(c); and Wisconsin Ethics Commission, Wis. Stat. § 15.62(1)(a).

Other commissions require that at least one member be from a minority party, or that at least one member is from the principal political party of which the Governor is not a member. In some states, a specific number of members must be affiliated with the largest minority party, such as in Kentucky where at least three members must be affiliated with the largest minority party in the state. Some states specify that at least one member must be an independent, as is the case in Nebraska, where at least one member must be registered as an independent for at least two years prior to their appointment

b. Prior Service Restrictions

Several state ethics commissions have implemented restrictions to ensure impartiality by requiring a waiting period before a former public official, candidate, or lobbyist can serve as a member. For example, Connecticut's Citizen's Ethics Advisory Board mandates a three-year waiting period after a member has held public office or been a candidate.⁵² Similarly, the Georgia Government Transparency and Campaign Finance Commission requires a five-year waiting period.⁵³ Other commissions, such as the Kansas Governmental Ethics Commission and the Maine Commission on Governmental Ethics and Election Practices, also impose restrictions on former public officials or candidates, with waiting periods of five years and two years respectively.⁵⁴

In addition, a number of states require a waiting period after a person has engaged in

⁵² Conn. Gen. Stat. § 1-80(b).

⁵³ Ga. Code Ann. §§ 21-5-4(d)(1), 21-5-4(d)(2).

⁵⁴ Kan. Stat. Ann. § 25-4119a(b); Me. Rev. Stat. Ann. Title 1, § 1002(1-A)(C).

lobbying. The Illinois Legislative Ethics Commission and Illinois Executive Ethics Commission both have a one-year waiting period.⁵⁵ The Louisiana Board of Ethics requires that members may not have engaged in lobbying activities within two years prior to their appointment.⁵⁶ Some states like the New Mexico State Ethics Commission and New York Commission on Ethics and Lobbying in Government, have more comprehensive restrictions, requiring a two-year waiting period for those who have been a public official, candidate, lobbyist, or political party official.⁵⁷

c. Criminal History

Several state ethics commissions have implemented restrictions regarding felony convictions for their members. The Illinois Legislative and Executive Ethics Commissions and Tennessee Bureau of Ethics and Campaign Finance stipulate that a person is not eligible to serve as a commission member if they have been convicted of a felony.⁵⁸ In Mississippi, no person who has ever been convicted of a felony or certain misdemeanors is eligible to serve on the Mississippi Ethics Commission.⁵⁹

d. Racial and Gender Diversity

In addition to the Ethics Commission, only two other commissions, Tennessee Bureau of Ethics and Campaign Finance and Arkansas Ethics Commission, have provisions mandating

⁵⁵ 5 Ill. Comp. Stat. Ann. § 430/25-5(c)(ii); 5 Ill. Comp. Stat. Ann. § 430/20-5(c)(ii).

⁵⁶ La. Stat. Ann. § 42:1132(B)(4)(d).

⁵⁷ N.M. Stat. Ann. § 10-16G-4(A)(4); N.Y. Exec. Law §§ 94(3)(e)(ii), 94(3)(e)(iii), 94(3)(e)(i).

⁵⁸ 5 Ill. Comp. Stat. Ann. § 430/25-5(c)(i); 5 Ill. Comp. Stat. Ann. § 430/20-5(c)(i); Tenn. Code Ann. § 3-6-103(a)(2).

⁵⁹ Miss. Code Ann. § 25-4-5(6).

racial or gender diversity in their commission membership requirements.⁶⁰

e. Legal Experience

Several states have member requirements for legal expertise on their ethics commissions. For example, the Louisiana Board of Ethics requires that at least three members appointed by the Governor be licensed attorneys.⁶¹ Similarly, the Nevada Commission on Ethics mandates that at least two members be attorneys licensed to practice law in Nevada, and the New Hampshire Legislative Branch Ethics Committee requires at least one member to be an attorney licensed to practice in New Hampshire.⁶² While these states also recognize the importance of having legal expertise on their commissions, it is important to note that these states are not the majority, and most states do not have this specific requirement for legal expertise

f. Former Public Officials/Government Experience

Several states require member(s) be a former public official, though the specific roles and numbers of members vary. The Nevada Commission on Ethics requires at least four former public officers or employees, and the West Virginia Ethics Commission requires four former public officials.⁶³ Utah has specific requirements for former officials on both their Executive Branch Ethics Commission and Legislative Ethics Commission, requiring two members to have previously served as elected officials on the Utah Executive Branch Ethics Commission and two

⁶⁰ Tenn. Code Ann. § 3-6-103(a)(2)(A); Ark. Code Ann. § 7-6-217(a)(1).

⁶¹ La. Stat. Ann. § 42:1132(B)(4)(a).

⁶² Nev. Rev. Stat §§ 281A.200(2); N.H. Rev. Stat. Ann. § 14-B:2(I).

⁶³ Nev. Rev. Stat § 281A.200(3); W. Va. Code § 6B-2-1(c).

members to be former public officials in the legislative branch on the Utah Legislative Ethics Commission.⁶⁴ Additionally, the Virginia Conflict of Interest and Ethics Advisory Council requires four members to be former legislators.⁶⁵

Some states also specify requirements for members with judicial experience, such as Utah, which requires one member of the Utah Executive Branch Ethics Commission to have served as a state judge and three members of the Utah Legislative Ethics Commission to have served as state judges.⁶⁶ Similarly, Virginia requires two members to be former judges, and Wisconsin Ethics Commission requires two members appointed by the governor to have previously served as judges.⁶⁷

In addition to former elected officials, some states look for other types of government experience. For example, the District of Columbia Board of Ethics and Government Accountability requires at least one member with experience in government transparency, and the Colorado Independent Ethics Commission requires one member to work in local government.⁶⁸

The more detailed and specific the requirements, the smaller the pool of individuals who qualify for consideration, which may affect the composition and perspectives of the Ethics Commission.

2. Application to the Ethics Code

⁶⁴ Utah Code Ann. § 663A-14-202(1)(a)(i); Utah Leg. Rules § JR6-2-103(2).

⁶⁵ Va. Code Ann. § 30-355(B).

⁶⁶ Utah Code Ann. § 663A-14-202(1)(a)(i); Utah Leg. Rules § JR6-2-103(2).

⁶⁷ Va. Code Ann. § 30-355(B); Wis. Stat. § 15.62(1)(a).

⁶⁸ D.C. Code § 1-1162.03(g); Colo. Const. Art. XXIX, § 5(2)(a)(V).

The Ethics Code contains several distinct membership requirements that both align with and diverge from national trends in ethics commission composition.

The requirement for one member to be a former elected official who served at least two terms partially mirrors practices in other states, though the Ethics Code's specific term requirement is uncommon.⁶⁹ While states like Nevada and West Virginia require multiple former public officials, and Utah maintains detailed requirements for both executive and legislative branch experience, most states that include such provisions don't specify length of service.

The mandate for one licensed attorney member aligns with a minority of states that require legal expertise on their commissions.⁷⁰ States like Louisiana, Nevada, and New Hampshire maintain similar requirements, though some require multiple attorneys. The Ethics Code's single attorney requirement represents a moderate approach compared to states like Louisiana, which requires three licensed attorneys, while still ensuring legal expertise on the commission.

Perhaps the most distinctive aspect of the Ethics Code's requirements is the mandate for "one Black member."⁷¹ This requirement is notably rare among state ethics commissions, with only Tennessee and Arkansas having similar provisions for racial or gender diversity in their membership requirements. This stands in stark contrast to the more common focus on political party balance, which is present in 37 state commissions, or professional qualifications and prior service restrictions. The specific racial designation in the Ethics Code, while intended to ensure

⁶⁹ Ala. Code § 36-25-3(a).

⁷⁰ Ala. Code § 36-25-3(a).

⁷¹ Ala. Code § 36-25-3(a).

diverse representation, employs outdated terminology and raises questions about inclusive representation of all racial and ethnic minority groups.

E. § 36-25-3 - State Ethics Commission; General (Term Length and Limits)

1. National Survey

Ethics commission members across the states serve varying term lengths, from two to seven years. Among state ethics commissions, four commissions have established two-year term lengths⁷², while three commissions ave established three-year terms.⁷³ The most common duration is four years, with twenty-seven commissions choosing this term length.⁷⁴ Fourteen commissions have established five-year terms⁷⁵, and five commissions have established six-year

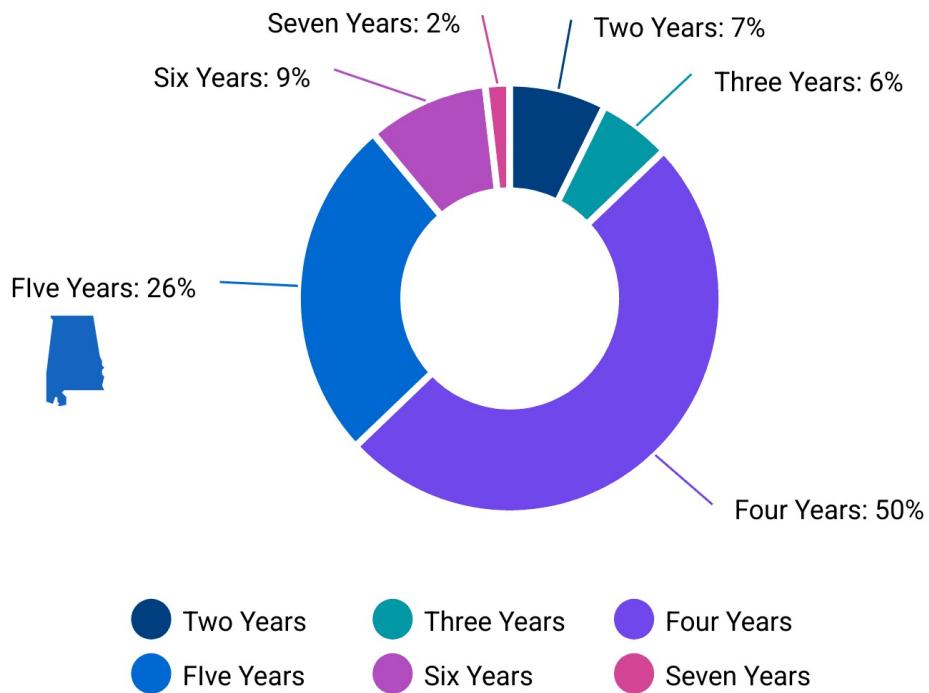
⁷² Florida Commission on Ethics; Kansas Governmental Ethics Commission; New Hampshire Legislative Branch Ethics Committee; and New Jersey Joint Legislative Committee on Ethical Standards.

⁷³ Maine Commission on Governmental Ethics and Election Practices; New Hampshire Executive Branch Ethics Committee; and Pennsylvania State Ethics Commission.

⁷⁴ California Fair Political Practices Commission; Colorado Independent Ethics Commission; Connecticut Office of State Ethics Citizen's Advisory Board; Georgia Government Transparency and Campaign Finance Commission; Hawaii State Ethics Commission; Illinois Legislative Ethics Commission; Illinois Executive Ethics Commission; Indiana State Ethics Commission; Kentucky Executive Branch Ethics Commission; Kentucky Legislative Ethics Commission; Michigan State Board of Ethics; Minnesota Campaign Finance and Public Disclosure Board; Mississippi Ethics Commission; Missouri Ethics Commission; Nevada Commission on Ethics; New Jersey State Ethics Commission; New Mexico State Ethics Commission; New York Commission on Ethics and Lobbying in Government; North Carolina State Ethics Commission; North Dakota Ethics Commission; Oregon Government Ethics Commission; Tennessee Bureau of Ethics and Campaign Finance; Texas Ethics Commission; Utah Executive Branch Ethics Commission; Utah Legislative Ethics Commission; and Virginia Conflict of Interest and Ethics Advisory Council.

⁷⁵ Alabama Ethics Commission; Alaska Public Offices Commission; Arkansas Ethics Commission; Louisiana Board of Ethics; Maryland State Ethics Commission; Massachusetts State Ethics Commission; Oklahoma Ethics Commission; Rhode Island Ethics Commission; South Carolina Ethics Commission; South Dakota Government Accountability Board; Vermont State

terms.⁷⁶ Only one commission has established a seven-year term length for its ethics commission members.⁷⁷



Ethics Commission; Washington Executive Ethics Board; Washington Legislative Ethics Board; West Virginia Ethics Commission; and Wisconsin Ethics Commission.

⁷⁶ District of Columbia Board of Ethics and Government Accountability; Iowa Ethics & Campaign Disclosure Board; Montana Commissioner of Political Practices; Nebraska Accountability and Disclosure Commission; and Ohio Ethics Commission.

⁷⁷ Delaware State Public Integrity Commission.

Many states impose term limits on their ethics commission members, although the specific restrictions vary. Fourteen commissions impose a one-term limit⁷⁸, while seventeen commissions impose a two-term limit.⁷⁹ Several state ethics commissions have specific provisions for handling unexpired or partial terms. The Alaska Public Offices Commission allows members to serve a full five-year term even after completing someone else's unexpired term. The Arkansas Ethics Commission provides that commissioners who have served two years or less of an unexpired term remain eligible for a subsequent full five-year term. The California Fair Political Practices Commission explicitly states that those appointed to fill vacancies are eligible for another full four-year term. The Montana Commissioner of Political Practices can be reappointed if they served less than three years of an unexpired six-year term. The West Virginia Ethics Commission has a unique waiting period requirement, mandating that members must wait at least two years after completing their second consecutive term before being eligible for reappointment. Additionally, numerous commissions explicitly specify that their term limits

⁷⁸ Alabama Ethics Commission; Alaska Public Offices Commission; Arkansas Ethics Commission; California Fair Political Practices Commission; Delaware State Public Integrity Commission; Georgia Government Transparency and Campaign Finance Commission; Massachusetts State Ethics Commission; Montana Commissioner of Political Practices; Rhode Island Ethics Commission; South Carolina Ethics Commission; Texas Ethics Commission; Washington Executive Ethics Board; Washington Legislative Ethics Board; and Wisconsin Ethics Commission.

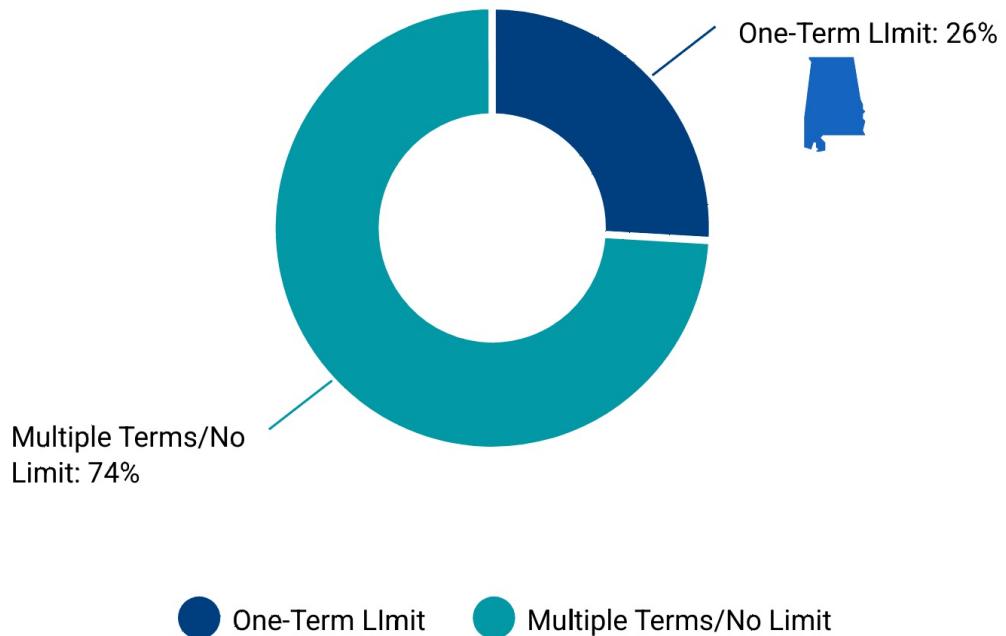
⁷⁹ Florida Commission on Ethics; Hawaii State Ethics Commission; Louisiana Board of Ethics; Maine Commission on Governmental Ethics and Election Practices; Maryland State Ethics Commission; Nevada Commission on Ethics; New Mexico State Ethics Commission; New York Commission on Ethics and Lobbying in Government; North Carolina State Ethics Commission; Oklahoma Ethics Commission; Oregon Government Ethics Commission; Pennsylvania State Ethics Commission; Utah Executive Branch Ethics Commission; Utah Legislative Ethics Commission; Vermont State Ethics Commission; Virginia Conflict of Interest and Ethics Advisory Council; and West Virginia Ethics Commission.

apply only to “full terms,” suggesting that partial terms may not count toward the limit.⁸⁰

2. Application to the Ethics Code

The Ethics Code adopts a notably strict approach to term limits compared to national trends in ethics commission governance. The Ethics Code’s one-term limit, coupled with its inflexibility regarding partial terms, places it among a minority of state commissions with similar restrictions. Out of 54 analyzed commissions nationwide, only 14 maintain one-term limits like the Ethics Commission, while 40 either allow multiple terms or have no term limits at all.

⁸⁰ Florida Commission on Ethics, Maine Commission on Governmental Ethics and Election Practices, Nevada Commission on Ethics, New Mexico State Ethics Commission, New York Commission on Ethics and Lobbying in Government, North Carolina State Ethics Commission, Oklahoma Ethics Commission, Oregon Government Ethics Commission, Pennsylvania State Ethics Commission, Rhode Island Ethics Commission, South Carolina Ethics Commission, Texas Ethics Commission, Utah Executive Branch Ethics Commission and Utah Legislative Ethics Commission, Vermont State Ethics Commission, and Virginia Conflict of Interest and Ethics Advisory Council.



A significant distinction between the Ethics Commission's approach and that of many other states lies in the handling of partial terms. Several states have implemented nuanced provisions for managing unexpired terms. For instance, the Alaska Public Offices Commission allows members to serve a complete five-year term even after fulfilling someone else's unexpired term. The inflexibility of the Ethics Code's term limits could potentially impact the Ethics Commission's effectiveness and institutional memory. Many states have recognized the value of retaining experienced members and maintaining continuity by either allowing multiple terms or providing exceptions for partial terms. West Virginia offers an interesting alternative approach,

implementing a waiting period requirement where members must wait two years after completing their second consecutive term before becoming eligible for reappointment. This type of provision balances the need for fresh perspectives with the benefits of experienced leadership.

The prevalence of provisions specifying that term limits apply only to “full terms” in numerous commissions further highlights the Ethics Code’s relatively rigid stance. This common clarification in other states’ codes suggests a widespread recognition of the need for flexibility in commission service, particularly when dealing with partial terms and unexpected vacancies.

F. § 36-25-4 - State Ethics Commission; Duties (Subpoena Power)

1. National Survey

An analysis of ethics commission subpoena powers across ethics commissions reveals a strong preference for granting full investigative authority to these oversight bodies. The vast majority of ethics commissions, 46 out of the 54 total, possess comprehensive subpoena powers, enabling them to compel both witness testimony and document production. This robust authority reflects a commitment to meaningful ethics enforcement and oversight across most jurisdictions.

In stark contrast, only one commission, Massachusetts, operates with limited subpoena authority, utilizing a summons system instead for obtaining testimony and records.⁸¹ Only seven commissions function without any subpoena power.⁸²

⁸¹ Mass. Gen. Laws Ch. 268B, § 4(d).

⁸²District of Columbia Board of Ethics and Government Accountability; Kansas Governmental Ethics Commission; Michigan State Board of Ethics, New Jersey Joint Legislative Committee on Ethical Standards; Pennsylvania State Ethics Commission; Vermont State Ethics Commission; and Virginia Conflict of Interest and Ethics Advisory Council.

2. Application to the Ethics Code

The Ethics Code's approach to subpoena power aligns with the strong national consensus favoring robust investigative authority for ethics commissions. The Ethics Commission's comprehensive subpoena powers, which include the ability to compel both witness testimony and document production, place it among the 46 commissions nationwide that maintain full investigative authority.

G. § 36-25-4 - State Ethics Commission; Duties (Advisory Opinions)

1. National Survey

a. Formal

i. Binding Nature

Formal advisory opinions are generally binding on the issuing commission. This means that if an individual acts in good faith, relying on a formal opinion, they are often protected from penalties or sanctions if that opinion is later found to be incorrect. For example, a formal opinion from the Mississippi Ethics Commission is binding if the public official follows the advice in good faith, unless a court declares the opinion to be "manifestly wrong". Similarly, in New Hampshire, an advisory opinion is binding on the New Hampshire Executive Branch Ethics Committee or the New Hampshire Legislative Branch Ethics Committee and provides an absolute defense against complaints or prosecutions. A written advisory opinion from the Minnesota Campaign Finance and Public Disclosure Board is binding on the board in subsequent proceedings concerning the person who made the request. A person is not liable for good faith action carried out according to a formal advisory opinion of the Oregon Government Ethics

Commission, and the commission cannot impose penalties for actions taken in good faith reliance unless the person omitted or misstated material facts. The South Carolina Ethics Commission provides that a formal advisory opinion is binding on the commission, unless material facts were omitted or misstated. Formal opinions from the Ohio Ethics Commission provide immunity to individuals who receive them, and to anyone in similar circumstances, provided that all relevant facts have been disclosed and the guidelines in the opinion are followed. The Kentucky Legislative Ethics Commission states that a written advisory opinion issued by the commission is binding on the commission in any subsequent proceeding concerning the facts and circumstances of the particular case, provided no intervening facts or circumstances arise that would change the opinion.

ii. Public Availability

Formal advisory opinions are typically public records and are often published on the commission's website.⁸³ Additionally, commissions may make formal opinions available for public inspection, like the Arkansas Ethics Commission. Similarly, the Maryland State Ethics Commission publishes formal advisory opinions in the Maryland Register.

⁸³ Alaska Public Offices Commission (formal advisory opinions publicly accessible on its website); Colorado Independent Ethics Commission (all advisory opinions publicly accessible on its website); North Carolina State Ethics Commission (publishes formal opinions on website within 30 days of issuance); Ohio Ethics Commission (formal opinions available on the website, searchable by number or keyword); Virginia Conflict of Interest and Ethics Advisory Council (formal advisory opinions are public record and are published on the council's website); Washington Executive Ethics Board (advisory opinions are considered public records and are available for review on the Board's website); West Virginia Ethics Commission (advisory opinions are made public and available on their website).

Often, identifying information about the requester is removed to maintain privacy. For example, the Texas Ethics Commission is required to keep the identity of a person requesting an advisory opinion confidential and must issue opinions in a way that maintains that confidentiality. New Mexico State Ethics Commission publishes only the advisory opinions themselves after omitting the requester's name and identifying information, as the request itself is confidential.

The Wisconsin Ethics Commission publishes summaries of its opinions, but they are altered to prevent identification of the requestor.

iii. Process

Formal advisory opinions are generally issued by the full commission or board, often after a review of a draft prepared by staff or legal counsel. For example, the California Fair Political Practices Commission holds a hearing on the opinion request, and staff prepares a memo for review by the commission. The Iowa Ethics & Campaign Disclosure Board's legal counsel prepares a draft opinion for board review, and an affirmative vote of at least four board members is required to issue an advisory opinion. Requests are presented to the Louisiana Board of Ethics at a public meeting, where the board may decline the request, defer action, or issue an opinion. The Kentucky Legislative Ethics Commission requires that a draft of the proposed response is provided to the requestor and each commissioner before the meeting. The Nebraska Accountability and Disclosure Commission, with a majority vote, may adopt the staff recommendation as an official advisory opinion or make a different decision. The New York Commission on Ethics and Lobbying in Government may have a public comment period before

issuing a formal advisory opinion.

b. Informal Opinions

i. Binding Effect

Ethics Commissions' informal advice is generally not binding, and these commissions do not typically provide the same legal protection through informal advice as they do through formal opinions. For example, the Colorado Independent Ethics Commission's staff guidance does not offer an affirmative defense in the event of a subsequent complaint. Similarly, the Iowa Ethics and Campaign Disclosure Board's routine administrative advice does not provide a defense against subsequent complaints, and the South Carolina State Ethics Commission's informal staff opinions are non-binding. The Nebraska Accountability and Disclosure Commission's decisions are not bound by informal opinions, the Oregon Government Ethics Commission's informal written opinions from its executive director have no precedential effect and are not binding, and the Washington State Executive Ethics Board's staff analysis is not a substitute for formal advisory opinions and remains non-binding.

ii. Public Access

Ethics Commissions' informal advice generally remains confidential and is not typically published or made publicly available. Among commissions with complete confidentiality policies, the Maryland State Ethics Commission, Hawaii State Ethics Commission, and Indiana State Ethics Commission keep their informal advice confidential (though Indiana allows state employees to waive this protection). Similarly, advisory communications from the Mississippi

Ethics Commission's executive director, the New Mexico State Ethics Commission, and the North Carolina Ethics Commission are not published or treated as public records. In the same vein, the Virginia Conflict of Interest and Ethics Advisory Council, Washington Legislative Ethics Board, and Ohio Ethics Commission do not make their informal advice publicly available, with Virginia specifically excluding such advice from FOIA requirements. In contrast, a few commissions maintain more transparent practices: the Connecticut Office of State Ethics indexes informal staff letters for public access, the Oregon Government Ethics Commission posts informal advisory opinions on their website, and the Pennsylvania State Ethics Commission treats informal advice as public record (though requesters can maintain anonymity through redactions).

c. Process

Ethics Commissions' informal advice is typically delivered by staff members or attorneys through various communication methods. Among commissions providing both written and verbal guidance, the Hawaii State Ethics Commission's attorneys offer advice via phone or written communication, and the Oregon Government Ethics Commission's executive director issues both oral and written staff advice on ethics law applications. Several commissions focus on written communications: the Connecticut Office of State Ethics provides informal advice through staff and general counsel letters, while the Pennsylvania State Ethics Commission issues informal advice through directives from their chief counsel. Other commissions have specific staff-based approaches: the Indiana State Ethics Commission delivers informal advisory opinions through their Office of Inspector General staff, and the Rhode Island Ethics Commission staff

provides informal phone guidance about their Code of Ethics.

2. Application to the Ethics Code

Regarding formal opinion publication and access, the Ethics Code maintains a less transparent system with potential publication fees and no clear online access, while commissions like the Alaska Public Offices Commission and the Delaware State Public Integrity Commission offer comprehensive, searchable online databases of their opinions.

Regarding informal opinions, the Ethics Commission keeps these confidential unless disclosure is specifically authorized, contrasting with more transparent approaches like those of the Oregon Government Ethics Commission and the Connecticut Office of State Ethics, which make informal opinions publicly available through their websites and indexed databases. In terms of privacy protection, the Ethics Commission's approach of requiring explicit authorization for any disclosure differs from the balanced approach taken by commissions like the North Carolina State Ethics Commission and the New Mexico State Ethics Commission, which publish opinions but protect privacy through careful redaction of identifying information.

H. § 36-25-4 - State Ethics Commission; Duties (Disciplinary Authority)

1. National Survey

a. Civil Enforcement

i. Fines and Penalties

Over half of the commissions analyzed (29) have the authority to issue fines, with many commissions having specific monetary penalties for violations.⁸⁴ Ten commissions have

⁸⁴ Arkansas Ethics Commission (\$50-\$3,500 per violation, § 7-6-218(b)(4)); California Fair

authority to impose civil penalties but without specified maximum amounts in their statutes, providing them flexible enforcement discretion.⁸⁵ The authority to impose monetary fines varies significantly across state ethics commissions, ranging from minimal amounts to substantial penalties of up to \$25,000 per violation.

ii. Restitution and Disgorgement

These commissions can order violators to repay improperly obtained benefits or funds, ensuring that violators don't profit from their misconduct.⁸⁶ This power serves to make the

Political Practices Commission (up to \$5,000 per violation, § 83116); Connecticut Office of State Ethics (at least \$10,000 per violation, § 1-88(a)); Iowa Ethics & Campaign Disclosure Board (up to \$2,000 per violation, § 68B.32D(1)); Kansas Governmental Ethics Commission (\$5,000 first violation, \$10,000 second, \$15,000 third+, § 25-4181(a)); Kentucky Executive Branch Ethics Commission (up to \$5,000 per violation, § 11A.100(3)); Kentucky Legislative Ethics Commission (up to \$2,000 per violation, § 6.691(5)); Louisiana Board of Ethics (up to \$10,000, § 42:1153); Maryland State Ethics Commission (up to \$5,000 for lobbyist violations, § 5-405(d)); Massachusetts State Ethics Commission (up to \$10,000 per violation, ch. 268B, § 4(j)); Mississippi Ethics Commission (up to \$10,000, § 24-5-109); Nebraska Accountability and Disclosure Commission (up to \$5,000 per violation, § 49-14,126); New Jersey State Ethics Commission (\$500-\$10,000, § 52:13D-21(i)); New Jersey Joint Legislative Committee on Ethical Standards (\$500-\$10,000, § 52:13D-22(i)); Rhode Island Ethics Commission (up to \$25,000 per violation, § 36-14-13(d)); South Carolina Ethics Commission (up to \$2,000 per violation, § 8-13-320(10)(l)); Texas Ethics Commission (up to \$5,000 or triple amount at issue, § 571.173); Washington Executive/Legislative Ethics Board (up to \$5,000 per violation, § 42.52.480(1)); West Virginia Ethics Commission (up to \$5,000 per violation, § 6B-2-4(s))

⁸⁵ Alaska Public Offices Commission; Georgia Government Transparency and Campaign Finance Commission; Illinois Legislative/Executive Ethics Commission; Indiana State Ethics Commission; Minnesota Campaign Finance and Public Disclosure Board; New York Commission on Ethics and Lobbying in Government; North Dakota Ethics Commission; Oklahoma Ethics Commission; Pennsylvania State Ethics Commission; and Tennessee Bureau of Ethics and Campaign Finance.

⁸⁶ Indiana State Ethics Commission, Ind. Code Ann. § 4-2-6-12 (authority for restitution and disgorgement); Mississippi Ethics Commission, Miss. Code Ann. § 24-5-109(3) (authority for restitution); Missouri Ethics Commission, Mo. Rev. Stat. § 105.961(5) (authority for restitution); New Jersey State Ethics Commission, N.J. Stat. Ann. § 52:13D-21(i) (authority for restitution); New Jersey Joint Legislative Committee on Ethical Standards, N.J. Stat. Ann. § 52:13D-22(i)

government whole and remove financial incentives for ethical violations.

iii. Investigation Cost Recovery

These commissions can require violators to reimburse the costs associated with investigating and prosecuting their violations, including expenses like witness fees, travel costs, and hearing expenses.⁸⁷ This authority helps offset the financial burden of enforcement on taxpayers.

iv. Cease and Desist

These commissions may order violators to immediately stop their violating conduct. Some commissions can issue these orders directly⁸⁸, while others must seek judicial orders.⁸⁹ This

(authority for restitution); Rhode Island Ethics Commission, R.I. Gen. Laws § 36-14-13(d) (authority for civil penalties including restitution); West Virginia Ethics Commission, W. Va. Code § 6B-2-4(s) (authority for restitution).

⁸⁷ Alaska Public Offices Commission, Alaska Admin. Code tit. 2, §50.891(h) (authority to assess costs of investigation and adjudication, including subpoenas, witness fees, database searches, deposition costs, staff travel, transcription costs, expert fees, overtime pay, materials costs); Nebraska Accountability and Disclosure Commission, Neb. Rev. Stat. § 49-14,126 (authority to order payment of hearing costs in contested cases); Washington Executive Ethics Board, Wash. Code Rev. § 42.52.480(1) (authority to order costs related to investigation); Washington Legislative Ethics Board, Wash. Code Rev. § 42.52.480(1) (authority to order costs related to investigation); and West Virginia Ethics Commission, W. Va. Code § 6B-2-4(s) (authority to order reimbursement for costs of investigation and prosecution).

⁸⁸ California Fair Political Practices Commission, Cal. Gov't Code § 83116 (authority to require violator to cease and desist violations); Connecticut Office of State Ethics Citizen's Ethics Advisory Board, Conn. Gen. Stat. § 1-88(a) (authority to order violator to cease and desist violations); Georgia Government Transparency and Campaign Finance Commission, Ga. Code Ann. § 21-5-6(b)(14) (authority to order violator to cease and desist from committing violations); Iowa Ethics & Campaign Disclosure Board, Iowa Code § 68B.32D(1) (authority to issue cease and desist orders); Kentucky Executive Branch Ethics Commission, Ky. Rev. Stat. Ann. § 11A.100(3) (authority to require violator to cease and desist violations); Kentucky Legislative Ethics Commission, Ky. Rev. Stat. Ann. § 6.691(5) (authority to require violator to cease and desist violations); Maryland State Ethics Commission, Md. Code Ann., Gen. Provisions § 5-405(c) (authority to direct violator to cease and desist); Massachusetts State Ethics Commission, Mass. Gen. Laws ch. 268B, § 4(j) (authority to order violator to cease and desist violations); Missouri Ethics Commission, Mo. Rev. Stat. § 105.961(5) (authority to seek judicial or-

power serves as an immediate enforcement tool to halt ongoing violations of ethics laws.

v. Public Reprimand/Censure

These commissions may issue formal public or private statements condemning violations, serving as an official rebuke and creating public accountability for ethical misconduct.⁹⁰ The sanctions range from private admonishments to public censure, which can significantly impact a public official's reputation.

vi. Remedial Action

These commissions may require specific corrective actions to address violations, including ordering violators to cease improper conduct, file required documentation, or undergo ethics training.⁹¹ This authority focuses on correcting the underlying problematic behavior and ensuring

ders to cease and desist violations); Rhode Island Ethics Commission, R.I. Gen. Laws § 36-14-13(d) (authority to require violator to cease and desist violating activity); West Virginia Ethics Commission, W. Va. Code § 6B-2-4(s) (authority to issue cease and desist orders).

⁸⁹ Missouri Ethics Commission, Mo. Rev. Stat. § 105.961(5) (authority to seek judicial orders to cease and desist violations).

⁹⁰ Arkansas Ethics Commission, Ark. Code Ann. § 7-6-218(b)(4) (authority to issue public letter of caution, warning, or reprimand); Iowa Ethics & Campaign Disclosure Board, Iowa Code § 68B.32D(1) (authority to publicly reprimand); Kentucky Executive Branch Ethics Commission, Ky. Rev. Stat. Ann. § 11A.100(3) (authority to publicly reprimand and provide copy to appointing authority); Kentucky Legislative Ethics Commission, Ky. Rev. Stat. Ann. § 6.691(5) (authority to publicly reprimand and provide copy to presiding officer); Louisiana Board of Ethics, La. Stat. Ann. § 42:1153(A) (authority to censure elected officials); Maryland State Ethics Commission, Md. Code Ann., Gen. Provisions § 5-405(c) (authority to issue reprimand); Nevada Commission on Ethics, Nev. Rev. Stat. § 281A.785(1)(b) (authority to publicly admonish, reprimand, or censure); New Jersey State Ethics Commission, N.J. Stat. Ann. § 52:13D-21(i) (authority to issue censure or reprimand); North Carolina State Ethics Commission, N.C. Gen. Stat. § 138A-12(m)(3)(a) (authority to issue private admonishment); South Dakota Government Accountability Board, S.D. Codified Laws § 3-24-8 (authority to issue public or private reprimand); West Virginia Ethics Commission, W. Va. Code § 6B-2-4(s) (authority to issue public reprimand).

⁹¹ California Fair Political Practices Commission, Cal. Gov't Code § 83116 (authority for

future compliance.

b. Criminal Enforcement

i. Referral to Attorney General or District Attorney

These commissions are legally obligated to refer cases to specific authorities when they determine a violation of ethics laws may involve criminal conduct.⁹² These commissions have the option, but are not mandated, to refer cases to the Attorney General or District Attorney for potential criminal prosecution.⁹³

ii. Referral to Law Enforcement

These commissions may choose to refer cases to law enforcement for investigation, but are

filings requirements and remedial actions); Connecticut Office of State Ethics, Conn. Gen. Stat. § 1-88(a) (authority to require filing of reports and remedial actions); Georgia Government Transparency Commission, Ga. Code Ann. § 21-5-6(b)(14) (authority to require public statements and remedial actions); Indiana State Ethics Commission, Ind. Code Ann. § 4-2-6-12 (authority for contract cancellation, employment bars, license revocation); Iowa Ethics Board, Iowa Code § 68B.32D(1) (authority to require remedial action and filing requirements); Nevada Commission on Ethics, Nev. Rev. Stat. § 281A.785(1)(a) (authority to require ethics training, remedial action, public apologies); and Rhode Island Ethics Commission, R.I. Gen. Laws § 36-14-13(d) (authority to require filing of reports and documentation).

⁹²Alabama Ethics Commission, Ala. Code § 36-25-4(i), § 36-25-4(b)(8), § 36-25-4.4(b) (must refer violations with evidence to Attorney General or district attorney); Maine Commission on Governmental Ethics and Election Practices, Me. Rev. Stat. Ann. tit. 1, § 1013(2)(F) (must refer findings to Attorney General); Vermont State Ethics Commission, Vt. Stat. Ann. tit. 3, § 1223(b)(1) (must refer complaints to Attorney General or State's Attorney); Virginia Conflict of Interest and Ethics Advisory Council, Va. Code Ann. § 2.2-3124(B) (must notify Attorney General of violations).

⁹³Kentucky Legislative Ethics Commission, Ky. Rev. Stat. Ann. § 6.691(6); New Hampshire Executive Branch Ethics Committee, N.H. Rev. Stat. Ann. § 21-G:31(III)(d); North Carolina Ethics Commission, N.C. Gen. Stat. § 138A-12(m)(3); Pennsylvania State Ethics Commission, Pa. Cons. Stat. Ann. § 1107; and Rhode Island Ethics Commission, R.I. Gen. Laws § 36-14-13(d).

not always required to do so.⁹⁴

iii. Referral to Other Disciplinary Bodies

These commissions are required to send their findings to specific disciplinary bodies or authorities within their state's government.⁹⁵ These commissions have the authority to refer cases to other disciplinary entities at their discretion.⁹⁶

iv. Prosecution by the Commission's Attorneys

The Montana Commissioner of Political Practices may hire attorneys to prosecute any criminal or civil action arising out of a violation of governmental ethics laws.⁹⁷ The Oklahoma Ethics Commission has the authority to investigate and, when it deems appropriate, prosecute in the District Court of the County where the violation occurred.⁹⁸ The Wisconsin Ethics Commission shall investigate violations of laws administered by the commission and may prosecute alleged civil violations of those laws, directly or through its agent.⁹⁹

2. Application to the Ethics Code

⁹⁴ District of Columbia Board of Ethics and Government Accountability, D.C. Code § 1-1162.15; New York Commission on Ethics and Lobbying in Government, N.Y. Exec. Law § 94(10)(n)(iv); Pennsylvania State Ethics Commission, Pa. Cons. Stat. Ann. § 1108(a); South Dakota Government Accountability Board, S.D. Codified Laws § 3-24-5; Tennessee Bureau of Ethics and Campaign Finance, Tenn. Code Ann. § 3-6-109.

⁹⁵ Florida Commission on Ethics, Fla. Stat. § 112.324(3); Hawaii State Ethics Commission, Haw. Rev. Stat. § 84-32; Ohio Ethics Commission, Ohio Rev. Code Ann. § 102.06(C)(1)(a); and Oregon Government Ethics Commission, Or. Rev. Stat. Ann. §§ 244.260(8), 244.270(2).

⁹⁶ Maryland State Ethics Commission, Md. Code Ann., Gen. Provisions § 5-405(c)(3); Missouri Ethics Commission, Mo. Rev. Stat. § 105.961(4); North Carolina State Ethics Commission, N.C. Gen. Stat. § 138A-12(m)(3);

⁹⁷ Mont. Code Ann. § 13-37-113.

⁹⁸ Okla. Const. Art. 29, § 4(A)

⁹⁹ Wis. Stat. § 19.49(2)(a).

Overall, the Ethics Code notably diverges from national standards in its approach to enforcement mechanisms, particularly in its lack of civil enforcement authority. While the majority of state ethics commissions across the nation possess direct civil enforcement powers, including the ability to impose fines, issue cease and desist orders, and implement administrative remedies, the Ethics Commission stands as an outlier with its strictly advisory role and mandatory criminal referral system. The Ethics Code places the Ethics Commission in a small minority of states that must channel all enforcement actions through the Attorney General or District Attorney's office, rather than handling civil violations independently. The Ethics Commission is required to report findings and recommend discipline to the district attorney for the relevant jurisdiction or to the Attorney General if a violation has occurred. The commission must also refer evidence of criminal violations of the Fair Campaign Practices Act to the Attorney General or appropriate district attorney. This structural limitation significantly contrasts with the prevalent model seen in states like California, Massachusetts, and Rhode Island, where ethics commissions maintain robust civil enforcement authority alongside their criminal referral powers. The requirement to refer all violations, even those that might be more appropriately handled through civil or administrative channels, to criminal prosecutors makes the Ethics Code uniquely restrictive and potentially less efficient than the more flexible, multi-tiered enforcement approaches adopted by most other state commissions. This singular focus on criminal enforcement through referral, rather than maintaining a balanced approach with civil enforcement options, represents a significant departure from what has become the national standard in ethics commission authority and enforcement capabilities.

I. § 36-25-4 - State Ethics Commission; Duties (Confidentiality)

1. National Survey

Many state ethics commissions prioritize confidentiality during the initial stages of a complaint, but the extent and specific rules vary significantly

a. Initial Confidentiality

Most commissions maintain confidentiality to protect the integrity of investigations and the privacy of those involved. This often includes keeping the identity of the complainant and respondent confidential, as well as the details of the complaint itself.

i. Exceptions to Confidentiality

(a) Public Disclosure by Respondent or Complainant

If the respondent or complainant publicly discloses the existence of a preliminary inquiry or investigation, many commissions reserve the right to confirm the existence of the inquiry and release relevant documents. The Kentucky Ethics Commission may publicly confirm the existence of an inquiry and release relevant documents if the alleged violator publicly discloses the existence of a preliminary investigation, and the Iowa Ethics and Campaign Disclosure Board can make a complaint or investigation public if the complainant or the subject of an investigation publicly discloses its existence.

(b) Criminal Proceedings

Information is often shared with law enforcement agencies like the Attorney General, US Attorney, or district attorneys, for potential criminal proceedings. For example, the Massachusetts State Ethics Commission's general counsel may share evidence with the attorney

general, a United States Attorney, or a district attorney if it may be used in a criminal proceeding.

(c) Other Agencies

Information may be shared with other state agencies for investigative purposes. For example, the Kentucky Ethics Commission can share evidence with the Personnel Board, the Auditor of Public Accounts, or other agencies for investigative purposes. The Virginia Conflict of Interest and Ethics Advisory Council forwards complaints to the House and Senate Ethics Advisory Panels. Also, the Oklahoma Ethics Commission can request cooperation from state agencies.

(d) Complainant Disclosure

In some cases, the complainant is allowed to disclose information once the commission has made a determination not to pursue the complaint or the investigation is complete. For example, the Maine Commission on Governmental Ethics and Election Practices states that a complainant may disclose information they provided to the commission as part of the complaint or investigation once the commission has determined not to pursue the complaint, or once the investigation is complete.

b. Complainant Identity

i. Protected

Several commissions explicitly protect the identity of the complainant from public disclosure. For example, the Washington Executive Ethics Board states that the identity of a person filing a complaint is exempt from public disclosure, and the Oklahoma Ethics Commission keeps the identity of the complainant confidential unless there is a wrongful use of

the act. The New Jersey State Ethics Commission also keeps a complainant's identity confidential, even if they identify themselves. Similarly, the Illinois Executive Ethics Commission states that the identity of individuals who provide information or report misconduct to an Ethics Commission must be kept confidential unless they consent to disclosure or if disclosure is required by law. Additionally, the Vermont State Ethics Commission keeps complaints submitted to them confidential, and the North Dakota Ethics Commission cannot release a confidential complainant's information without their authorization

ii. Not Protected

In contrast, some states do not protect the identity of the complainant, and it may be disclosed to the respondent. The Mississippi Ethics Commission, for example, does not protect the identity of the person who filed the complaint. Also, the Georgia Government Transparency and Campaign Finance Commission does not mention any provisions for keeping the identity of the complainant confidential.

iii. Conditional Disclosure

Some states have conditional rules regarding the disclosure of a complainant's identity. The Maryland State Ethics Commission, for instance, must disclose the identity of the complainant to the respondent upon the respondent's request. The West Virginia Ethics Commission also requires that the identity of a complainant be disclosed to a respondent upon the respondent's request. Similarly, the Kentucky Ethics Commission may reveal the identity of a complainant if the complainant publicly discloses the existence of a preliminary inquiry. The Indiana State Ethics Commission maintains confidentiality unless the target of the investigation chooses to

disclose information or if the Commission responds to public statements by the person who filed the complaint. The Iowa Ethics and Campaign Disclosure Board has the option to keep information confidential when a complaint is not filed, but the information is reported to the board and results in a board-initiated investigation

c. Public Access to Records and Documents

After certain stages, many commissions make records and documents related to complaints available to the public. The Indiana State Ethics Commission makes a complaint open for public inspection after the commission finds probable cause. The Minnesota Campaign Finance and Public Disclosure Board makes the record of the investigation public once the Board makes a decision resolving a matter. The Mississippi Ethics Commission makes statements of economic interest available on its website and at its physical office. In Maine, the Commission on Governmental Ethics and Election Practices makes findings of fact and recommendations on complaints against legislators public records. Similarly, the Arkansas Ethics Commission makes a final order, with written findings of fact and conclusions of law, available for public inspection. The Rhode Island Ethics Commission also makes investigative reports public after a probable cause hearing has been completed.

(a) Timing of Public Disclosure

The timing of public disclosure varies. The Minnesota Campaign Finance and Public Disclosure Board makes the record public only after the board makes a decision. The Indiana State Ethics Commission makes a complaint public once probable cause is found, while the Tennessee Bureau of Ethics and Campaign Finance keeps complaints confidential until it

determines probable cause exists. The Maine Commission on Governmental Ethics and Election Practices keeps a complaint confidential until after the commission has voted to pursue it. The Mississippi Ethics Commission states that a finding of probable cause removes the confidentiality. In Kentucky, all commission proceedings are confidential until a final determination

(b) Information Made Public

The specific types of information made public also vary. The Maine Commission on Governmental Ethics and Election Practices makes public the findings of fact and recommendations of the commission on complaints against legislators. The Texas Ethics Commission provides a list of proposed witnesses, copies of exhibits, and the nature of the expected testimony to the complainant and the respondent within five business days of a scheduled formal hearing. The Mississippi Ethics Commission makes statements of economic interest available by means of its website and at its physical office. The Arkansas Ethics Commission makes a final order available to the public, which includes written findings of fact and conclusions of law. The Washington Legislative Ethics Board provides a public status sheet of complaints, which includes the reference number of each complaint, the date it was received, and its current status

(c) Exceptions to Public Access

Some records are exempt from disclosure. For example, the Mississippi Ethics Commission states that ethics opinions, complaints, investigative materials, attorney work product and personnel files are exempt from disclosure. In Washington, the results of investigations are

confidential. Some commissions may choose to redact information, as in Virginia, where personal information is redacted from publicly available documents. The New York Commission on Ethics and Lobbying in Government states that records related to unsubstantiated complaints are exempt from public disclosure. The Iowa Ethics and Campaign Disclosure Board can keep information confidential when a complaint is not filed, but the information is reported to the board and results in a board-initiated investigation

ii. Criminal Penalties

Several ethics commissions impose penalties for unauthorized public disclosure of confidential information related to complaints or investigations. The Maine Commission on Governmental Ethics and Election Practices considers a breach of confidentiality a Class D crime. Similarly, the Massachusetts State Ethics Commission imposes penalties of up to \$1,000 and/or imprisonment for up to a year. The Mississippi Ethics Commission considers a breach of confidentiality a misdemeanor with fines up to \$1,000 and/or one year in prison.

d. Public Access to Hearings

Many ethics commissions conduct hearings that are open to the public. For example, the Hawaii State Ethics Commission specifies that hearings are open to the public, as are the hearings of the Indiana State Ethics Commission and the South Carolina State Ethics Commission. Similarly, the Kentucky Ethics Commission holds public adjudicatory proceedings. The Virginia House and Senate Ethics Advisory Panels also hold open hearings after probable cause has been established. However, the Illinois Executive Ethics Commission has closed hearings and the Missouri Ethics Commission conducts hearings as a closed meeting. The

Minnesota Campaign Finance and Public Disclosure Board closes any part of a board meeting where testimony is being heard or action is being taken on a complaint. In some cases, a commission may have the option to close a hearing, such as the Massachusetts State Ethics Commission, which can vote to go into executive session during adjudicatory proceedings. The Nebraska Accountability and Disclosure Commission typically holds hearings in closed session, but the alleged violator can request an open session. The Pennsylvania State Ethics Commission's hearings are generally closed to the public unless the subject requests an open hearing

2. Application to the Ethics Code

The Ethics Code's confidentiality provisions only permits access to the disposition of a case after a probable cause finding, which is notably more restrictive than other commissions. For example, the Indiana State Ethics Commission allows broader public access to complaint materials once probable cause is established, not just the final disposition. This limitation in the Ethics Code may unnecessarily restrict public understanding of ethics proceedings and limit accountability.

The Ethics Code's classification of confidentiality violations as a Class C felony, while demonstrating commitment to privacy protection, may be disproportionately severe. Most states achieve effective confidentiality protection through less punitive measures such as misdemeanor charges or financial penalties. This severe criminal penalty could potentially create a chilling effect on legitimate whistleblowing or discourage legitimate public discussion of ethics matters.

J. § 36-25-27 - Penalties; Enforcement; Jurisdiction, venue, judicial review;

Limitations period (Complaint Procedures)

1. National Survey

a. Complaint Construction

To initiate a complaint, most jurisdictions require the submission of a formal, written document, often under oath, which includes the complainant's identifying information and detailed allegations of misconduct. For example, the Missouri Ethics Commission requires complaints to be in writing, sworn under penalty of perjury, and contain all known facts related to the alleged violation.

Many commissions, such as the Texas Ethics Commission, provide a prescribed form for filing a complaint. Commissions tend to provide specific forms for filing complaints on the commission's website. The Arkansas Ethics Commission provides a citizen complaint form that can be found on their website. It's also common for commissions to offer assistance in drafting and filing complaints. Some commissions also allow for electronic submission of complaints, while others do not accept electronic copies.

Most jurisdictions require the complainant's name and contact information, but some, like the Washington Executive Ethics Board allow for anonymous complaints, although this is not always the norm. The Oklahoma Ethics Commission, for example, does not accept anonymous complaints. Complaints must usually include detailed information such as the specific facts of the alleged violation, the date of the violation, and the specific laws or rules believed to have been violated. For instance, the Maine Commission on Governmental Ethics and Election Practices requires the complaint to specify the facts of the alleged violation, citing the specific

provisions of the relevant sections of the law. Supporting documentation or evidence is often required or strongly recommended. The South Dakota Government Accountability Board requires a signed complaint that names the individual suspected of misconduct, identifies their public office, and details the specific acts that constitute the alleged misconduct. Similarly, the Georgia Government Transparency and Campaign Finance Commission requires a clear and concise statement of the facts, a reference to the specific law, rule, or statute allegedly violated, and any supporting information. Some commissions, like the Alaska Public Offices Commission, also require proof that the complaint was delivered to the alleged violator.

Many jurisdictions also require that the complaint be signed under oath and sometimes notarized. The Tennessee Bureau of Ethics and Campaign Finance requires the complaint to be sworn to before a notary public.

Certain commissions also specify time limits for filing a complaint. For instance, the Missouri Ethics Commission will not investigate complaints about conduct that occurred more than two years prior to the complaint for non-criminal conduct. In addition, the Utah Legislative Ethics Commission does not accept complaints within 60 days of an election if the legislator is an opposed candidate, and the alleged violation must have occurred within the past two years.

Some commissions have specific requirements for complaints against multiple individuals. For example, the Colorado Independent Ethics Commission requires each complaint to be filed separately against individual persons.

b. Initial Review

During the initial review, a commission assesses if a complaint meets all formal

requirements. This includes verifying that the complaint is submitted in writing and signed by the complainant, and in some cases, notarized. If these requirements are not met, the complaint may be rejected. Many ethics commissions have procedures to allow for the correction of deficiencies found during the initial review of a complaint, ensuring that complaints are not dismissed due to minor errors or omissions. For example, the Texas Ethics Commission and the Illinois Executive Ethics Commission return complaints that do not meet form requirements, giving the complainant 21 days to correct the issues and resubmit. If the complaint is not resubmitted within this timeframe, or is still deficient, it may be dismissed. While not directly stating corrections, the Kansas Governmental Ethics Commission offers assistance in drafting and filing complaints, which implies that deficiencies can be addressed during the drafting process. Similarly, the Alaska Public Offices Commission reviews the complaint immediately upon receipt, suggesting that deficiencies would be addressed early

c. Preliminary/Jurisdictional Review

Many ethics commissions have initial review processes to assess complaints for substantive deficiencies and to determine jurisdiction. A jurisdiction review phase is a step in the ethics complaint process where the commission determines if it has the authority to investigate the alleged violation. For instance, the Maine Commission on Governmental Ethics and Election Practices may summarily dismiss a complaint if it's not within its jurisdiction. Similarly, the Texas Ethics Commission's Executive Director determines if the commission has jurisdiction; a lack of jurisdiction results in dismissal. If a complaint is missing required information, or is about a person or issue not within the commission's purview, it may be rejected or dismissed

without further investigation. The Indiana State Ethics Commission, for example, can reject a complaint if it is frivolous, has been dealt with, or does not allege sufficient facts. Likewise, the Wisconsin Ethics Commission can reject a complaint if it is frivolous or if the issue has been dealt with already, or if it doesn't allege sufficient facts to constitute a violation.

d. Respondent Notification

Many state ethics commissions have specific procedures for notifying a respondent that a complaint has been made. For example in North Dakota, the respondent must be informed of any complaint the commission receives, including the identity of the complainant unless the complaint was submitted confidentially, and this notice must be provided within 30 calendar days after the complaint was received. The Oregon Government Ethics Commission requires the respondent to be notified within two business days of the complaint being received. The Texas Ethics Commission attempts to notify the respondent by phone or email and sends a written notice within five business days. The New Mexico State Ethics Commission requires that the respondent be notified of the complaint within 30 days, and the specific allegations of the complaint, the notification to the respondent, any response filed, and related records shall be made public after this notification period. The Maryland State Ethics Commission also requires a copy of the complaint to be promptly sent to the respondent, and the Michigan State Board of Ethics requires, if the complaint meets the requirements, that the executive secretary will serve it to the person charged.

2. Application to the Ethics Code

The Ethics Code's complaint filing procedures reveal several interesting disconnects between

codified requirements and actual practice. While the Ethics Code requires written and signed complaints, aligning with national standards, there's a notable gap regarding notarization.

Although the commission requires notarization in practice, this requirement isn't explicitly stated in the code, potentially raising questions about its legal enforceability. This represents one of several instances where commission practices exceed or differ from codified requirements.

The Ethics Commission's complaint form demonstrates this dynamic, requiring comprehensive complainant information including name, full contact information, employment details, multiple phone numbers, and email address. However, the Ethics Code itself doesn't mandate the use of a specific form, creating another disconnect between the Ethics Code and practical implementation. This detailed information requirement aligns with national standards but lacks explicit statutory backing.

The Ethics Commission maintains robust requirements for complaint content, mandating specific details of alleged violations, dates of incidents, applicable statute citations, and factual allegations. The requirement for complainant cooperation presents yet another Ethics Code-practice misalignment: while the complaint form requires complainants to agree to cooperate and testify, this requirement isn't explicitly stated in the Ethics Code. This creates potential uncertainty about the enforceability of the cooperation requirement.

A significant procedural inconsistency exists in the preliminary review process. While the Ethics Code specifies that the Ethics Director conducts initial reviews to determine violations and reasonable cause, the Ethics Commission's website FAQ describes a different process where

Ethic Commission staff reviews complaints and may request additional information or dismiss complaints.

Regarding respondent notification, the Ethics Code's 45-day notification requirement differs from many other states by linking the timeline to a hearing rather than to the complaint's receipt or investigation initiation. This approach could potentially impact the timeliness of respondent awareness and preparation for proceedings.

IV. Recommendations

Based on our analysis of constitutional concerns, best practices and the national standards for government ethics statutes, we recommend the follow amendments and additions to the Ethics Code.

A. § 36-25-1 – Definitions

a. Amend § 36-25-1(2) Associated Business to Apply to Only Businesses of the Public Servant

§ 36-25-1(2) currently defines Associated Business to apply to businesses of both the Public Servant and members of his or her family (undefined). There are provisions of the Ethics Code where it is inappropriate to apply the provision to businesses of all Family Members, such as Conflict of Interest provisions, so their automatic inclusion by definition unduly complicates the matter. If it is appropriate to apply a provision to Associated Business of a Household member or Other Close Relatives, such as Personal Gain, the provision can say that.

b. Amend § 36-25-1(8) to Limit Conflicts of Interests to Household members and Associated Business of a Public Servant.

§ 36-25-1(8) applies Conflict of Interest restrictions well beyond the financial interests of Public Servant and the Public Servant's Household but also to apply to the broadly defined Family Members of the Public Official, § 36-25-1(15), and to the Associated Business, § 36-25-1(2), with every Family Member. Conflict of Interest restrictions should only apply to the financial interests of Public Servants, their Household and the Associated Businesses of the Public Servant.

Furthermore, there are two provisions defining Conflict of Interest, § 36-25-1(8) and § 36-25-5(f). These are overlapping, confusing and potentially conflicting. There should be only one definition of Conflict of Interest used throughout the Ethics Code, the one suggested above.

Furthermore, neither of the Conflict of Interest provisions contain explicit recusal or waiver provision which are needed to provide clarity and prevent overbreath.

c. Amend §§ 36-25-1(14); 36-25-1(15) to Create a Definition of “Other Close Relatives”

Currently, the Ethics Code employs three separate definitions to describe two different categories of family members, two describe immediate family members, §§ 36-25-1(14); 36-25-1(17) (“**Household**”) and one describes immediate family members and Other Close Relatives, § 36-25-1(15), creating unnecessary complexity and inconsistency. A more effective and constitutionally sound approach would be to maintain the current term Household, which encompasses immediate family members and dependants, and create a new term, Other Close Relatives, which would be a person's and spouse's parents, children, and siblings, and their grandparents, grandchildren, nephew and nieces, aunts and uncles and first cousins.

Furthermore, as recommended below, the definitions need a new definition of Public Servant

which would encompass both Public Officials and Public Employees, since they are often treated the same.

These narrow definitions would provide more flexibility to focus restrictions on the appropriate category of persons with a direct and personal relationship with the appropriate Public Servant, reducing the risk of restricting innocent conduct and more closely aligning with the *Sun-Diamond* framework's emphasis on preventing actual corruption.¹⁰⁰

d. Amend § 36-25-1(20) Definition of “Lobby or Lobbying”

The definition should be amended to mean to communicate with a Public Servant of the legislative or executive branch in order to expressly advocate the adoption or rejection of any legislative proposal or executive action. The focus should be on traditional direct lobbying, not grassroots lobbying, or educational efforts of any kind.

e. Amend § 36-25-1(22) Definition of “Minor Violation”

The term “substantial restitution” should be defined through specific threshold. For example: full restitution, 100% repayment of economic loss plus 5% interest; substantial restitution, at least 75% of total economic loss repaid; partial restitution, 25-74% of economic loss repaid; and minimal restitution, less than 25% repaid.

“Great monetary gain” and “great monetary loss” should be specifically defined as, for example: minor, up to \$1,500 (current threshold); moderate, \$1,501 to \$5,000; substantial, \$5,001 to \$10,000; or great, exceeding \$10,000. All thresholds should be adjusted annually based on Consumer Price Index.

¹⁰⁰ Several provisions of the Ethic Code will need to be amended to use this new terminology. *See, e.g.*, § 36-25-8.

“High degree of sophistication or planning” should be defined through specific elements, such as: duration of planning exceeding 30 days; creation of false documentation; use of multiple accounts or entities to conceal activity; exploitation of internal controls or procedures; recruitment of other participants; any three elements present would constitute “high sophistication.”

“Lengthy period of time” should be defined using specific durations, such as: brief, up to 30 days; moderate, 31-90 days; extended, 91-180 days; or lengthy, exceeding 180 days. Duration measured from first violation action to last related action.

These specific definitions would replace subjective terminology while preserving reasonable discretion for the Ethics Commission to evaluate overall context.

f. Amend § 36-25-1(24) Definition of “Principal”

The definition of “Principal” should be revised to be more narrowly focused on entities that engage in lobbying. So, in accord with ALI Principles § 211, a Principal should be limited to persons or entities that hired a Lobbyist to lobby particular Public Servants that would exercise of Law-Making Power that would effect the entity. The Lobbyist Gift ban would only restrict gifts by that entity to that particular Public Servant.

g. Amend § 36-25-1(26) Definition of “Public Employee”

Public Employee is extremely broad, applying to nearly every employee of all levels of government, but only health care workers are categorically excluded. Public School Teachers, Public Safety, Law Enforcement and Correctional Officers, and Administrative and Support Staff should be excluded and serious consideration should be given to whether other employees

with virtually no discretionary governmental authority should also be categorically excluded.

h. Amend § 36-25-1(27) Definition of “Public Official”

Following Florida and Rhode Island models, the definition for “Public Official” should explicitly exclude:

- i. All state, county, and municipal judges
- ii. Political party officers at state and local levels

i. Amend § 36-25-1(34) Definition of “Thing of Value”

The definition for “Thing of Value” should establish specific valuation methods for:

- i. Non-monetary benefits
- ii. Entertainment and experiential gifts
- iii. Digital assets and cryptocurrency

j. Define Additional Terms

- i. “Public Servant”: combined category of Public Officials and Public Employees
- ii. “Official Action” per *McDonnell*.

B. § 36-25-1.3 – Economic Development Professionals

a. Clarifying “Above and Beyond” Standards

The Ethics Code should define specific parameters for actions that go “above and beyond” current statutory or constitutional authorization, replacing this vague language with concrete examples and clear boundaries. For instance, the Ethics Code could enumerate specific

prohibited activities while explicitly protecting common legitimate economic development practices.

b. Establishing Objective “Good Faith” Criteria

To address the “good faith” standard’s subjectivity, the Ethics Code should establish objective criteria for evaluating economic development professionals’ conduct. This could include specific factors such as documentation requirements, transparency measures, and procedural safeguards that, when followed, would create a presumption of good faith action. These objective standards would provide both guidance and protection for professionals acting legitimately while making it easier to identify improper conduct.

c. Differentiating Between Entity Types

The Ethics Code should also refine its broad application across different entity types by creating tailored provisions for different categories of economic development professionals. For instance, separate guidelines could be established for Public Employees, private sector professionals, and nonprofit organizations, recognizing their distinct roles and responsibilities. This differentiated approach would help prevent the restriction of legitimate economic development activities while maintaining appropriate oversight.

C. § 36-25-3 – State Ethics Commission; General

a. Political Party Balance Requirement

To enhance impartiality and reduce partisan influence in ethics oversight, the Ethics Commission should maintain strict political party balance among its members. No more than

three members should be affiliated with the same political party, ensuring diverse political perspectives in decision-making. This requirement should be formally codified in the Ethics Code, with clear definitions of party affiliation and procedures for verifying political independence. When vacancies occur, appointments should be made with consideration of maintaining this balance, and commissioners should be required to disclose any changes in their party affiliation during their term of service.

b. Legal Expertise Requirement

The Ethics Commission should include at least one member who is an attorney currently licensed to practice law in Alabama. This requirement ensures the Ethics Commission has direct access to legal expertise in interpreting ethics laws, evaluating complex cases, and understanding procedural requirements. The attorney member should have demonstrated experience in ethics, administrative law, or related fields. Their presence would enhance the Ethics Commission's ability to make well-reasoned legal determinations and provide guidance on complex ethical issues.

c. Structured Appointment Procedure

A clearly defined, transparent appointment procedure should be established to ensure qualified individuals are selected through a systematic process. This procedure should include specific qualification criteria, public notice of vacancies, standardized application processes, and defined timelines for appointments. The process should also include provisions for vetting candidates' backgrounds, checking for potential conflicts of interest, and evaluating their commitment to ethical governance. Clear terms of service, including provisions for

reappointment and removal, should be established.

d. Legislative Confirmation Process

All appointments to the Ethics Commission should require confirmation by the legislative branch, providing an additional layer of scrutiny and public accountability. The confirmation process should include public hearings where nominees can be questioned about their qualifications, ethical philosophy, and approach to enforcement. This process should have defined timelines to prevent delays in filling vacancies while allowing sufficient time for thorough vetting. The legislative confirmation requirement would help ensure commissioners have broad support and enhance the Ethics Commission's legitimacy and public trust.

D. § 36-25-4 – State Ethics Commission; Duties

a. Implement a Structured Ethics Complaint Process Following Texas Model

i. Initial Complaint Filing and Review

The process should begin with clearly defined eligibility requirements for Complainants, limiting filing rights to Alabama residents or property owners. Complaints must be submitted on standardized forms requiring specific information including Complainant and Respondent details, alleged violations, factual statements, and supporting documentation. The Ethics Commission staff would review complaints for compliance, allowing 21 days for correction of deficient filings. Compliant submissions would trigger immediate Respondent notification (within five business days), including clear information about their rights and procedures.

ii. Commission-Initiated Reviews

For Commission-initiated reviews, similar procedural protections should apply. These

reviews would require a majority vote of at least three commissioners to commence, followed by the same five-day notification requirement to Respondents. This ensures consistency in due process regardless of how the investigation begins.

iii. Jurisdiction Review Phase

Upon receiving a complaint or initiating a review, the Director should make an initial jurisdiction determination within 15 business days, evaluating whether the alleged conduct falls within ethics laws, whether the Respondent is subject to the Ethics Commission authority, whether the violation occurred within the statute of limitations, and whether the Ethics Commission can impose relevant penalties. Written notice of this determination must be provided to both Complainant and Respondent within five business days, including the specific basis for the decision and clear instructions about the right to request review within 30 days. If review is requested, the full Ethics Commission must consider the matter at its next scheduled meeting for which notice has not yet been posted. This structured approach would enhance transparency and due process while ensuring efficient case processing.

iv. Preliminary Review Process

The preliminary review stage should follow strict timelines: 15 business days for Respondents to answer complaints, 15 business days to respond to written questions, and 120 days for the Ethics Commission to either propose settlement or dismiss (unless litigation is pending). This creates predictability and prevents cases from languishing.

v. Hearing Procedures and Final Decisions

Formal proceedings should include clear voting requirements - four commissioners to find a

violation, three to find no violation - and strict deadlines for decisions (60 days post-hearing).

Final decisions must include detailed findings of fact, legal conclusions, and any penalty recommendations, with copies provided to all parties within five business days and made public. This transparency and structure would significantly improve the current system's accountability and effectiveness.

vi. Confidentiality of Complaint Procedure

The requirement of confidentiality of the complaint procedure should apply to the Ethics Commission itself, and its staff, and, by default, to participants regarding disclosure of testimony before the Ethics Commission and that person's interaction with it. However, the confidentiality requirement should expressly exempt third parties, such as the press, from reporting on a pending inquiry, Complainants or participants from publicly disclosing the substance of complaint or that a complaint was filed, and the Respondent from speaking out about the matter, if a Respondent decides to do it or authorizes another to do so.

b. Enhance the Ethics Commission Subpoena Authority with Procedural Safeguards

The Ethics Commission's authority to issue subpoenas for witness testimony and records should be explicitly granted while incorporating appropriate procedural safeguards. The Ethics Commission should be authorized to issue subpoenas for both documentation and witness testimony in matters under active investigation. However, this power must be exercised through a formal process requiring a motion by one commissioner and subsequent approval by three commission members.

E. § 36-25-4.1 – State Ethics Commission; Public Access to Complaint, Investigation,

and Disposition

a. Publish Anonymized Summaries of Dismissed Complaints or Those Lacking Probable Cause

Texas takes this approach, making disposition information accessible to the public while maintaining Respondent confidentiality. This would offer valuable insights into the types of complaints received, the review process, and areas where further training may be beneficial for Public Officials.

b. Establish a Publicly Accessible Online Archive of Issued Informal Opinions

While concerns about confidentiality are valid, the Ethics Code could adopt Vermont's approach of redacting personally identifiable information before publishing these opinions, striking a balance between transparency and protecting individual privacy. Additionally, the Ethics Commission should publish summaries of informal opinions, which would offer a more digestible overview of key ethical issues addressed without compromising confidentiality.

c. Increase Transparency in the Ethics Commission Hearings

Washington provides a useful example, where their Ethics Code mandates public hearings for cases once reasonable cause has been established. Similarly, Rhode Island conducts open adjudicative hearings, demonstrating that public access can be successfully implemented while protecting sensitive information. The Ethics Commission could adopt a hybrid approach by allowing public observers or releasing redacted transcripts for certain portions of ethics hearings. The Ethics Commission could develop clear criteria for determining which portions of hearings should be public, ensuring consistency and predictability in the process.

To implement this change, the Ethics Commission should establish detailed procedures for

redacting sensitive information, develop guidelines for public attendance, and create a system for timely release of hearing transcripts. The process could begin with a pilot program for select cases, allowing the Ethics Commission to refine procedures and address any unforeseen challenges before full implementation. This increased transparency would enhance public trust and accountability while maintaining necessary protections for sensitive information and individual privacy rights.

d. Expand Online Access to a Wider Range of Information

The Ethics Commission could provide online access to finalized Ethics Commission orders, advisory opinions, and a comprehensive database of campaign finance information. Rhode Island offers an online database of ethics decisions, and Texas has a detailed, searchable online campaign finance system, allowing public monitoring of campaign finances and potential conflicts of interest.

e. Create an Online Database for Lobbyist Activity

Washington has a robust system for Lobbyist registration and reporting, requiring the disclosure of clients, compensation, and subject matter. Alabama could consider a similar database, making it easier for the public to understand Lobbyist interactions with government officials.

f. Proactively Issue Press Releases or Public Statements about Resolved Cases

This would demonstrate commitment to transparency by providing summaries of the allegations, the Ethics Commission's findings, and sanctions.

g. Develop and Publish an Annual Report on the Commission's Activities

The Ethics Commission's current practice of releasing reports in three-year groupings, rather than annually as required, significantly hampers transparency and accountability efforts. To address this issue, the Ethics Commission should develop and publish comprehensive annual reports detailing its activities and investigations.

These annual reports should include detailed case summaries that protect confidentiality while providing insight into the types of ethical violations being addressed. Statistical data should cover the number and types of complaints received, investigation timeframes, resolution rates, and enforcement actions taken. This data would enable year-over-year trend analysis and help identify emerging patterns or areas of concern. To ensure successful implementation, the Ethics Commission should establish firm annual deadlines for report publication.

F. § 36-25-4.2 – State Ethics Law Training Programs

a. Establish Alternative Compliance Pathways

The Ethics Commission should implement a flexible system allowing Lobbyists to demonstrate ethics knowledge through various means. This could include passing a comprehensive written examination, completing approved online training modules, or documenting significant prior experience with ethics compliance in other jurisdictions. These alternatives would maintain high standards while removing unnecessary barriers to constitutionally protected activities.

b. Create a Provisional Registration System

A provisional registration system should be established allowing Lobbyists to begin work

while completing training requirements within a reasonable timeframe (e.g., 90 days). The provisional period would give Lobbyists adequate time to fulfill educational requirements without preventing them from exercising their right to petition government.

c. Develop Ongoing Support Resources

The Ethics Commission should focus on providing accessible resources and support rather than relying on punitive measures. This includes maintaining comprehensive online materials, offering regular updates on ethics requirements, and providing access to advisory opinions and staff guidance. These resources would help ensure ongoing compliance while respecting constitutional rights and professional needs.

G. § 36-25-5(a) – Use of Official Position or Office for Personal Gain

a. Amend Personal Gain Prohibition to Apply only to Associated Businesses of Public Servants, not of Household Members and Other Close Relatives

§ 36-25-5 should be amended to only extend to any Associated Business of the Public Servant, not Associated Businesses of Household members and Other Close Relatives.

H. § 36-25-5(b)-(e) – Personal Gain - Other Provisions

a. Establish Clear Monetary Thresholds for “Material” Effects

The provision should establish specific monetary thresholds to define when a financial interest is “materially affected.” Financial impacts should be deemed material if they result in a change of, for example, \$2,500 or more in annual income or asset value for the Public Servant, their Household members, or Associated Business of the Public Servant. Different thresholds should be set based on position level and jurisdiction size to recognize varying scales of government operations.

b. Define “Ordinary Course of Business” Through Specific Standards

The provision should enumerate objective criteria for determining what constitutes “ordinary course of business,” for example: arms-length transactions with standard market terms; transactions consistent with established policies and procedures; transactions with robust documentation and approvals; and transactions subject to competitive bidding or price comparison requirements. Specific examples of what does and does not qualify should be provided.

c. Create Bright-Line Tests for “Uniquely Affected” Status

The provision should establish quantifiable standards for what makes an impact “unique,” for example: effects on less than 5% of similar entities in the jurisdiction; disproportionate effects at least 25% greater than average impacts; and special benefits or burdens not shared by others in the same class. Clear examples across different contexts should illustrate proper application.

d. Institute Rigorous Recusal Requirements

The provision should specify detailed recusal procedures when conflicts arise, for example: written notice to supervising authorities; delegation of decisions to neutral officials; physical absence from related discussions; prohibition on accessing confidential information; and public disclosure of the recusal. Merely abstaining from final votes should not be sufficient.

I. § 36-25-5.1 – Limitation on Actions of Lobbyists, Subordinates of Lobbyists, and Principals (“Lobbyist Gifts”)

a. Delete Specific Listing of Subordinates in § 36-25-5.1

§ 36-25-5.1 also applies to all subordinates of Lobbyist, by specifically listing them. The

definition of Lobbyist § 36-25-1(21)(a)(4), however, appropriately already includes any employee or agent of a Lobbyist who regularly communicates with Legislators about legislation, but § 36-25-5.1 unreasonably goes way beyond that. The specific listing of subordinates in § 36-25-5.1 should be deleted.

b. Limit Application of Gift Ban to Only Public Servants with Law-Making Power

§ 36-25-5.1 extends the Lobbyist Gift ban to all Public Servants regardless of their ability to exercise any government power to effect the adoption or defeat of legislation, executive approval of legislation, adoption or defeat of regulations, (“**Law-Making Power**”) that the Lobbyist seeks to influence. Prohibited Sources should be limited to the Public Servants with this government power.

c. Limit Application of Gift Ban to Only Households of Public Servants

§ 36-25-5.1 extend the Lobbyist Gift ban beyond Households of Public Servants to Other Close Relatives, where it is unlike that a gift to them will influence a Public Servant’s exercise of government power. The Lobbyist Gift ban should only apply to the appropriated Public Servants and their Household.

d. Adopt a Fact-based Exception to the Lobby Gift Ban if Undue Influence was not Intended, Expected or Inferred from a Specific Gift

Some gifts that fall within the Lobbyist Gift ban are still unlikely to influence a Public Servant. To ensure that the Lobby Gift ban is not overbroad, many states allow a fact-based determination of whether a particular gift violated the Lobbyist Gift ban by a reasonable person or reasonable inference test. § 36-25-5.1 should be amended to add such a fact based exception,

like New York's.¹⁰¹

J. § 36-25-7--Corruptly Influencing Official Action (§ 36-25-7)

The Ethics Code does not have a definition of “official action” that is vital to limit the scope of the Corruptly Influencing statute. One needs to be adopted that is in accord with the definition of “official acts” in *McDonnell*.

K. § 36-25-8 – Confidential Information

a. Amend Limit on Disclosure to Any Person Who the Public Servant Knows will Use It for Personal Gain

§ 36-25-8 is overbroad by prohibiting disclosure of nonpublic information to any person or business that “could result in financial gain.” § 36-25-8 should be clarified and narrowed to prohibit disclosure of nonpublic information to any person that the Public Servant knows or reasonably should know is likely to use that information principally for financial gain.

b. Address All Aspects of Confidential Information Like Other States

Washington's law demonstrates how the Ethics Code could establish clearer standards by: specifically prohibiting employment that risks unauthorized disclosure; defining when disclosure is statutorily authorized; creating affirmative duties regarding public records management; explicitly addressing intentional concealment of records; and providing detailed guidance on evaluation of disclosure requests. Washington's multi-faceted approach, as seen in RCW 42.52.050, better equips officials to properly handle confidential information while still maintaining strong protections against misuse. The detailed requirements should expand beyond just financial gain to encompass employment restrictions, records management duties, proper

¹⁰¹ N.Y. Comp. Codes R. & Regs, tit. 19, § 933.3(a), (b).

disclosure procedures, and security protocols.

L. § 36-25-13 – Actions Prohibited for Two Years after Departure

a. Establish Graduated Restrictions Based on Position and Authority

The provision should implement a tiered system of post-employment restrictions calibrated to the former official's level of influence and access to sensitive information. Senior officials like agency heads, legislative leaders, and procurement executives should face longer two-year cooling-off periods given their significant influence and access. Mid-level managers and lower-level Public Employees should face one-year restrictions unless they had substantial decision-making authority. This graduated approach better balances preventing conflicts with allowing reasonable post-government opportunities.

b. Institute Pre-Departure Employment Search Requirements

The provision should mandate that officials seeking outside employment while still in office must, for example: disclose potential employment discussions to ethics officers; recuse themselves from matters affecting potential employers; maintain detailed records of recusal and contacts; and obtain written ethics guidance before accepting offers. The requirements should address both direct employment and consulting arrangements, with stricter scrutiny for positions with entities they regulated.

c. Provide Clear Guidance on Scope of Restrictions

The provision should specify that restrictions apply to, for example: matters the official personally and substantially participated in; programs they administered; policies they helped develop; contracts they negotiated or approved; and parties they directly regulated. However, it

should clarify that restrictions do not extend to: new matters arising after departure; general rulemaking proceedings; or ministerial agency interactions. This guidance helps officials understand boundaries while preserving core ethical principles.

d. Create Systematic Waiver Process

The provision should establish a formal process for officials to request waivers from post-employment restrictions when: the potential for abuse is minimal; their expertise serves the public interest; and appropriate safeguards can be implemented. The process should require detailed written requests, ethics officer review, public notice, and formal determinations with stated rationales. This allows flexibility while maintaining transparency and consistency.

M. § 36-25-17 – Reports of Violations; Cooperation of Agency Heads

a. Establish Proactive Disclosure Protocols

The provision should mandate that agency heads implement systematic procedures for identifying and reporting potential ethics concerns before they become violations. These procedures should include, for example: regular ethics audits of agency operations; compliance checklists for high-risk activities; standardized reporting forms for potential issues; documentation requirements for ethics-related decisions; and tracking systems for monitoring resolution of identified concerns. Agency heads should be required to certify annually that these protocols are in place and functioning effectively.

b. Create Confidential Consultation Mechanisms

The provision should establish a framework for confidential ethics consultations between agency personnel and ethics officers. This should include: designated ethics advisors within each

agency; protected communications channels for raising concerns; standardized processes for documenting consultations; clear timelines for responding to inquiries; and protections against retaliation for good faith consultations. The framework should encourage early discussion of potential issues while maintaining appropriate confidentiality.

c. Define Clear Reporting Standards

The provision should specify when and how potential violations must be reported, including, for example: detailed criteria for determining reportable conduct; standardized reporting procedures and forms; required documentation and evidence preservation; timelines for preliminary review and reporting; and protocols for handling urgent matters. The standards should help agency heads consistently identify and properly report potential violations while ensuring thorough documentation.

d. Institute Systematic Investigation Cooperation Requirements

The provision should establish specific protocols for agency cooperation with ethics investigations, including: designation of agency liaison officers; procedures for document preservation and production; standards for Public Employee interviews and testimony; protection of sensitive agency information; and coordination of parallel administrative proceedings. These requirements should balance full cooperation with protection of legitimate agency interests.

e. Establish Performance Metrics

The provision should require agency heads to track and report specific ethics compliance metrics, including: number and types of potential violations identified; timeliness of reporting; effectiveness of preventive measures; cooperation with investigations; and implementation of

recommended reforms. These metrics help evaluate program effectiveness while ensuring accountability for ethics compliance.

N. § 36-25-18 – Lobbying; Registration

a. Define Clear Registration Triggers

The provision should specifically define what constitutes an “undertaking” requiring registration, such as: direct contact with Public Servants exceeding 24 hours per quarter¹⁰²; compensation exceeding \$5,000 per quarter for lobbying activities¹⁰³; expenditure of more than \$5,000 per quarter on lobbying efforts¹⁰⁴; or registration as a Lobbyist in another jurisdiction. The definition should address both direct advocacy and preparatory activities. The provision should also establish clear start dates for measuring these thresholds and specify documentation requirements for demonstrating when thresholds are met.

b. Establish Detailed Subject Matter Categories

The provision should create standardized categories for reporting lobbying subject matters, replacing the current vague requirement. These categories should include: specific policy areas (e.g., healthcare, taxation, education); types of legislative or administrative action sought; affected government programs or agencies; and economic sectors involved. The categories should be detailed enough to provide meaningful transparency while remaining administratively manageable. Regular updates to these categories should reflect emerging policy areas.

c. Specify “Substantial Change” Parameters

¹⁰² Or. Rev. Stat. Ann. § 171.740.

¹⁰³ Cal. Gov't Code § 86115.

¹⁰⁴ N.Y. Legis. Law § 1-e(a).

The provision should enumerate what constitutes a “substantial change” requiring supplemental registration, such as: changes in compensation exceeding 20%; addition or removal of Principals; significant shifts in lobbying priorities or subject matters; changes in employment status; and modifications to authority granted by Principals. The provision should establish clear reporting deadlines for each type of change and require documentation supporting the timing and nature of changes.

d. Create Comprehensive Documentation Requirements

The provision should mandate specific documentation to support registration submissions, such as: engagement letters or contracts with Principals; records of compensation arrangements; evidence of authorization to lobby; documentation of subject matter expertise; and certification of completion of required ethics training. These requirements should help verify registration information while creating an audit trail for enforcement.

O. § 36-25-24 – Prohibition on Discrimination Against Public Employee Filing Complaint

a. Establish Clear Classifications of Retaliatory Conduct

The provision should explicitly classify retaliation as a serious ethics violation with corresponding penalties. This should include: categorizing different types of retaliatory actions based on severity (e.g., termination as most serious, followed by demotion, reassignment, etc.); establishing minimum penalties for each category; defining aggravating factors like pattern of conduct or multiple victims; and requiring documentation of corrective actions. The classification system should clearly signal that retaliation represents a significant breach of public trust warranting serious consequences.

b. Create Comprehensive Whistleblower Protection Mechanisms

The provision should establish robust protection mechanisms beyond just prohibiting retaliation, including: confidential reporting channels; interim protective measures during investigations; presumption of retaliation for adverse actions within one year of protected activity; shifting burden of proof to employer after *prima facie* showing; and mandatory reinstatement with back pay for substantiated retaliation. These protections should extend to witnesses and others who assist in ethics investigations.

c. Institute Mandatory Investigation Procedures

The provision should require specific procedures for investigating retaliation claims, including: immediate preservation of relevant documents; prompt interviews of key witnesses; protection of whistleblower confidentiality; independent investigation by outside personnel; detailed documentation requirements; and specific timelines for completing investigation phases. These procedures help ensure thorough and timely investigation while protecting all parties' rights.

d. Establish Strong Deterrent Penalties

The provision should create a robust penalty framework specifically for retaliation, including: substantial civil fines; mandatory discipline up to termination; personal liability for supervisors who retaliate; and debarment from future public employment. The penalties should increase for repeat offenders and supervisors who fail to prevent retaliation by subordinates. This framework provides real deterrence while ensuring proportional punishment.

e. Require Proactive Prevention Measures

The provision should mandate that agencies implement specific anti-retaliation measures, including: regular training on whistleblower rights; clear reporting procedures; monitoring systems to detect potential retaliation; regular climate surveys; and annual certification of compliance efforts. Agencies should be required to document these efforts and report on their effectiveness to the Ethics Commission.

f. Create Support Services for Whistleblowers

The provision should establish support services for Public Employees who report violations, including: confidential counseling; legal assistance; career counseling if transfer becomes necessary; and ongoing monitoring to prevent subtle retaliation. These services help whistleblowers navigate the reporting process while maintaining their careers and wellbeing.

P. § 36-25-27 – Penalties; Enforcement; Jurisdiction, Venue, Judicial Review;

Limitations Period

a. Assess Civil and Administrative Penalties

- i. Imposing civil fines (graduated systems like Oregon's)
- ii. Issuing cease and desist orders (as seen in states like Iowa and Nebraska)
- iii. Ordering remedial actions
- iv. Issuing public reprimands or letters of caution
- v. Ordering the filing of missing reports or statements
- vi. Ordering restitution of misappropriated funds
- vii. Removing officials from office for ethical breaches (excluding impeachable offenses)

b. Mandatory Referral for Criminal Prosecution

The Ethics Commission should not retain the power to make formal recommendations for criminal prosecution. Instead, its role should be limited to referring evidence of potential criminal activity to the appropriate legal authorities, as is standard practice for state agencies. This shift in approach ensures a clear separation between the Ethics Commission's core functions of investigating ethical breaches and imposing administrative penalties and the role of the criminal justice system in pursuing criminal charges. This separation safeguards due process protections for individuals under investigation and maintains a balanced approach to ethics enforcement.

By a vote of four Commissioners, the Ethics Commission would be required to report its findings that a criminal violation has occurred, and all relevant evidence, to the attorney general or district attorney. This ensures a high threshold for initiating a referral. Requiring a vote of four Commissioners for reporting potential criminal violations maintains consistency with the Ethics Code's emphasis on a high level of consensus for actions that could significantly impact individuals, such as issuing subpoenas.

Conclusion

In order to resolve constitutional concerns, utilize best practices and adhere to national standards for government ethics statutes, substantial amendments would be required of the Ethics Code.

However, an alternate approach would be to start afresh with a new and modern ethics code that benefits from the many developments since the original Ethics Code was adopted. We think this is a preferable approach.

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