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***BOUCHER V. USDA***  
**149 F. Supp.3d 1045 (7<sup>th</sup> Cir. 2019)**

**SYNOPSIS**

*Boucher* was an appeal to the 7<sup>th</sup> Circuit from a Final Technical Determination of the United States Department of Agriculture (“USDA”) finding that Rita Boucher’s property contained wetlands and converted wetlands, pursuant to the Swampbuster provisions of the Food Security Act of 1985. The appeal involved two fields, identified in the record as Un1 (0.7 acres) and Un2 (1.9 acres). The National Resource Conservation Service (“NRCS”) found that the Fields became converted wetlands under the Act when Boucher’s husband removed the sum total of 9 trees from that 2.6 acres of otherwise tillable ground in 1994 and 1998. Boucher’s appeal focused primarily on the USDA’s improper use of a comparison site, and its failure to properly consider her evidence and evaluate whether the Fields had requisite hydrology to be considered wetlands under the Act, prior to the conversion.

**RESULT**

The 7<sup>th</sup> Circuit reversed the USDA, finding its decision was arbitrary, capricious, and an abuse of discretion. The case was remanded back to the agency, and Boucher has received a

revised Final Technical Determination that adjudicates the Fields as prior-converted, non-wetlands.

## **FACTS**

Boucher's property ("Property") has been utilized continuously as a farmstead for the production of livestock and grain for more than 150 years. Like any similar farm ground, it has been altered extensively over that time, to reconfigure livestock lots, build and tear down sheds, and modify access roads. The Bouchers purchased the property that contained the Fields in or around 1985. At that time, and continuing through the present, the Fields contained no natural vegetation- they were either used as pasture or for crop production, which use continues through today.

In 1987, the Bouchers received a Notice of Highly Erodible Land and Wetland Conservation Determination, which essentially put them on notice that the land had hydric soils with potential for wetlands, but according to the National Wetland Inventory of 1989, no wetlands were located on the property. During the appeal process, Boucher unearthed cement drainage tile on the property, adjacent to the Fields, which was installed in 1981 or 1982. This discovery became key to Boucher's appeal.

In 1994, Boucher's husband noticed the Fields were being used as a dump and removed 5 trees from Un2. He farmed around the remaining trees until sometime after 1997, when he removed the remaining 4 trees on Un2. In all, Boucher's husband removed 9 trees total from, which trees represented approximately 12/1000th of an acre. There was little evidence the trees were wetland species – the only pictures in the record were from ~10,000 feet. Some of the pictures are in these materials.

As a result of a whistleblower complaint, in 2002 the FSA sent the NRCS to the Fields to determine whether Boucher's husband cleared woody vegetation on the Fields to make them easier to farm. In October 2002, the NRCS completed a Routine Wetland Determination on the Fields, finding them to be converted wetlands. On February 7, 2003, the NRCS sent a Preliminary Technical Determination with appeal rights to Boucher's husband, which found 2.8 acres of converted wetlands on Un1, and 1.6 acres of wetland on Un2. The Preliminary Determination found that Un1 contained converted wetlands due solely to the fact that aerial maps seemed to indicate that trees had been removed from the Property between 1993 and 1994. The NRCS utilized off-site analysis (a comparison site) to determine the presence of hydrophytic vegetation, i.e., no hydrophytic vegetation was present on Un1 and Un2, but no Atypical Situation data sheet was prepared.

Boucher's husband appealed that determination and requested reconsideration and a site visit. On March 19, 2003, the NRCS conducted a site visit and met with Boucher's husband. Boucher's husband was not satisfied with that visit, and requested an appeal through FSA, and asked for a State Conservationist review. The last correspondence in the record from 2003 was sent by the FSA to the NRCS State Conservationist on July 22, 2003, which requested a written technical determination be provided within 30 days, supported by "all factors, technical criteria and facts". There is no evidence that visit ever took place, and the NRCS took no further action until July 2, 2012. Boucher's husband passed away in February 2004.

In July 2012, Boucher contacted FSA and requested approval to remove a house and barn from her property in order to farm another field. FSA sent that request to NRCS for a technical determination. Upon review of its records, NRCS realized it had never entered a Final Technical

Determination on the 2003 appeal and determined to move forward with a site visit in order to issue a Final Technical Determination.

In December 2012, a total of 16 inches of snow fell on Boucher's property, and it held 11 inches of snow in early January 2013, before two inches of rain fell on January 13, 2013. The NRCS made its site visit on January 14, 2013, sending a soil scientist, area easement specialist, and district conservationist to the property. That site visit resulted in conversion of the 2003 Preliminary Technical Determination to a Final Determination, but slightly reduced the size of the Fields (due to better mapping equipment).

The NRCS Final Technical Determination found that Un1 and Un2 and could not be adequately tested for wetland characteristics because "drainage tile [had] been added to these locations" so the NRCS completed an "Atypical Situation Data Sheet" to explain the decision to use Field 7 (a woods, which the NRCS found to be a wetland) as a reference site to determine vegetation and hydrology for the Fields.

Boucher appealed the Final Technical Determination to the National Appeals Division ("NAD") of the USDA. Her appeal provided six (6) reasons the wetland determination was in error, including that drainage for the Fields was enhanced by drainage tile that was installed prior to 1985 and the Food Security Act and that no free water or saturation levels were found or documented and no primary indicators were noted under the hydrology criteria.

As part of her appeal, Boucher had the Fields trenched in May 2013. The trenches were dug at a depth of 5.5 feet and width of 9 inches in a crisscross pattern. Over the course of a week of observation, water in the trenches never rose above approximately 18 inches; 4 feet of dry ground remained in each trench. Boucher also obtained a GPS laser survey that determined the

property was largely level but tended to be slightly higher in the middle and sloped lower at the sides, meaning water would run across and off the Fields to other parts of the property.

During the NAD hearing, the NRCS asserted that the trenching was not conclusive and continued to maintain that the Fields had been tiled, but ignored the evidence of cement drainage tile, which had to be installed before 1983, which was important, because the Act provides that a wetland that was converted before December 23, 1985 is considered a non-wetland (i.e., there are no restrictions on its use). Eventually, the NRCS conceded that tile had not been installed on the Fields but took the position that it did not matter because the tree removal permitted it to use a comparison site to establish hydrology. This position was inconsistent with the Final Technical Determination, an issue that became important as the appeal progressed.

The NAD and the NAD Director both affirmed the NRCS, finding that the tree removal permitted the NRCS to use a comparison site. The United States District Court did the same. None of them took issue with the NRCS's change of position on appeal, nor did any of them address Boucher's evidence that the Fields did not contain requisite hydrology in the absence of drainage tile. They each found that tree removal permitted the NRCS to utilize a comparison site (which bore little actual comparison) to evaluate all 3 requirements of the Act- hydric soil, hydrophytic vegetation, and hydrology.

#### **7<sup>TH</sup> CIRCUIT**

Boucher raised a number of issues before the District Court. On appeal to the 7<sup>th</sup> Circuit, she narrowed her focus to two, arguing that either 1) the Fields had been drained, as the NRCS Final Technical Determination stated, by the cement tile installed before 1985, and were therefore prior converted, non-wetlands or 2) the Fields were never wetlands to begin with. Boucher rested

her positions on the part of the record where the parties agreed – that the Fields did not contain wetland hydrology as of 2003 or 2013.

In response, the USDA again redirected the argument, and asserted that 1) the tree removal permitted the NRCS to use a comparison site, and 2) that what's more, the tree removal was touchstone to the wetland conversion. In support of its second position, the USDA cited to 7 CFR 12.2, which it argued would permit a finding of a converted wetland any time hydrophytic vegetation had been removed. This ignored the immediately preceding provisions, which said essentially that a wetland could be converted by the removal of hydrophytic vegetation, meaning that before vegetation removal could convert a wetland, the land first had to meet all 3 wetland criteria.

Oral argument focused generally on the trees that were removed and the evidence Boucher provided that the Fields did not contain requisite hydrology. The 7<sup>th</sup> Circuit opinion held, in essence, that the USDA ignored the impact of Boucher's evidence, and failed to conduct further investigation to determine whether her evidence was accurate. In sum, instead of making the objective review of the Fields required by the Act, the NRCS changed its position – but importantly, the record did not support either of its positions.

In its opinion, the court noted that the USDA's regulations defining a "converted wetland" are "slightly altered from the statutory text", "pulling the definition away from the statutes primary focus on hydrology", particularly with respect to 7 CFR 12.2, where the court found the USDA's argument that the "removal of woody hydrophytic vegetation from hydric soils is sufficient by itself to deem the site a converted wetland, without reference to hydrological factors", which "conflicts with the statutory definition's focus on hydrology." *Id.* at 7n.2, 43. The

court confirmed that the all 3 wetland criteria must be present under normal circumstances for an area to be a wetland under the Act, affirming by implication that the NRCS may not conflate the existence or removal of hydrophytic vegetation with hydrology, as the NRCS did in *Boucher* and in *B&D Land and Livestock Company v. Schafer*, 584 F.Supp.2d 1182 (N.D. Iowa 2008).

### Final Wetland Determination

Date: 1/14/2013

Customer(s): RAYMOND LEE HELMS  
Hancock County: Farm #5309 Tract #813

Agency: USDA-NRCS  
Assisted By: Rick Neilson and Jerry Roach



#### Legend



- Sampling Points
- Field Boundary
- street\_dm\_1\_in059







1861  
NW  
↑

36



↑  
1981

depth should be  
1986  
(but is dryland  
anyway)

37



↑ N  
1985

000224

38

A-114



N  
↑  
1986

39



↑N  
1990

40

AKZ

1993

EXHIBIT B PAGE 75

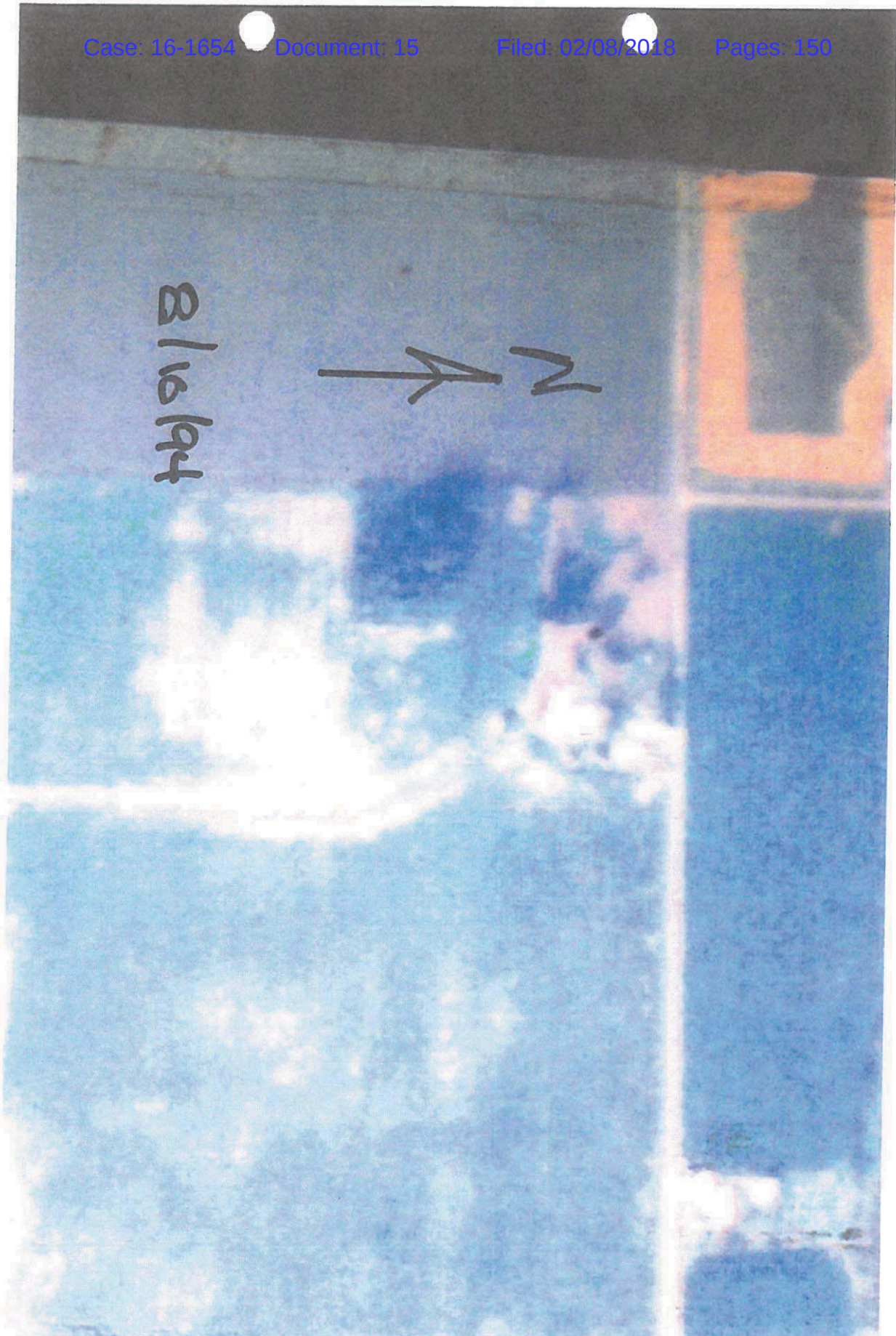


EXHIBIT B - PAGE 76



9/12/95

A

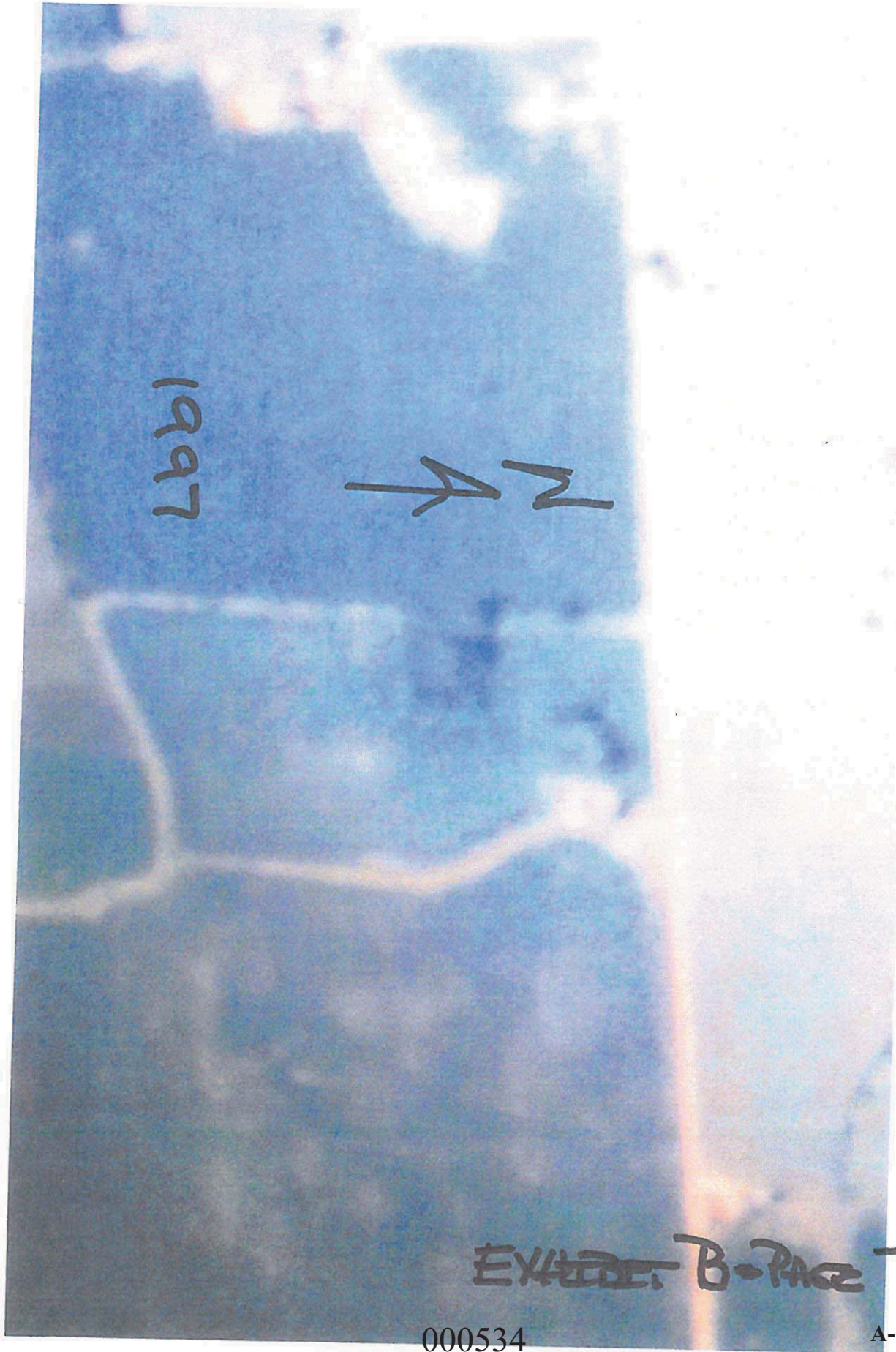




101192

N

EXHIBIT B - PAGE 78



1997

AN

EXHIBIT B - PAGE 79

2003  
Boucher

N  
↑

2003

EXHIBIT B-PAGE 80

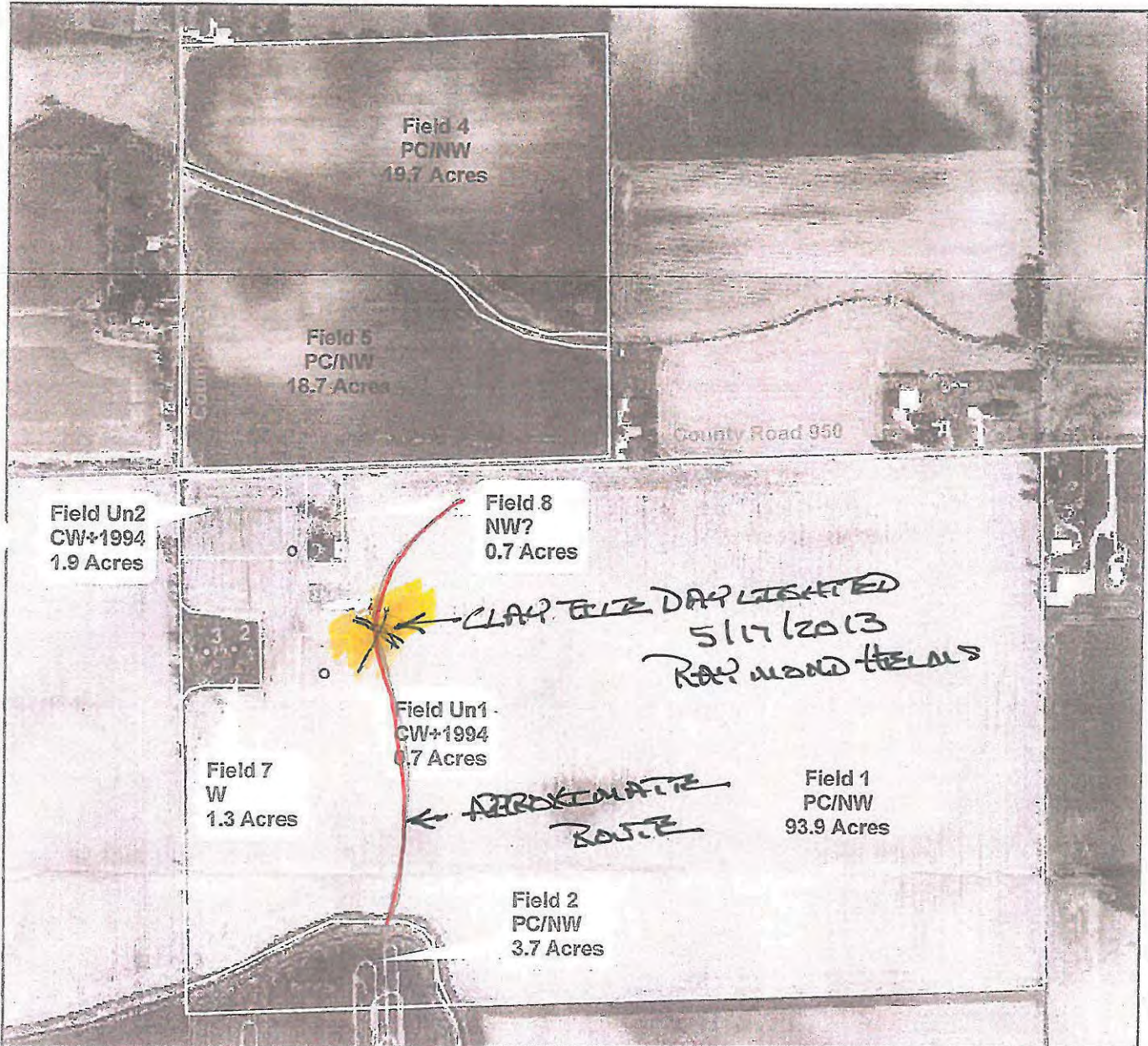
Final Wetland Determination

Date: 1/14/2013

Customer(s): RAYMOND LEE HELMS

Agency: USDA-NRCS

Assisted By: Rick Neilson and Jerry Roach



Legend

- Sampling Points
- Field Boundary
- street\_dm\_l\_in059





05/17/2018

BROKEN PIECE OF CLAY TILE

DAYLOADED CLAY TILE



EVIDENCE B - PAGE 98

000553

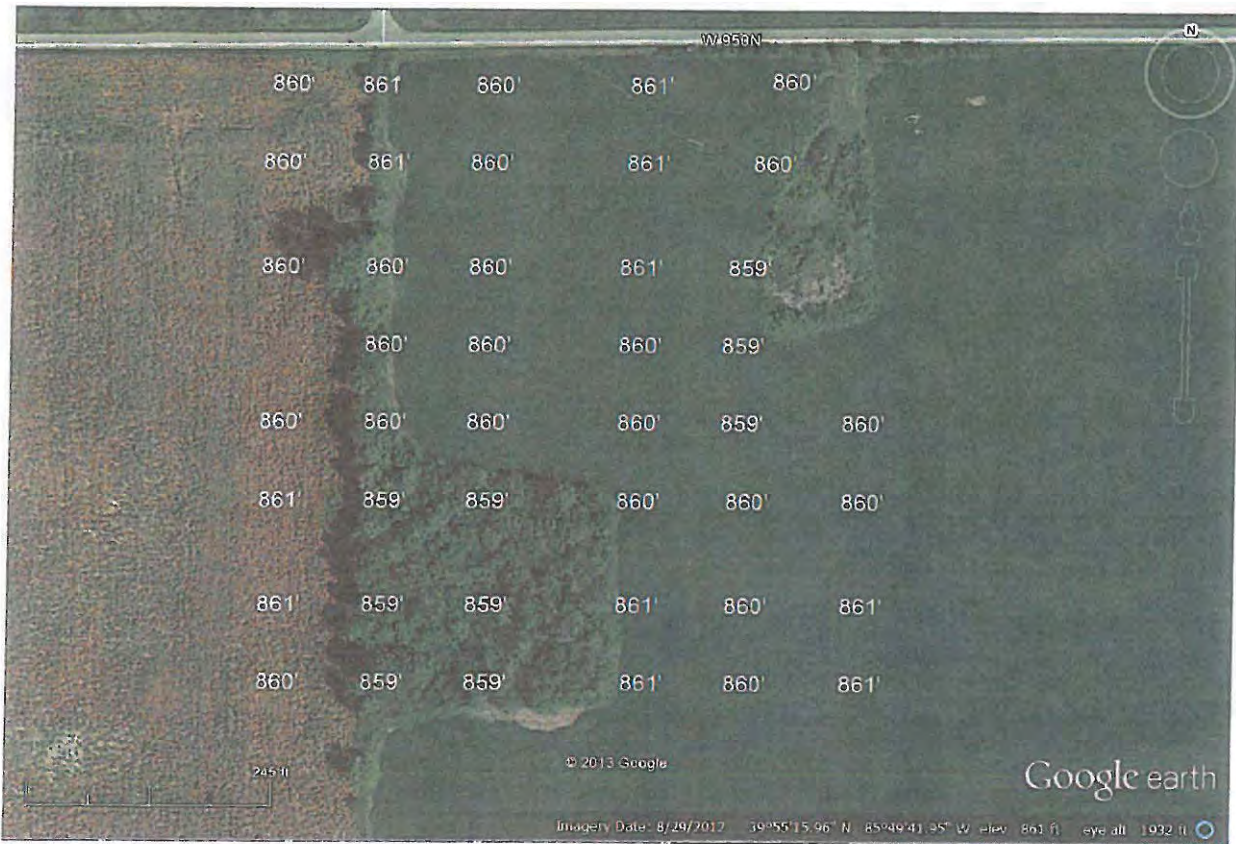
A-148



**B. Thompson Associates, LLC**

7810 North 50 West  
Fortville, IN 46040  
Blake: 317-491-3392

Boucher, 950 N and 125 W Hancock County Indiana



Map indicating approximate elevations based on mean sea level.

GPS SURVEY / LOCATED

EXHIBIT B - PAGE 102

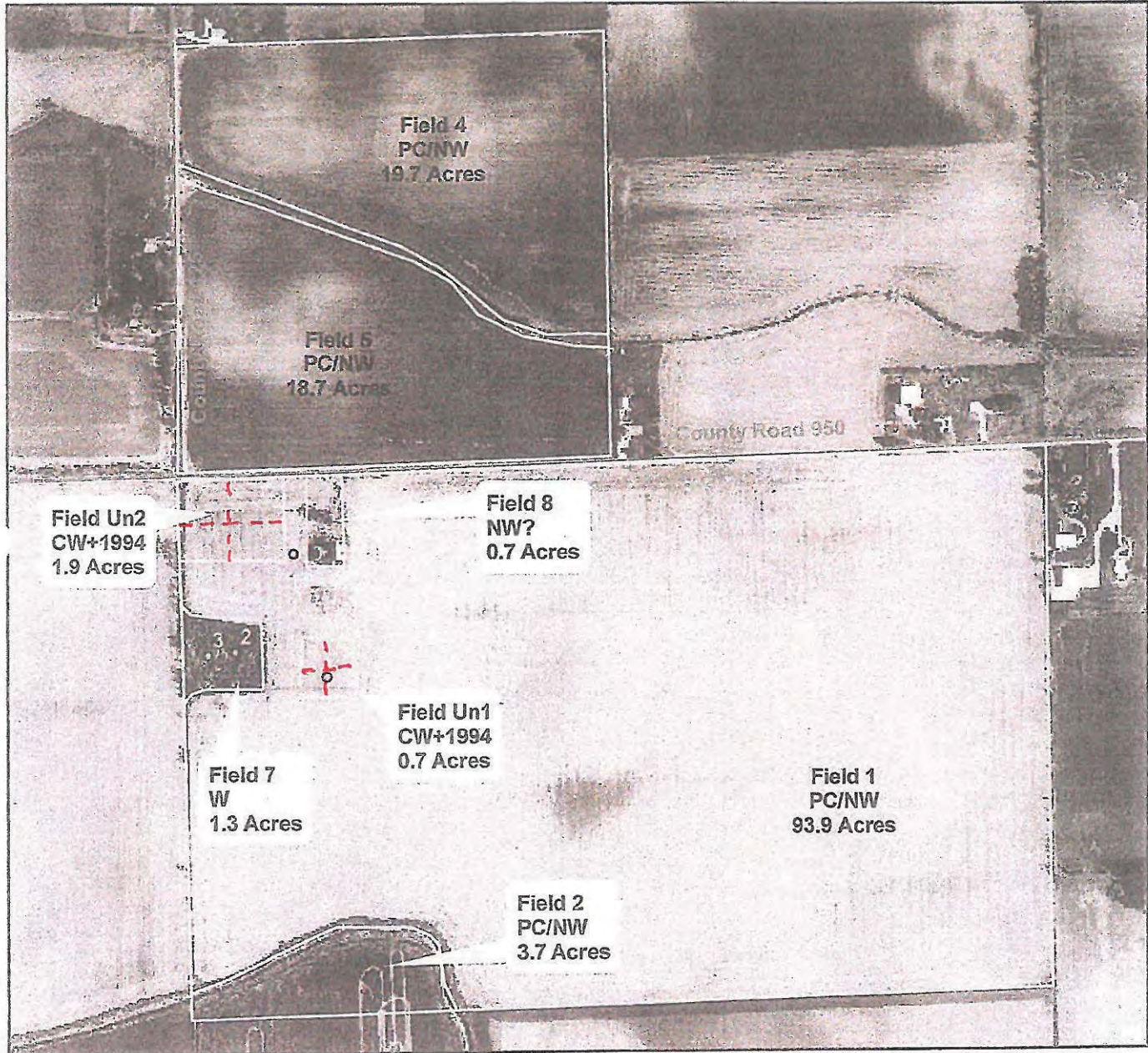
Final Wetland Determination

Date: 1/14/2013

Customer(s): RAYMOND LEE HELMS

Agency: USDA-NRCS

Assisted By: Rick Neilson and Jerry Roach



*----- Trenching*

Legend

- Sampling Points
- Field Boundary
- street\_dm\_l\_in059

*EVAPORATION BASE 103*





01 Trench View Un1 Facing East - 5-31-13  
EXHIBIT B = PAGE 108

000563

A-157



## Disclosure of Lobbying Activities

### §1602. Definitions

As used in this chapter:

#### (1) Agency

The term "agency" has the meaning given that term in section 551(1) of title 5.

#### (2) Client

The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. A person or entity whose employees act as lobbyists on its own behalf is both a client and an employer of such employees. In the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members.

#### (3) Covered executive branch official

The term "covered executive branch official" means-

(A) the President;

(B) the Vice President;

(C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;

(D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;

(E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37; and

(F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5.

#### (4) Covered legislative branch official

The term "covered legislative branch official" means-

(A) a Member of Congress;

(B) an elected officer of either House of Congress;

(C) any employee of, or any other individual functioning in the capacity of an employee of-

(i) a Member of Congress;

(ii) a committee of either House of Congress;

- (iii) the leadership staff of the House of Representatives or the leadership staff of the Senate;
  - (iv) a joint committee of Congress; and
  - (v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and
- (D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

#### **(5) Employee**

The term "employee" means any individual who is an officer, employee, partner, director, or proprietor of a person or entity, but does not include-

- (A) independent contractors; or
- (B) volunteers who receive no financial or other compensation from the person or entity for their services.

#### **(6) Foreign entity**

The term "foreign entity" means a foreign principal (as defined in section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)).

#### **(7) Lobbying activities**

The term "lobbying activities" means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

#### **(8) Lobbying contact**

##### **(A) Definition**

The term "lobbying contact" means any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to-

- (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
- (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
- (iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
- (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

##### **(B) Exceptions**

The term "lobbying contact" does not include a communication that is-

- (i) made by a public official acting in the public official's official capacity;

- (ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;
- (iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;
- (iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.);
- (v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;
- (vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;
- (vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force;
- (viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;
- (ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit, or license;
- (x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;
- (xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;
- (xii) made to an official in an agency with regard to-
  - (I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or
  - (II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis, if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing;
- (xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5 or substantially similar provisions;
- (xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;
- (xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with-

(I) a covered executive branch official, or

(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision), with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978, or under another provision of law;

(xviii) made by-

(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of title 26, or

(II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033(a); and

(xix) between-

(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act [15 U.S.C. 78c(a)(26)]) that is registered with or established by the Securities and Exchange Commission as required by that Act [15 U.S.C. 78a et seq.] or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act [7 U.S.C. 1 et seq.]; and

(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively; relating to the regulatory responsibilities of such organization under that Act.

### **(9) Lobbying firm**

The term "lobbying firm" means a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist.

### **(10) Lobbyist**

The term "lobbyist" means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.

### **(11) Media organization**

The term "media organization" means a person or entity engaged in disseminating information to the general public through a newspaper, magazine, other publication, radio, television, cable television, or other medium of mass communication.

## **(12) Member of Congress**

The term "Member of Congress" means a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress.

## **(13) Organization**

The term "organization" means a person or entity other than an individual.

## **(14) Person or entity**

The term "person or entity" means any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

## **(15) Public official**

The term "public official" means any elected official, appointed official, or employee of-

(A) a Federal, State, or local unit of government in the United States other than-

(i) a college or university;

(ii) a government-sponsored enterprise (as defined in section 622(8) of this title);

(iii) a public utility that provides gas, electricity, water, or communications;

(iv) a guaranty agency (as defined in section 1085(j) of title 20), including any affiliate of such an agency; or

(v) an agency of any State functioning as a student loan secondary market pursuant to section 1085(d)(1)(F) of title 20;

(B) a Government corporation (as defined in section 9101 of title 31);

(C) an organization of State or local elected or appointed officials other than officials of an entity described in clause (i), (ii), (iii), (iv), or (v) of subparagraph (A);

(D) an Indian tribe (as defined in section 5304(e) of title 25; <sup>1</sup>

(E) a national or State political party or any organizational unit thereof; or

(F) a national, regional, or local unit of any foreign government, or a group of governments acting together as an international organization.

## **(16) State**

The term "State" means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

( Pub. L. 104-65, §3, Dec. 19, 1995, 109 Stat. 691 ; Pub. L. 105-166, §§2, 3, Apr. 6, 1998, 112 Stat. 38 ; Pub. L. 110-81, title II, §201(b)(1), Sept. 14, 2007, 121 Stat. 742 .)

## **References in Text**

This chapter, referred to in text, was in the original "this Act" meaning Pub. L. 104–65, Dec. 19, 1995, 109 Stat. 691 , known as the Lobbying Disclosure Act of 1995. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of this title and Tables.

Levels I, II, III, IV, and V of the Executive Schedule, referred to in par. (3)(D), are set out in sections 5312, 5313, 5314, 5315, and 5316, respectively, of Title 5, Government Organization and Employees.

Section 109(13) of the Ethics in Government Act of 1978, referred to in par. (4)(D), is section 109(13) of Pub. L. 95–521, which is set out in the Appendix to Title 5.

The Foreign Agents Registration Act of 1938, referred to in par. (8)(B)(iv), is act June 8, 1938, ch. 327, 52 Stat. 631 , which is classified generally to subchapter II (§611 et seq.) of chapter 11 of Title 22, Foreign Relations and Intercourse. For complete classification of this Act to the Code, see Short Title note set out under section 611 of Title 22 and Tables.

The Federal Advisory Committee Act, referred to in par. (8)(B)(vi), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770 , which is set out in the Appendix to Title 5, Government Organization and Employees.

The Whistleblower Protection Act of 1989, referred to in par. (8)(B)(xvii), is Pub. L. 101–12, Apr. 10, 1989, 103 Stat. 16 , which enacted subchapters II [5 U.S.C. 1211 et seq.] and III [5 U.S.C. 1221 et seq.] of chapter 12 and section 3352 of Title 5, Government Organization and Employees, amended sections 1201 to 1206, 1209, 1211, 2302, 2303, 3393, 7502, 7512, 7521, 7542, 7701, and 7703 of Title 5 and section 4139 of Title 22, Foreign Relations and Intercourse, repealed sections 1207 and 1208 of Title 5, and enacted provisions set out as notes under sections 1201, 1211, and 5509 of Title 5. For complete classification of this Act to the Code, see Short Title of 1989 Amendment note set out under section 1201 of Title 5 and Tables.

The Inspector General Act of 1978, referred to in par. (8)(B)(xvii), is Pub. L. 95–452, Oct. 12, 1978, 92 Stat. 1101, which is set out in the Appendix to Title 5.

The Securities Exchange Act, referred to in par. (8)(B)(xix), probably means the Securities Exchange Act of 1934, act June 6, 1934, ch. 404, 48 Stat. 881 , which is classified principally to chapter 2B (§78a et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78a of Title 15 and Tables.

The Commodity Exchange Act, referred to in par. (8)(B)(xix), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

### **Amendments**

**2007**-Par. (10). Pub. L. 110–81 substituted "3-month period" for "six month period".

**1998**-Par. (3)(F). Pub. L. 105–166, §2, substituted "7511(b)(2)(B)" for "7511(b)(2)".

Par. (8)(B)(ix). Pub. L. 105–166, §3(a), inserted before semicolon at end ", including any communication compelled by a Federal contract, grant, loan, permit, or license".

Par. (15)(F). Pub. L. 105–166, §3(b), inserted before period at end ", or a group of governments acting together as an international organization".

**Effective Date of 2007 Amendment**

Except as otherwise provided, amendment by Pub. L. 110–81 applicable with respect to registrations under the Lobbying Disclosure Act of 1995 (this chapter) having an effective date of Jan. 1, 2008, or later and with respect to quarterly reports under that Act covering calendar quarters beginning on or after Jan. 1, 2008, see section 215 of Pub. L. 110–81, set out as a note under section 30104 of Title 52, Voting and Elections.

**Effective Date**

Section effective Jan. 1, 1996, see section 24 of Pub. L. 104–65, set out as a note under section 1601 of this title.

<sup>1</sup> *So in original. A closing parenthesis probably should precede the semicolon.*

## **Section 1 – Introduction**

The Lobbying Disclosure Act, as amended, ([2 U.S.C. § 1601](#) et. seq., referred to hereinafter as the “LDA”) states that the Secretary of the Senate and the Clerk of the House of Representatives shall (1) provide guidance and assistance on the registrations and reporting requirements of this Act and develop common standards, rules, and procedures for compliance with this Act; [and] (2) review, and, where necessary, verify and inquire to ensure the accuracy, completeness, and timeliness of registrations and reports.

The LDA does not provide the Secretary or the Clerk with the authority to write substantive regulations or issue definitive opinions on the interpretation of the law. The Secretary and Clerk have, from time to time, jointly issued written guidance on the registration and reporting requirements. This document is a compilation of all previously issued guidance documents and supersedes all previous guidance documents.

This combined guidance document does not have the force of law, nor does it have any binding effect on the United States Attorney for the District of Columbia or any other part of the Executive Branch. To the extent that the guidance relates to the accuracy, completeness, and timeliness of registrations and reports, it will serve to inform the public as to how the Secretary and Clerk intend to carry out their responsibilities under the LDA.

## **Section 2 – What’s New**

This revision includes updated registration thresholds reflecting changes in the Consumer Price Index.

### **Updated Registration Threshold**

As required by the LDA, the lobbying disclosure thresholds referenced throughout the Guidance have been updated to reflect changes in the Consumer Price Index (as determined by the Secretary of Labor) during the preceding 4-year period. After January 1, 2017, an organization employing in-house lobbyists is exempt from registration if its total expenses for lobbying activities does not exceed and is not expected to exceed \$13,000 during a quarterly period. The \$3,000 income threshold for lobbying firms remains unchanged. [See Guidance Section 4 on “Who Must Register and When” for additional information.](#)

The previous Guidance update included non-substantive grammatical changes throughout and revisions to sections that previously referred to Line numbers in the reporting forms, as the current online filing system no longer relies on Line numbers. References to the LDA were also revised to identify the citation from the U.S. Code, with Internet links added in the online Guidance document to the U.S. Code.

### **Identification of Client and Covered Officials**

Clarification is added in Guidance Section 4 to reflect the requirement of lobbyists to identify their client and interest of foreign entities when making lobbying contacts, and the requirement



of covered officials or their employing office to identify whether the individual is a covered official.

### **Outside Retained Lobbyists**

Guidance Section 4 includes an additional example confirming that outside retained lobbyist names are not reported on the registration (LD-1) or quarterly activity reports (LD-2) of organizations that employ in-house lobbyists. The section re-affirms that outside retained lobbying costs must be taken into account when calculating lobbying expenses. Outside retained lobbyists file their own registration and quarterly reports.

### **Income and Expense Rounding and Reporting, Agencies Contacted**

Guidance Section 6 includes a new example to clarify that income or expenses are required to be rounded to the nearest \$10,000. Another example is expanded to suggest care be taken when an organization uses an entire office budget for reporting purposes, since additional lobbying expenses need to be factored in and may be overlooked when using such an expense reporting method. In the discussion of “Contents of the Report,” additional clarification is added to confirm that filers should choose the most specific Agency available from the reporting system list. If the list does not display the government entity contacted, the filer is advised to select the agency or department in which the entity is housed.

### **Lobbyist and Registrant Contribution Reports (LD-203)**

An example is added to Guidance Section 7 to make it clear that sole proprietors, including those who register with their lobbyist name as the registrant name, are required to file two contribution reports each filing period—one report for the registrant and one report for the individual lobbyist.

### **Public Availability and Compliance**

In Guidance Section 10, filers are encouraged to use the online public databases for compliance purposes, to verify that registrations and reports have been received and processed into the public databases. Registrations and reports are available online at the House website at <http://lobbyingdisclosure.house.gov>, as well as the Senate website at <http://www.senate.gov/lobby>.

## **Section 3 – Definitions**

Actively Participates:

An organization “actively participates” in the planning, supervision, or control of lobbying activities of a client or registrant when that organization (or an employee of the organization in his or her capacity as an employee) engages directly in planning, supervising, or controlling at least some of the lobbying activities of the client or registrant. Examples of activities constituting active participation would include participating in decisions about selecting or retaining lobbyists, formulating priorities

among legislative issues, designing lobbying strategies, performing a leadership role in forming an ad hoc coalition, and other similarly substantive planning or managerial roles, such as serving on a committee with responsibility over lobbying decisions.

Organizations that, though members of or affiliated with a client, have only a passive role in the lobbying activities of the client (or of the registrant on behalf of the client), are not considered active participants in the planning, supervision, or control of such lobbying activities. Examples of activities constituting only a passive role would include merely donating or paying dues to the client or registrant, receiving information or reports on legislative matters, occasionally responding to requests for technical expertise or other information in support of the lobbying activities, attending a general meeting of the association or coalition client, or expressing a position with regard to legislative goals in a manner open to, and on a par with, that of all members of a coalition or association—such as through an annual meeting, a questionnaire, or similar vehicle. Mere occasional participation, such as offering an ad hoc informal comment regarding lobbying strategy to the client or registrant, in the absence of any formal or regular supervision or direction of lobbying activities, does not constitute active participation if neither the organization nor its employee has the authority to direct the client or the registrant on lobbying matters **and** the participation does not otherwise exceed a de minimis role.

**Affiliated Organization:**

An affiliated organization is any entity other than the client that contributes in excess of \$5,000 toward the registrant's lobbying activities in a quarterly period, **and** actively participates in the planning, supervision, or control of such lobbying activities.

**Client:**

Any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. An organization employing its own in-house lobbyist(s) is considered its own client for reporting purposes.

**Contribution Reports:**

Semiannual contribution reports (LD-203 reports) are required to be filed semiannually by July 30th and January 30th (or the next business day should either of those days fall on a weekend or holiday) covering the first and second calendar halves of the year.

Registrants **and** active lobbyists (except those who have been terminated *for all clients prior to the beginning of the reporting period*) must file separate reports that detail Federal Election Campaign Act (FECA) contributions, honorary contributions, presidential library contributions, and payments for event costs. ([See discussion in Guidance Section 7.](#))

**Covered Executive Branch Official:**

The application of coverage of [2 U.S.C. § 1602\(3\)](#) (who is a covered Executive Branch official) was intended for Schedule C employees only. Senior Executive Service employees are not covered Executive Branch officials as defined in the LDA unless they fall within one of the categories below. Covered Executive Branch officials are:

- The President
- The Vice President
- Officers and employees of the Executive Office of the President
- Any official serving in an Executive Level I through V position

- Any member of the uniformed services serving at grade O-7 or above
- Schedule C employees.

Covered Legislative Branch Official:

Covered Legislative Branch officials are:

- A Member of Congress
- An elected Officer of either the House or the Senate
- An employee, or any other individual functioning in the capacity of an employee, who works for a Member, committee, leadership staff of either the Senate or House, a joint committee of Congress, a working group or caucus organized to provide services to Members, and any other Legislative Branch employee serving in a position described under Section 109(13) of the Ethics in Government Act of 1978 ([5 U.S.C. Appendix § 109\(13\)](#)).

In whole or major part:

The term “in major part” means in substantial part. It is not necessary that an organization or foreign entity exercise majority control or supervision in order to fall within [2 U.S.C. § 1603 \(b\)\(3\)\(B\) and \(b\)\(4\)\(B\)](#). In general, 20 percent control or supervision should be considered “substantial” for purposes of these sections.

Lobbying Activities:

Lobbying contacts and any efforts in support of such contacts, including preparation or planning activities, research, and other background work that is intended, at the time of its preparation, for use in contacts, and coordination with the lobbying activities of others.

Lobbying Contact:

Any oral, written, or electronic communication to a covered official that is made on behalf of a client with regard to the enumerated subjects at [2 U.S.C. § 1602\(8\)\(A\)](#). Note the exceptions to the definition at [2 U.S.C. § 1602\(8\)\(B\)](#). [See Discussion at Guidance Section 4.](#)

Lobbying Firm:

A lobbying firm is a person or entity consisting of one or more individuals who meet the definition of a lobbyist with respect to a client other than that person or entity. The definition includes a self-employed lobbyist.

Lobbying Registration:

An initial registration (LD-1) filed pursuant to [2 U.S.C. § 1603](#).

Lobbying Report:

A quarterly report (LD-2) filed pursuant to [2 U.S.C. § 1604](#).

Lobbyist:

Any individual (1) who is either employed or retained by a client for financial or other compensation (2) whose services include more than one lobbying contact; **and** (3) whose lobbying activities constitute 20 percent or more of his or her time in services for that client over any three-month period.

Person or Entity:

Any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or state or local government.

#### Public Official:

A public official includes an elected or appointed official, or an employee of a Federal, State, or local unit of government in the United States. There are five exceptions to this definition, including a college or university, a government-sponsored enterprise, a public utility, a guaranty agency, or an agency of any state functioning as a student loan secondary market. The definition of a public official in [2 U.S.C § 1602\(15\)\(F\)](#) includes a group of governments acting together as an international organization. This definition's purpose is to ensure international organizations, such as the World Bank, are treated in the same manner as the governments that comprise them.

#### Registrant:

A lobbying firm or an organization employing in-house lobbyists that files a registration pursuant to [2 U.S.C. § 1603](#).

## Section 4 – Lobbying Registration

### Who Must Register and When

Lobbying firms are required to file a separate registration for each client. A lobbying firm is exempt from registration for a particular client if its total income from that client for lobbying activities does not exceed and is not expected to exceed \$3,000 during a quarterly period.

Note: A lobbyist is not the registrant unless he/she is self-employed. In that case, the self-employed lobbyist is treated as a lobbying firm.

Organizations employing in-house lobbyists file a single registration. Such an organization is exempt from registration if its total expenses for lobbying activities do not exceed and are not expected to exceed \$13,000 during a quarterly period.

The registration requirement of potential registrants is triggered either (1) on the date their employee/lobbyist is employed or retained to make more than one lobbying contact on behalf of a client (and meets the 20 percent of time threshold), or (2) on the date their employee/lobbyist (who meets the 20 percent of time threshold) in fact makes a second lobbying contact, whichever is earlier. In either case, registration is required within 45 days.

Example 1: Lobbying firm “A” is retained on May 1, 2015 by Client “B” to make lobbying contacts and conduct lobbying activities. “A” files a registration (LD-1) on behalf of “B” with an effective date of registration of May 1, 2015.

Example 2: Corporation “C” does not employ an individual who meets the definition of “lobbyist.” Employee “X” is told by her supervisor to contact the Congressman representing the district in which Corporation “C” is headquartered. “X” makes a lobbying contact on June 1, 2015. “X” does not anticipate making any further lobbying contacts, but spends 25 percent of her time on this legislative issue. No registration is required at this point. In August 2015, “X” is instructed to follow up with the Congressman. “C” registers and discloses August 5, 2015 as the effective date of registration (the date that “X” contacted the Congressman for the second time and thereby met the definition of a lobbyist).

## **Preparing to File a Registration – Threshold Requirements**

In order to determine the applicability of the LDA, one must first look at the definition of “lobbyist” under [2 U.S.C. § 1602\(10\)](#). Under this definition, an individual is a “lobbyist” with respect to a particular client if he or she makes more than one lobbying contact **and** his or her “lobbying activities” (as defined in [2 U.S.C. § 1602\(7\)](#)) constitute at least 20 percent of the individual’s time in services for **that** client over any three-month period. Note that a registration would not be required for pro bono clients since the monetary thresholds of [2 U.S.C. § 1603\(a\)\(3\)\(A\)\(i\)](#) in the case of a lobbying firm, or of [2 U.S.C. § 1603\(a\)\(3\)\(A\)\(ii\)](#) in the case of an organization employing in-house lobbyists, would not be met. Keep in mind that the obligation to report arises from active status as a registrant. Therefore if a registration has been filed for a pro bono client, quarterly activity reports (LD-2) and semiannual contribution reports (LD-203) would be expected to be filed until the registration is validly terminated.

### **More than One Lobbying Contact**

“More than one lobbying contact” means more than one communication to a covered official. Note that an individual falls within the definition of “lobbyist” by making more than one lobbying contact over the course of services provided for a particular client (even if the second contact occurs in a later quarterly period).

Example 1: Lobbyist “A” telephones Covered Official “B” in the morning to discuss proposed legislation. In the afternoon she telephones Covered Official “C” to discuss the same legislation. Lobbyist “A” has made more than one lobbying contact.

Example 2: Under some circumstances a series of discussions with a particular official might be considered a single communication, such as when a telephone call is interrupted and continued at a later time. Discussions taking place on more than one day with the same covered official, however, should be presumed to be more than one lobbying contact.

### **Clarification of an Exception to Lobbying Contact**

The LDA excepts from the definition of “lobbying contact” communications “required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency” ([2 U.S.C. § 1602\(8\)\(B\)\(ix\)](#)). Communications that are compelled by the action of a Federal agency include communications that are required by a Federal agency contract, grant, loan, permit, or license ([2 U.S.C. § 1602\(8\)\(B\)\(vix\)](#)).

Example: Contractor “A” has a contract to provide technical assistance to Agency “B” on an ongoing basis. Technical communications between Contractor “A’s” personnel and covered officials at Agency “B” would be required by the contract and therefore would not constitute “lobbying contacts.”

Note, however, that this exception would not encompass an attempt by “A” to influence covered officials regarding either matters of policy, or an award of a new contract, since such communications would not be required by the existing contract.

## **Do Lobbying Activities Constitute 20 Percent Or More of an Individual’s Time?**

Lobbying activity is defined in [2 U.S.C. § 1602\(7\)](#) as “lobbying contacts and efforts in support of such contacts, including . . . background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.” If the intent of the work is to support ongoing and future lobbying, then it would fall within the definition of lobbying activities. Timing of the work performed, as well as the status of the issue, is also pivotal. Generally, if work such as reporting or monitoring occurs at a time when future lobbying contacts are contemplated, such reporting and monitoring should be considered as a part of planning or coordinating of lobbying contacts, and therefore included as “lobbying activity.” If, on the other hand, a person reports back to the relevant committee or officer regarding the status of a completed effort, that activity would probably not be included as a lobbying activity, if reports are not being used to prepare a lobbying strategy the next time the issue is considered.

Communications excepted from the definition of “lobbying contact” under [2 U.S.C. § 1602\(8\)\(B\)](#) may be considered “lobbying activities” under some circumstances. Communications excepted by [2 U.S.C. § 1602\(8\)\(B\)](#) will constitute “lobbying activities” if they are in support of other communications which constitute “lobbying contacts.”

Example: Under [2 U.S.C. § 1602\(8\)\(B\)\(v\)](#), the term “lobbying contact” does not include “a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered Executive Branch official or a covered Legislative Branch official.” However, a status request would constitute “lobbying activity” if it were in support of a subsequent lobbying contact.

Please note that for disclosure purposes the 20 percent of time threshold applies to registration and not to the reporting section.

### **Is it Lobbying Contact/Lobbying Activity?**

If a communication is limited to routine information gathering questions and there is not an attempt to influence a covered official, the exception of [2 U.S.C. § 1602\(8\)\(B\)\(v\)](#) for “any other similar administrative request” would normally apply. In determining whether there is an attempt to influence a covered official, the identity of the person asking the questions and her relationship to the covered official obviously will be important factors.

Example 1: Lobbyist “A”, a former chief of staff in a congressional office, is now a partner in the law firm retained to lobby for Client “B.” After waiting one year to comply with staff post-employment restrictions on lobbying, Lobbyist “A” telephones the Member on whose staff she served. She asks about the status of legislation affecting Client “B’s” interests. Presumably “B” will expect the call to have been part of an effort to influence the Member, even though only routine matters were raised at that particular time.

Example 2: Company “Z” offers temporary employment to recent college graduates. The graduates are hired to conduct surveys of congressional staff by reading prepared questions and

recording the answers. The questions seek only information. These communications do not amount to lobby contacts.

### **Identification of Client and Covered Officials**

[2 U.S.C. § 1609\(a\)](#) requires that any person making an **oral** lobbying contact with a covered official shall disclose, on the request of the covered official at the time of the lobbying contact: (a) whether that person is registered under this act; (b) the name of the client represented; (c) whether that client is a foreign entity; and (d) the name of any foreign entity that has a direct interest in the outcome of the lobbying activity who contributes more than \$5,000 to the lobbying activities of the client and either holds at least 20 percent equitable ownership of the client or actively participates in the planning, supervision, or control of such lobbying activities.

Individuals making **written** contact with a covered official (including electronic communication) must disclose: (a) if the client on whose behalf the lobbying contact was made is a foreign entity and, if so, the name of the client represented and whether the writer is a registrant under the LDA and (b) any foreign entity that has a direct interest in the outcome of the lobbying activity who contributes more than \$5,000 to the lobbying activities of the client and either holds at least 20 percent equitable ownership of the client or actively participates in the planning, supervision, or control of such lobbying activities.

Upon request by individuals making lobbying contacts, the individual being contacted or their employing office must indicate whether the individual is a covered official as defined in [2 U.S.C. § 1602\(3\) and \(4\)](#).

### **Lobbying Contacts and Activities Using IRC Elections (Alternate Reporting Methods)**

The LDA permits those organizations that are required to file and do file under [26 U.S.C. § 6033\(b\)\(8\)](#) of the Internal Revenue Code (IRC) and organizations that are subject to [26 U.S.C. § 162\(e\)](#) of the IRC to use the tax law definitions of lobbying in lieu of the LDA definitions for determining “contacts” and “lobbying activities” for Executive Branch lobbying. Registrants should note that the tax definition of lobbying is broader with respect to the type of activities reported, while it is narrower with respect to the universe of Executive Branch officials who qualify as covered Executive Branch employees.

Pursuant to the LDA, registrants making such an IRC election under the LDA must use the IRC definition for Executive Branch lobbying, and the LDA definitions for Legislative Branch lobbying. Because there are fewer Executive Branch officials under the IRC definitions than under the LDA definitions, this may result in fewer individuals being listed as lobbyists and fewer lobbying contacts reflected on the quarterly activity report (LD-2).

Also note that definitions under the tax code include “grass-roots” and “state” lobbying, while the LDA excludes those types of lobbying from the definition of “lobbying activities,” and the LDA does not permit modification of the tax code definition to exclude such expenditures when reporting lobbying expenses under IRC definitions.

## Relationship Between 20 Percent of Time and Monetary Threshold

If the definition of “lobbyist” is satisfied with respect to at least one individual for a particular client, the potential registrant (either a lobbying firm or an organization employing the lobbyist, or a self-employed individual lobbyist) is **not** required to register if it does not meet the monetary thresholds of [2 U.S.C. § 1603\(a\)\(3\)\(A\)\(i\)](#), in the case of a “lobbying firm,” or of [2 U.S.C. § 1603\(a\)\(3\)\(A\)\(ii\)](#), in the case of an organization employing in-house lobbyists. Note that the monetary exemption is computed based on the lobbying activities of the potential registrant as a whole for the particular client in question, not simply on the lobbying activities of those individuals who are “lobbyists.”

Example 1: A law firm has two lawyers who perform services for a particular client. Lawyer “A” spends 15 percent of the time she works for that client on lobbying activities, including some lobbying contacts. Lawyer “B” spends 25 percent of the time he works for the client on lobbying activities, but makes no lobbying contacts. Neither lawyer falls within the definition of “lobbyist,” and therefore the law firm is not required to register for that client, even if the income it receives for lobbying activities on behalf of the client exceeds \$3,000.

Example 2: Employee “A” of a trade association is a lobbyist who spends 25 percent of his time on lobbying activities on behalf of the association. There are \$7,500 of expenses related to Employee “A’s” lobbying activities. Employee “B” is not a “lobbyist” but engages in lobbying activities in support of lobbying contacts made by Employee “A.” There are \$7,500 of additional expenses related to the lobbying activities of Employee “B.” The trade association is required to register because it employs a “lobbyist” and its total expenses in connection with lobbying activities on its own behalf exceed \$13,000.

Example 3: Same as Example 2, except the expenses related to the lobbying activities of Employees “A” and “B” total only \$9,000, but the trade association also pays \$5,000 to an outside firm for lobbying activities. Registration is still required because payments to outside contractors (including lobbying firms that may be separately registered under the LDA), must be included in the total expenses of an organization employing lobbyists on its own behalf. Also note that lobbyists employed by the outside firm are **not** listed on the trade association’s registration (LD-1) or quarterly activity report (LD-2). Lobbyists employed by the outside firm must be reported on the outside firm’s quarterly activity report (LD-2).

## Timing

The registration requirement of a potential registrant is triggered either (1) on the date its employee/lobbyist is employed or retained to make more than one lobbying contact on behalf of the client (and meets the 20 percent of time threshold), or (2) on the date their employee/lobbyist (who meets the 20 percent of time threshold) in fact makes a second lobbying contact, whichever is earlier. In either case, registration is required within 45 days of that date.

Example: Lobbying Firm “A” is retained to monitor an issue, but whether or not lobbying contacts will be made depends on future legislative developments. In another case, Corporation “B,” which employs an in-house lobbyist, knows that its lobbyist will make contacts but



reasonably expects its lobbying expenditures will not amount to \$13,000 in a quarterly period. However, issues of interest to “B” turn out to be more controversial than expected, and the \$13,000 threshold is in fact met a month later.

Lobbying firm “A” has no registration requirement at the present time. The requirement to register is triggered if and when the firm makes contacts, or reasonably expects that it will make contacts. Corporation “B’s” registration requirement arose as soon as it knew, or reasonably expected, that its lobbying expenditures will exceed \$13,000. “B” needs to register immediately.

### **Listing of Foreign Entities**

Each registration must contain the name, address, principal place of business, amount of any contribution greater than \$5,000 to the lobbying activities of the registrant, and approximate percentage of ownership in the client of any foreign entity that: holds at least 20 percent equitable ownership in the client or any affiliate of the client required to be reported; **or** directly or indirectly, in whole or major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client or affiliate of the client required to be reported; **or** is an affiliate of either the client, or an organization affiliated with the client identified on the registration (LD-1) and has a direct interest in the outcome of the lobbying activity. The purpose of the disclosure is to identify the interests of the foreign entity that may be operating behind the registrant.

Example: Lobbying Firm “A” is retained to lobby on behalf of Company “B,” which is wholly owned by Foreign Company “C.” “C” is wholly owned by Foreign Company “D,” and “D” is wholly owned by Foreign Company “E.” “C,” “D,” and “E” must be disclosed on the registration.

**Filers are expected to use reasonable care when filling out and submitting registrations (LD-1), quarterly activity reports (LD-2), and semiannual contribution reports (LD-203).**

## **Section 5 – Special Registration Circumstances**

### **Elaboration on the Definition of Client**

In some cases a registrant is retained as part of a larger lobbying effort that encompasses more than one lobbying firm on behalf of a third party. Generally, the entity that is paying the registrant is listed as the client on behalf of the third party. The third party, who is paying the intermediary (client), is listed also on the registration (LD-1) as an affiliate.

Example: Client “P” retains lobbying firm “F” for general lobbying purposes, but has a new interest in obtaining an outcome in an area new to “P.” “F” realizes that a boutique lobbying firm “L” has an excellent track record for obtaining the type of outcome “P” is seeking, and talks to “P” about subcontracting. “P” agrees with “F’s” strategy. “F” contacts “L” to retain the latter to do the project. “F” is responsible for paying “L.” Within 45 days, “L” registers disclosing “F on behalf of P” as the client, and listing “P” as the affiliate on the registration (LD-1).

### **Lobbying Firms Retained Under a Contingent Fee**

Law other than the LDA governs whether a firm may be retained on a contingent-fee basis. There is, for example, a general prohibition on the payment of contingent fees in connection with the award of government contracts. Assuming, however, that the agreement is not contrary to law or public policy, an agreement to make lobbying contacts for a contingent fee, like other fee arrangements, triggers a registration requirement at inception. The fee is disclosed on the quarterly activity report (LD-2) for the period that the registrant becomes entitled to it.

Example 1: On January 1, 2015, Lobbying Firm “G” agrees to lobby for Client “H” for a fee contingent on a certain result, **and the agreement is permitted under other applicable law**. Lobbying activities begin. “G” is required to register by February 14, 2015. The result is not obtained and “G” is not entitled to any fee during the first quarterly period. “G” must report its lobbying activities for the first quarterly period; the income reported is “Less than \$5,000.” The desired result does occur in the second quarterly period of 2015. In the report for that period, “G” discloses its lobbying activities for that period and the total contingent fee in income reported, rounded to the nearest \$10,000.

Example 2: Lobbying Firm “J” discusses an arrangement to accept stock options worth \$4,500 from Client “M” in lieu of payment of a contingency fee. After determining that acceptance of a success fee is not a violation of another statute, “J” signs a contract with “M,” and registers. Late in the first quarter of the lobbying activities, it appeared “J” achieved the result. “J’s” initial quarterly lobbying report disclosed lobbying income of less than \$5,000. “M’s” stock value increased shortly thereafter to be valued at \$6,000, so “J” exercised its options. “J” amended the previously filed quarterly report to reflect income of “\$5,000 or more,” and rounded the amount to \$10,000.

### **Registration for Entities with Subsidiaries or State and Local Affiliates**

Assuming a parent entity or national association and its subsidiary or subordinate are separate legal entities, the parent makes a determination whether it meets the registration threshold based upon its own activities, and does not include subordinate units' lobbying activities in its assessment. Each subordinate must make its own assessment as to whether any of its own employees meet the definition of a lobbyist, and then determine if it meets the registration threshold with respect to lobbying expenses.

Example: Lobbyist “Z” is an employee of Company “A,” which is a wholly owned subsidiary of Company “B.” “Z’s” lobbying activities advance the interests of both. Which company is responsible for registering and reporting under the LDA?

The registration and reporting requirements apply to the organization of which Lobbyist “Z” is an employee. Therefore, Company “A” would register and file the quarterly reports.

If Company “B” contributes \$5,000 or more to “Z’s” lobbying activities during a quarterly period and actively participates in the planning, supervision, or control of the lobbying activities, Company “B” must be listed on Company “A’s” registration (LD-1). A contribution may take any form, and may be direct or indirect. For example, if Company “B” established Company “A” with an initial capital contribution of \$1,000,000, which “A” draws upon for employee salaries,

including “Z’s,” and to pay for office space used by “Z,” a \$5,000 contribution probably has been made.

If Company “B” is a foreign entity, and the facts are otherwise the same as above, “B” would be listed as an affiliate on the registration (LD-1) filed by Company “A.” “B’s” interests in specific lobbying issues would also be disclosed on the quarterly activity report (LD-2).

The LDA does not make any express provision for combined or consolidated filings. A single filing by a parent corporation may be appropriate in some cases, especially when there are multiple subsidiaries and the lobbyists address the same issues for all and act under the close control of the parent. In this regard, note that the LDA does not contain any specific definition of “employee” (there is only the general definition at [2 U.S.C. § 1602\(5\)](#)), and the policy of the LDA is to promote disclosure of real parties in interest.

In circumstances in which multiple subsidiaries each have only a fraction of the lobbyist’s time and little control over his work, the parent which in fact exercises actual control can be regarded as the “employer” for lobbying registration purposes. In such cases, the parent may file a single registration, provided that the registration (LD-1) discloses that the listed lobbyists are employees of subsidiaries and the subsidiaries are identified as affiliated organizations.

### **Effect of Mergers and Acquisitions on Registrations**

The following examples serve to illustrate hypothetical situations regarding mergers and acquisitions:

Example 1: Corporation “C” registered under the LDA during 2014. Effective upon close of business on December 31, 2014, “C” merged with Corporation “D.” “D,” the surviving corporation, had no lobbyist employees before the merger and is not registered. How and when should this information be reported? Assuming that “D” retains at least one of “C’s” lobbyist employees and will incur lobbying expenses of at least \$13,000 during the January–March quarterly period, Corporation “D” is required to register. The 45-day period in which its initial registration must be filed begins to run on December 31, 2014, the date “D” first had lobbyist employees, and the registration is due by February 14, 2015. On the other hand, if “D” will not be lobbying after the merger, it is not required to register. In pre-merger discussions, Corporation “C” might have agreed to terminate its registration and file its final lobbying report before ceasing its corporate existence. If, however, “C” did not do so, Corporation “D” should terminate the registration and file the outstanding lobbying report in “C’s” name. “D” may simply annotate the signature block on the quarterly activity report (LD-2) to indicate that it is filing as successor in interest to “C.”

Example 2: Lobbying Firm “O” is a registrant under the LDA. It merges with Lobbying Firm “P,” which is also a registrant. The new entity will be known as Lobbying Firm “T.” How and when should this information be reported? The answer depends on the particular facts. If Lobbying Firm “T” is a newly created legal entity, it should file a new registration within 45 days. The registrations of both “O” and “P” should be terminated by filing separate termination reports for each remaining registrant/client relationship. But if “T” is simply the new name

adopted by “O” following the merger with “P,” with “P” going out of existence, “O” should report its new name and other updated information (such as the names of lobbyist employees of “P” who are retained or hired by “T”) on the quarterly activity report (LD-2). “P’s” registration should be terminated, and P should file termination reports for each remaining registrant/client relationship, but only after P ceases to exist.

Example 3: Corporation “J,” a registrant, acquired Corporation “K,” a non registrant. At the time of the acquisition, “J” changed its name to “J & K.” How and when should this information be reported? For LDA purposes, this is simply a change in the name of the registrant. The change should be reported on the next quarterly activity report (LD-2) with the registrant name listed as “J & K, formerly reported as J.”

### **Associations or Coalitions**

The LDA provides that “[i]n the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members” ([2 USC § 1602\(2\)](#)). A bona fide coalition that employs or retains lobbyists on behalf of the coalition may be the client for LDA reporting purposes, even if the coalition is not a legal entity or has no formal name. A registrant lobbying for an unnamed informal coalition needs to adopt some type of identifier for the registration (LD-1), and indicate “(Informal Coalition)” or another applicable description. For all coalitions and associations, formal or informal, the LDA requires further disclosures, e.g., of organizations other than the client that contribute more than \$5,000 toward the lobbying activities of the registrant in the quarterly period, **and** actively participate in the planning, supervision, or control of the lobbying activities ([2 U.S.C. § 1603\(b\)\(3\)](#)). Such organizations are identified as affiliates on the registration (LD-1).

Example 1: Association “A” has 20 organizational members who each pay \$20,000 as a portion of their annual dues to fund “A’s” lobbying activities. “E” is an employee of Organization “O,” which is a member of “A.” “E” serves as a member of “A’s” board, as a representative of “O.” While “A” carries out various functions, a substantial part of its mission is lobbying on issues of interest to its member organizations. “E’s” board membership constitutes active participation by “O” in the lobbying activities of “A,” and thus “O” would need to be listed as an affiliated organization of “A.”

Example 2: Another association “A” has 1000 organizational members who each pay \$20,000 as a portion of their annual dues to fund “A’s” lobbying activities. “E” is an employee of Organization “O,” which is a member of “A.” “E” serves as a member of “A’s” board, as a representative of “O.” “A” performs numerous functions, only a modest portion of which is lobbying. With regard to “A’s” lobbying activities, “A’s” board is only involved in approving an overall budget for such activities, but otherwise leaves supervision, direction, and control of such matters to a separate committee of member organizations. “E’s” board membership in this case does not constitute active participation by “O” in the lobbying activities of “A.”

Example 3: Another association “A” has 1000 organizational members who each pay \$1,000 a month in annual dues to “A.” “E” is an employee of Organization “O,” which is a member of “A.” “E” serves as a member of “A’s” lobbying oversight group as a representative of “O.” The

lobbying oversight group plans and supervises lobbying strategy for “A.” While “E’s” activities in “A” would constitute active participation, because “O” does not contribute \$5,000 in the reporting quarter to the lobbying activities of “A,” “O” would not need to be listed as an affiliate of “A.”

Example 4: Another association “A” has 100 organizational members who each pay \$30,000 a month as a portion of their annual dues to fund “A’s” lobbying activities. “E” is an employee of Organization “O,” and attends “A’s” annual meeting/conference, informally provides “O’s” list of legislative priorities to “A,” and also facilitates responses from “O” to occasional requests for information by “A’s” lobbyists. These activities would not make “O” an active participant in the lobbying activities of “A.”

Example 5: Organization “O” joins with a group of nine other organizations to form Coalition “C” to lobby on an issue of interest to it. Each contributes \$50,000 to “C’s” budget. “O’s” vice president for government relations is part of the informal group that directs the lobbying strategy for “C.” “O” would be considered an active participant in “C’s” lobbying activities and would have to be disclosed.

Note that a coalition with a foreign entity as a member must identify the foreign entity on the registration (LD-1) if the foreign entity meets the test of either [2 U.S.C. § 1603\(b\)\(3\) or \(b\)\(4\)](#).

### **Churches, Integrated Auxiliaries, Conventions or Association of Churches and Religious Orders – Hiring of Outside Firms**

Although the definition of a lobbying contact does not include a communication made by a church, its integrated auxiliary, a convention or association of churches and religious orders ([2 U.S.C. § 1602\(8\)\(B\)\(xviii\)](#)), if a church (its integrated auxiliary, a convention or association of churches, and religious orders) hires an outside firm that conducts lobbying activity on its behalf, the outside firm must register if registration is otherwise required.

### **Registration of Professional Associations of Elected Officials**

The LDA ([2 U.S.C. § 1602\(15\)](#)) definition of “public official” includes a professional association of elected officials who are exempt from registration. If the association retains an outside firm to lobby, the lobbying firm must register if otherwise required to do so, i.e., the firm employs a lobbyist as defined in [2 U.S.C. § 1602\(10\)](#) and lobbying income exceeds \$3,000 in a quarterly period.

## **Section 6 – Quarterly Reporting of Lobbying Activities**

### **When and Why a Report is Needed**

Each registrant must file a quarterly activity report (LD-2) no later than 20 days (or on the first business day after such 20th day if the 20th day is not a business day) after the end of the quarterly period beginning on the first day of January, April, July, and October **of each year** in which a registrant is registered. Lobbying firms file separate reports for each client for each

quarterly reporting period, while organizations employing in-house lobbyists file one report covering their in-house lobbying activities for each quarterly reporting period. All reports must be filed electronically. **The Secretary and Clerk do not have the authority under the LDA to grant extensions to registrants.**

The obligation to report under the LDA arises from active status as a registrant (with a registration on file for which a termination report has not been filed). The LDA ([2 U.S.C. § 1604\(a\)](#)) requires a registrant to file a report for the quarterly period **in which it incurred its registration requirement**, and for each quarterly period thereafter, through and including the reporting period encompassing the date of registration termination. A timely quarterly activity report (LD-2) is required even though the registration was in effect for only part of the reporting period. So long as a registration is on file and has not been terminated, a registrant must report its lobbying activities even if those activities during a particular quarterly period would not trigger a registration requirement in the first instance (e.g., a lobbying firm's income from a client amounted to less than \$3,000 during a particular quarterly period). A registrant with no lobbying activity during a quarterly period checks the "no activity" box on the quarterly activity report (LD-2).

Example 1: "A" is the only lobbyist of Lobbying Firm "Z" listed in the registration filed for Client "Y" on February 14, 2015. During January–March 2015, "A" lobbied for "Y" nearly full-time. During the April–June period in 2015, however, "A" made only one lobbying contact for "Y" in April, but lobbying fees for the quarter were \$10,000. For the April–June quarterly period, even though "A" had minimal lobbying activities, Lobbying Firm "Z" must report "A's" lobbying activities (due to "A's" being listed as a lobbyist) and must report the \$10,000 lobbying fees.

Example 2: Lobbying Firm "Z" is retained by Client "X" on June 1, 2015 for 30 days to lobby on a particular issue that is on the legislative calendar and the issue is settled prior to the departure of House and Senate Members for the July 4th recess. Firm "Z" must file its registration by July 15, file its quarterly activity report (LD-2) by July 20, and, if it chooses to terminate, file its termination report by October 20.

### **Disclosing that a Client is a State or Local Government or Instrumentality**

A client that is a state or local government or instrumentality must be disclosed as such on the quarterly activity report (LD-2).

### **Mandatory Electronic Filing**

Mandatory electronic filing of all documents is required by the LDA ([2 U.S.C. § 1604](#)). The only exception to mandatory electronic filing is for the purpose of compliance with the Americans with Disabilities Act. The online electronic filing system provides usability for people with vision impairments who have the appropriate software and hardware. If you have questions regarding additional ADA accommodations, please contact the Senate Office of Public Records at (202) 224-0758.

## Preparing to File the Quarterly Report – Income or Expense Recording

The LDA does not contain any special record keeping provisions, but requires, in the case of an outside lobbying firm (including self-employed individuals), a good faith estimate of all income received from the client, other than payments for matters unrelated to lobbying activities. In the case of an organization employing in-house lobbyists, the LDA requires a good faith estimate of the total expenses of its lobbying activities. As long as the registrant has a reasonable system in place and complies in good faith with that system, the requirement of reporting expenses or income would be met. Since the LDA ([2 U.S.C. § 1605\(a\)\(5\)](#)) requires the Secretary and Clerk to “retain registrations for a period of at least 6 years after they are terminated and reports for a period of at least 6 years after they are filed,” it is recommended registrants retain copies of their filings and supporting documentation for the same length of time.

### Lobbying Firm Income

Lobbying firms report income earned or accrued from lobbying activities during a quarterly period, even though the client may not be billed or make payment until a later time. For a lobbying firm, gross income from the client for lobbying activities is reportable, including reimbursable expenses, costs, or disbursements that are in addition to fees and separately invoiced. The quarterly activity report (LD-2) provides boxes for a lobbying firm to report income of less than \$5,000, or of \$5,000 or more. If lobbying income is \$5,000 or more, a lobbying firm must provide a good faith estimate of the actual dollar amount **rounded to the nearest \$10,000**.

Example: Lobby Firm “A” has lobbying income of \$5,700 from Client “Z” for the first quarter of 2015. “A” files a quarterly activity report (LD-2) for Client “Z” by April 20, checking the box for “\$5,000 or More” in income and reporting the amount of income (rounded to the nearest \$10,000) as \$10,000.

### Organization Expenses Using LDA Expense Reporting Method

Organizations that employ in-house lobbyists may incur lobbying-related expenses in the form of employee compensation, office overhead, or payments to vendors, which may include lobbying firms. Organizations must report expenses as they are incurred, though payment may be made later. The quarterly activity report (LD-2) provides for an organization to report lobbying expenses of less than \$5,000, or \$5,000 or more. If lobbying expenses are \$5,000 or more, the organization must provide a good faith estimate of the actual dollar amount **rounded to the nearest \$10,000**. Organizations using the LDA expense reporting method mark the “Method A” box on the quarterly activity report (LD-2).

To ensure complete reporting, the Secretary and Clerk have consistently interpreted [2 U.S.C. § 1604\(b\)\(4\)](#) to require such organizations to report all of their expenses incurred in connection with lobbying activities, including all payments to retained lobby firms or outside entities, without considering whether any particular payee has a separate obligation to register and report under the LDA. Logically, if an organization employing in-house lobbyists also retains a lobbying firm, the expense reported by the organization should be greater than the fees reported

by the lobbying firm of which the organization is a client. An organization must contact any other organization to which it pays membership dues in order to learn what portion of the dues is used by the latter organization for lobbying activities. It is necessary for the former organization to include the portion of the dues that is designated for lobbying activities in the total of lobbying expenses reported by the former organization. A registrant cannot apportion the lobbying expense part of the dues to avoid disclosure. Dues payments for lobbying activities should be included in the estimate for the quarter in which they are paid.

***All employee time spent in lobbying activities must be included in determining the organization's lobbying expenses, even if the employee does not meet the statutory definition of a "lobbyist."***

Example: The CEO of a registrant, "Defense Contractor," travels to Washington to meet with a covered DOD official regarding the renewal of a government contract. "Defense Contractor" has already determined that its CEO is not a "lobbyist," because he does not spend 20 percent of his time on "lobbying activities" during a quarterly period. Nonetheless, the expenses reasonably allocable to the CEO's lobbying activities (e.g., plane ticket to Washington, salary and benefit costs, etc.) will be reportable.

Similarly, all expenses of lobbying activities incurred during a quarterly period are reportable. The LDA definition of lobbying activities ([2 U.S.C. § 1602\(7\)](#)) is not limited to lobbying contacts. Examples of lobbying expenses to be included are reflected below.

Example 1: A research assistant in the Washington office of the registrant, "Defense Contractor" (described in the example above) researches and prepares the talking points for the CEO's lobbying contact with the covered DOD official. Likewise, the expenses reasonably allocable to the research assistant's lobbying activities will be included in "Defense Contractor's" expense estimate for the quarterly period.

Example 2: Corporation "R" is a registrant that is interested in building a bypass around a city in state "S." "R's" governmental affairs team is comprised of lobbyists who are federally-focused, and lobbyists who are state-focused. The entire staff prepares a strategic lobbying plan to support the building of the bypass. This includes both federal and state lobbying. In this example, the time spent by the state level lobbyists preparing the materials would be included in "R's" good faith estimate of lobbying expenses for the quarter because, at the time the materials were prepared, they were to be used for federal lobbying.

Example 3: Same circumstances as Example 2, but in this situation, the aforementioned strategic lobbying plan includes hiring one firm to help with the production of the plan, and another firm to place advertising in media in "S" to encourage citizens in "S" to contact their representatives about the importance of building the bypass. The total cost of producing the plan, but not the cost of the advertising media fees, must be included in "R's" good faith estimate of lobbying expenses for the quarter.

The examples below are intended to be illustrative of the possibilities of LDA expense reporting, and are not intended to require detailed accounting rules.



Example 1: An organization employing in-house lobbyists might choose to estimate lobbying expenses by asking each professional staffer to track his/her percentages of time devoted to lobbying activities. These percentages could be averaged to compute the percentage of the organization's total effort (and budget) that is devoted to lobbying activities. Under this example the organization would include salary costs (including a percentage of support staff salaries), overhead, and expenses, including any third-party costs attributable to lobbying.

Example 2: Another organization, which lobbies out of its Washington office, might avoid the need for detailed breakdowns by including the entire budget or expenses (whichever the organization believes in good faith is closer to the actual amount) of its Washington office. Care should be taken in this instance to also add any additional lobbying expenses to this amount, such as the cost of fly-ins, events, etc. and outside lobbyists not paid by the Washington office.

### **Organizations Reporting Expenses Under 2 U.S.C. § 1610 (Optional IRC Reporting Methods)**

The LDA ([2 U.S.C. § 1610\(a\)](#)) allows entities that are required to report and do report lobbying expenditures under [26 U.S.C. § 6033\(b\)\(8\)](#) of the Internal Revenue Code to use IRC definitions for purposes of the LDA ([2 U.S.C. § 1603\(a\)\(3\)](#) and [2 U.S.C. § 1604\(b\)\(4\)](#)). Charitable organizations, as described in [26 U.S.C. § 501\(c\)\(3\)](#), are required to report to the Internal Revenue Service their lobbying expenditures in conformity with [26 U.S.C. § 6033\(b\)\(8\)](#) of the IRC. They may treat as LDA expenses the amounts they treat for influencing legislation under the IRC.

The LDA ([2 U.S.C. § 1610\(b\)](#)) allows entities that are subject to the IRC ([26 U.S.C. § 162\(e\)](#)) to use IRC definitions for purposes of [2 U.S.C. § 1603\(a\)\(3\)](#) and [2 U.S.C. § 1604\(b\)\(4\)](#). The eligible entities include for-profit organizations (other than lobbying firms) and tax-exempt organizations such as trade associations that calculate their lobbying expenses for IRC purposes with reference to [26 U.S.C. § 162\(e\)](#) rules. The Secretary and the Clerk believe that this reporting option is available to include also a small number of trade association registrants not required by the IRC to report non-deductible lobbying expenses to their members (i.e., those whose members are tax-exempt).

If an eligible organization elects to report under [2 U.S.C. § 1610](#), it must do so consistently for all reports covering a calendar year. The electing organization also must report **all expenses that fall within the applicable Internal Revenue Code definition**. The total that is ultimately reportable to the Internal Revenue Service is the figure that would be used for the quarterly activity report. The quarterly activity report (LD-2) would require any organization to report if the amount of lobbying expenses was less than \$5,000, or \$5,000 or more. If the expense amount is \$5,000 or more, it should be **rounded to the nearest \$10,000**. The quarterly activity report (LD-2) also requires the electing organization to mark as applicable, either the “Method B” box ([26 U.S.C. § 6033\(b\)\(8\)](#)) or the “Method C” box ([26 U.S.C. § 162\(e\)](#)).

The Secretary and Clerk are aware that the IRC and LDA are not harmonized in terms of expense reporting. Registrants are advised that if they elect to report under IRS methods per [2 U.S.C. § 1610](#), they may not subtract lobbying expenses for lobbying state and local officials and

grassroots lobbying from the total expenses reported. Doing so alters the IRS reportable total, and is not permitted.

## **Quarterly Reporting of Lobbying Activities - Contents of Report**

The LDA ([2 U.S.C. § 1604\(b\)](#)) requires registrants to report specific information on the nature of the lobbying activities on quarterly activity reports (LD-2), including:

- Disclosing the general lobbying issue area code(s).
- Identifying the specific issues on which the lobbyist(s) engaged in lobbying activities.
- Identifying the Houses of Congress and the most specific Federal Agencies contacted.
- Disclosing the lobbyists who had any activity in the general issue area.
- Describing the interest of a foreign entity if applicable.

Example 1: Registrant “A” represents Client “B” to monitor an issue of interest to B and make occasional lobbying contacts as necessary. During the Q1 2015 reporting period, “A” received \$3,000 from “B,” but had no lobbying activity because “B’s” issue was dormant. “A” would complete the quarterly activity report (LD-2), mark the box for “No Lobbying Activity,” mark income as “Less than \$5,000,” and submit the report.

Example 2: Same circumstances as above, except that “A” has two lobbyists who make lobbying contacts on a single lobbying issue with the Senate and the House. In this case, “A” will need to complete the Lobbying Activity section of the quarterly activity report (LD-2) and submit the report.

Example 3: Same circumstances as example 2, but one of the lobbyists retires during the reporting period. In this case, the Information Update Page of the quarterly activity report is required to be included, listing the lobbyist’s name as being no longer expected to lobby for that client, which has the effect of delisting the lobbyist’s name (his/her retirement) from “A’s” registration and reports.

When reporting specific lobbying issues, some registrants have listed only House or Senate bill numbers on the issues page without further indication of their clients’ specific lobbying issues. Such disclosures are not adequate, for several reasons. First, [2 U.S.C. § 1604\(b\)\(2\)\(A\)](#) requires disclosure of “specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities, including ... bill numbers[.]” As we read the law, a bill number is a required disclosure when the lobbying activities concern a bill, but is not in itself a complete disclosure. Further, in many cases, a bill number standing alone does not inform the public of the client’s specific issue. Many bills are lengthy and complex, or may contain various provisions that are not always directly related to the main subject or title. If a registrant’s client is interested in only one or a few specific provisions of a much larger bill, a lobbying report containing a mere bill number will not disclose the specific lobbying issue. Even if a bill concerns only one specific subject, a lobbying report disclosing only a bill number is still inadequate, because a member of the public would need access to information outside of the filing to ascertain that subject. The LDA contemplates disclosures that are adequate to inform the public of the lobbying client’s specific issues from a review of the quarterly activity report (LD-2), without independent

familiarity with bill numbers or the client's interest in specific subject matters within larger bills. The disclosures on the quarterly activity report must include bill numbers, where applicable, but must always contain information that is adequate, standing alone, to inform the public of the specific lobbying issues.

Example: Client "A's" general lobbying issue area is "Environment." During the first quarter of 2015, lobbyists for "A" made contacts concerning the Department of Defense appropriations for environmental restoration. For fiscal year 2016, the Department of Defense Appropriations Act was part of the Omnibus Consolidated Appropriations Act for 2016, H.R. 3610, a lengthy and complex bill that did not have numbered sections throughout. Title II contained separate but unnumbered provisions making appropriations for "Environmental Restoration, Army," "Environmental Restoration, Navy," "Environmental Restoration, Air Force," "Environmental Restoration, Defense Wide," and "Environmental Restoration, Formerly Used Defense Sites." Lobbying contacts for Client "A" addressed all environmental restoration funding within the Defense Department bill. An appropriate disclosure of the specific lobbying issue would read as follows: H.R. 3610, Department of Defense Appropriations Act for 2016, Title II, all provisions relating to environmental restoration.

The Tariff (TAR) issue code is used for tariff bills, including miscellaneous tariff bills. Filers must use this general issue area code to report lobbying activity related to tariff issues, including miscellaneous tariff issues. For any other trade-related issues, filers should use the Trade (TRD) code.

Example: Registrant "R" is retained by Client "B" to pursue a bill to provide a temporary tariff suspension for chemical X, and a separate bill to provide a temporary tariff reduction for chemical Y. During the first quarter of 2015, "R" made lobbying contacts concerning both matters on behalf of "B" and a separate bill was introduced for each matter (S.123 for chemical X and S.456 for chemical Y). "R" reports in its LD-2 filing for Q1 that the general issue area code for these bills is "TAR," and the specific issues lobbied upon were the substance of the bills, citing to the bill number, if a bill has been introduced (e.g., "temporary tariff suspension for chemical X (S.123) and temporary tariff reduction for chemical Y (S.456)"). In the Q3 reporting period, the two chemical tariff provisions are each rolled into an omnibus bill (e.g., S.789, the "Miscellaneous Tariff Bill"). If "R" had lobbying activities during the Q3 reporting period encompassing all three bills, then "R" reports that the general issue area code for these bills is "TAR" and the specific issues lobbied upon were the substance of the bills (e.g., "temporary tariff suspension for chemical X and temporary tariff reduction for chemical Y, included in the original bills (S.123 and S.456) and in the Miscellaneous Tariff Bill (S.789)"). In Q4, "R" had lobbying activities focusing on the omnibus bill which "R" then discloses on its Q4 report, using TAR for the general issue area code as well as reporting the specific issues lobbied upon ("modification focused on tariff suspension for chemical X and tariff reduction for chemical Y, included in Miscellaneous Tariff Bill (S.789)").

The Houses of Congress and Federal agencies contacted **by lobbyists** during the reporting period must be disclosed on the quarterly activity report (LD-2), picking from the list of government entities provided in the online filing system. Registrants should select the most specific Federal Agency possible. If the list does not display the government entity contacted, then select the

department in which the entity is housed. **In the event that no lobbying contacts were made, the registrant must mark the “No Agencies Lobbied” box.**

Previously identified lobbyists and new lobbyists for this reporting period must be listed on the quarterly activity report (LD-2) if they had any lobbying activities during the reporting period, whether or not they made lobbying contacts. The General Issue Area on the quarterly activity report is only intended to reflect lobbying activity *by lobbyists*, and not activity of those who are not lobbyists. The registrant does not report the names of individuals who may perform some lobbying activities, but who do not and are not expected to meet the definition of a lobbyist.

Example: Lobbying Firm “A” filed its initial registration for Client “B” on February 14, listing Lobbyists “X,” “Y,” and “Z.” From January through March, Lobbyists “W” (hired in February) and “X” and “Y” made contacts for “B,” while Lobbyist “Z” was assigned work for other clients. Lobbyist “Z” is expected, however, to be active on behalf of Client “B” after Spring Recess until adjournment. In its first quarter (LD-2) report for Client “B,” filed on or before April 20, Lobbying Firm “A” lists “W,” “X,” and “Y” as lobbyists. “W” is also identified as “new,” and Firm “A” would disclose if “W” occupied a covered position within the last twenty years. “Z” is not listed on the quarterly activity report (LD-2) filed for Client “B” for the January–March quarterly period, but because of the current expectation that he will lobby during the April–June quarterly period, his name **is not delisted** as a lobbyist for “B.”

In the case of a registrant organization with in-house lobbyists, which also engages the services of an outside lobbying firm, the names of outside retained lobbyists *are not* listed on the organization’s registration or quarterly activity reports. However, the registrant’s expenses for such an outside lobbying firm must be part of the registrant’s lobbying expense calculations and disclosure. The outside lobbying firm would file its own report pursuant to the LDA, listing the names of its lobbyists, as appropriate.

New lobbyists must be disclosed in the appropriate General Issue Area for the reporting period in which the individual first meets the definition of lobbyist. Filers need to list a new lobbyist’s previous covered executive or legislative branch positions held within twenty (20) years of first acting as a lobbyist for a client. Once a filer has met the previously described statutory requirement for listing a new lobbyist’s previous covered position(s), then the filer does not have to list those positions again for subsequent reports concerning the same client. If a registrant lists that lobbyist for the first time on a report/registration regarding a different client, then the registrant must list that lobbyist’s previous covered positions held within twenty (20) years of first acting as a lobbyist for the new client.

We are aware that there will be situations in which a registrant expects an individual to become a lobbyist and wishes to disclose the name of that individual as a matter of public record. However, the LDA ([2 U.S.C. § 1604](#)), provides that updated registration information is contained in the registrant’s next quarterly activity report (LD-2). Therefore, there may be a period of time in which an individual is legitimately making lobbying contacts but is not identified on the public record until the next quarterly activity report (LD-2) is filed. In such cases, the registrant reports updated information as the LDA requires.

A foreign entity is reported on the quarterly activity report (LD-2) if both of two circumstances apply: 1) the foreign entity must be an entity that is required to be identified on the registration (LD-1) or on the Information Update page on the quarterly activity report (LD-2). That, in turn, depends on whether the entity meets one of the three conditions of the LDA ([2 U.S.C. § 1603\(b\)\(4\)](#)); and 2) the entity must have an interest in the specific lobbying issues listed on the quarterly activity report (LD-2). If a foreign entity has an interest in the specific issues, the quarterly activity report (LD-2) requires a description of that interest. For the sake of clarity the registrant should indicate whether the foreign entity(s) is/are the same as identified on the registration. The requirement to disclose a foreign interest is not contingent upon the entity making a contribution of \$5,000 or more to the registrant during that particular reporting period.

Example: “[Name of foreign entity], identified on Registration (LD-1), exports [type of product] to United States and would benefit from [specific desired outcome].”

**Filers are expected to use reasonable care when filling out and submitting registrations (LD-1), quarterly activity reports (LD-2), and semiannual contribution reports (LD-203).**

## **Section 7 – Semiannual Reporting of Certain Contributions**

### **When and Why a Report is Needed**

Registrants and lobbyists must file a semiannual contribution report (LD-203) by July 30 and January 30 (or on the next business day should either day occur on a weekend or holiday) for each semiannual period in which a registrant or lobbyist remains active (and regardless of whether they do or do not make reportable contributions). An “active” registrant is one that has not filed a valid termination report for all clients. An “active” lobbyist is an individual who has been listed on any registration (LD-1) or quarterly activity report (LD-2) and who has not been terminated/delisted by the registrant. **If a lobbyist is listed as active on a quarterly activity report (LD-2) for all or any part of a semi-annual period**, he or she must file a contribution report (LD-203) for that period ([see Guidance Section 8](#)). [2 U.S.C. § 1604](#) states that “each person or organization who is registered or is required to register...and each employee who is or is required to be listed as a lobbyist...shall file a report.” Thus, the requirement to file a contribution report (LD-203) falls upon all lobbyists who were listed on a registration (LD-1) or quarterly activity report (LD-2), regardless of whether they were required to be listed (as in the case in which a registrant listed an individual as a lobbyist in an abundance of caution). Any lobbyist who is reported on a registration (LD-1) or quarterly activity report (LD-2) must file a contribution report (LD-203), unless that lobbyist has been terminated/delisted on the quarterly activity report (LD-2) for all clients of the registrant prior to the beginning of the relevant LD-203 filing period. The Secretary and the Clerk view the registration (LD-1) and quarterly activity report (LD-2) as determinative for an individual lobbyist’s obligation to file a contribution report (LD-203).

**Sole proprietors and small lobbying firms are reminded that two contribution reports are required: one filed by the registrant and one filed by the listed lobbyist (even if the lobbyist is the registrant and vice versa).**

Example: A sole proprietor is registered identifying the sole proprietorship business name as the registrant name. The lobbyist's name is also listed as a lobbyist on the registration (LD-1) and on subsequent quarterly activity reports (LD-2). When the **registrant** contribution report (LD-203) is due from the registrant sole proprietorship business organization, the **lobbyist** contribution report (LD-203) is **also** due from the individual lobbyist. Two contribution reports must be filed, one report using the registrant login ID and password, and one report using the lobbyist login ID and password.

**Filers are expected to use reasonable care when filling out and submitting registrations (LD-1), quarterly activity reports (LD-2), and semiannual contribution reports (LD-203).** The coverage periods for the semiannual reports are January 1 through June 30, and July 1 through December 31. **The Secretary and the Clerk do not have the authority under the LDA to grant extensions for filing lobbying disclosure documents.**

### **Mandatory Electronic Filing**

The LDA ([2 U.S.C. § 1604](#)) requires mandatory electronic filing of all lobbying registrations and reports. The only exception to mandatory electronic filing is for the purpose of compliance with the Americans with Disabilities Act. The online electronic filing system provides usability for people with vision impairments who have the appropriate software and hardware. If you have questions or need assistance regarding additional ADA accommodations, please contact the Senate Office of Public Records at (202) 224-0758.

It is necessary for each active lobbyist to obtain his/her individual user identification number and password in order to file semiannual lobbyist contribution reports (LD-203) electronically with the Secretary and Clerk. The registrant must add every lobbyist name into the contribution reporting system (under the Manage Lobbyist tab) in order for the individual lobbyist to obtain an identification number and set up a private password.

**Each and every registrant and lobbyist is responsible for maintaining the confidentiality and use of the user password and for all filings made using their assigned user ID and password. Filers should notify the Secretary and Clerk immediately upon learning of any unauthorized use of a user ID and/or password, as it is presumed that filings are made by the filer.**

### **Semiannual Reporting of Certain Contributions - Contents of Report**

The core information required by the LDA ([2 U.S.C. § 1604\(d\)](#)) and incorporated into the semiannual contribution report (LD-203) is: (1) certain contributions that are not disclosed in the quarterly activity report (LD-2); and (2) a certification that the filer has read and understands the gift and travel provisions in the Rules of both the House of Representatives and the Senate, and that the filer has not knowingly violated the aforementioned Rules.

The LDA ([2 U.S.C. § 1604\(d\)](#)) requires specific information regarding certain contributions and payments made by the filer (i.e., each active registrant and active lobbyist), as well as any political committee established or controlled by the filer. In determining contributions and/or

payments to report, it is important to note that, in some cases, a leadership PAC (as defined by the Federal Election Campaign Act, FECA) or a former leadership PAC (for example, in the case of a lobbyist who was previously a covered official) may be a political committee established, financed, maintained, or controlled by a lobbyist. Also, a political committee that has changed from a principal campaign committee into a multicandidate committee (defined in the FECA) could be considered to have been established by a covered official or federal candidate. Finally, the FECA defines those organizations that may establish separate segregated funds (SSFs).

The LDA ([2 U.S.C. § 1604\(d\)](#)) requires the filer to disclose for itself, and for any political committee the filer establishes or controls:

- The date, recipient, and amount of funds contributed (including in-kind contributions) to any Federal candidate or officeholder, leadership PAC, or political party committee (registered with the Federal Election Commission), if the aggregate during the period to that recipient equals or exceeds \$200. Please note that contributions to state and/or local candidates and committees not required to be registered with the Federal Election Commission need not be disclosed.
- The date, the name of honoree and/or honorees, the payee(s) and amount of funds paid for an event to honor or recognize a covered Legislative Branch or covered Executive Branch official (except for information required to be disclosed by another entity under [52 U.S.C. § 30104](#)).
- The date, the name of honoree and/or honorees, the payee(s) and amount of funds paid to an entity or person that is named for a covered Legislative Branch official, or to an entity or person in recognition of such official (except for information required to be disclosed by another entity under [52 U.S.C. § 30104](#)).
- The date, recipient, the name of the covered official, the payee(s) and amount of funds paid to an entity established, financed, maintained, or controlled by a covered Legislative or Executive Branch official or to an entity designated by such official (except for information required to be disclosed by another entity under [52 U.S.C. § 30104](#)).
- A non-voting board member (e.g. honorary or ex-officio) does not control an organization for these purposes. For purposes of the LDA, the term “designated,” for instance, includes a covered legislative branch official’s or covered executive branch official’s directing a charitable contribution in lieu of an honoraria pursuant to House, Senate, or executive branch Ethics rules. It also includes a payment that is directed to an entity by a covered official who is also on the board of the entity. In contrast, a contribution following a mere statement of support or solicitation does not necessarily constitute a reportable event under ([2 U.S.C. § 1604\(d\)](#)), without some further role by a covered official.
- Please note that a charitable organization established by a person before that person became a covered official and where that covered official has no relationship to the organization after becoming a covered official, is not considered to be one established by a covered official.
- Please also note that a covered official’s de minimis contribution to a charity (in proportion to the charity’s overall receipts of contributions) is not an indication of financing, maintaining, or controlling the charity (although supplemental facts might require reporting the contribution).

- The date, the name of honoree and/or honorees, the payee(s) and amount of funds paid for a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered Legislative Branch or covered Executive Branch officials (except for information required to be disclosed by another entity under [52 U.S.C. § 30104](#)). Costs related to non-preferential sponsorship of a multi-candidate primary/general election debate for a particular office do not have to be disclosed on an LD-203 report.
- The date, the name of honoree, the payee(s) and amount of funds equal to or exceeding \$200 paid to each Presidential library foundation and each Presidential inaugural committee. Please note that contributions to the official Presidential Transition Organization (“PTO”) of the President-elect and Vice President-elect are reportable under the Presidential Transition Act and not reportable under the LDA.

In the case of items 2–6 above, if a lobbyist makes a reportable payment but is reimbursed by a registrant, the registrant reports the payment as its own, rather than the lobbyist reporting the payment.

This section of the LDA ([2 U.S.C. § 1604\(d\)](#)) is written broadly, and, in light of other legal provisions, it would be prudent to consult with the appropriate Ethics Committee, or the Office of Government Ethics, in order to determine if any event listed above is otherwise prohibited under law, Senate or House Rules, or Executive Branch regulations. For some events, it may be prudent to consult with the Federal Election Commission as well. Please note that the LDA and the Federal Election Campaign Act are not harmonized to contributions of exactly \$200.

Example 1: In State “A,” a group of constituents involved in widget manufacturing decide to honor Senator “Y” and Representative “T” with the “Widget Manufacturing Legislative Leaders of 2015” plaques. Registrant “B” is aware that “Y” has checked with the Senate Select Committee on Ethics regarding her ability to accept the award and attend the coffee, and “T” has checked with the House Committee on Ethics. “B” pays caterer “Z” \$500 and Hotel “H” \$200 to partially fund the event. “B” would report that it paid \$500 to “Z” and \$200 to “H” on November 20, 2015 for the purpose of an event to honor or recognize “Y” and “T” with the plaques.

Example 2: After checking to discover if the activity is permissible, Lobbyist “C” contributes \$300 on June 1, 2015 to Any State University toward the endowment of a chair named for Senator “Y.” “C” would report the information above noting that the payment was made to Any State for the endowment of “Y’s” chair.

Example 3: Senator “Y” has been asked to speak at a conference held in Washington, D.C., sponsored by a professional association of which Registrant “B” is a member. “B” makes a donation of \$100 to Charity “X” in lieu of the association paying a speaking fee (i.e., a contribution in lieu of honoraria). “B” would disclose a contribution of \$100 on the date of the payment, with the notation that the payment was made as a contribution in lieu of honoraria to an entity designated by “Y.”

Example 4: There is a large regional conference on “Saving Our River,” sponsored by three 501(c)(3) organizations. Senator “Y” and Representative “T” are given “Champions of Our River” awards at a dinner event that is part of the conference. Registrant “B” contributes \$3,000



specifically for the costs of the dinner event, paying one of the sponsors directly. At the time of the specific or restricted contribution, “B” was aware that “Y” and “T” would be honorees. Regardless of whether “B” is a sponsor under House or Senate gift rules and although B is not listed on the invitation as a sponsor (or the like) nor is publicly held out as a sponsor (or the like), since “B” partially paid for the cost of the event, “B” would disclose a payment of \$3,000 on the relevant date payable to the sponsor with the notation that “Y” and “T” were honored.

Example 5: Registrant “B,” an industry organization, hosts its annual gala dinner and gives a “Legislator of the Year” award to Representative “T.” Revenues from the gala dinner help fund Registrant “B’s” activities throughout the year. Registrant “B” must report: 1) the cost of the event (hotel, food, flowers, etc., but not indirect costs such as host staff salaries and host office overhead); 2), the payee(s) (as a convenience to filers, separate vendors may be aggregated by using the term “various vendors”); and 3) that the event honored Representative “T.” Please note that “B” must still separately report the cost of any item that “B” gave “T.” The fact that the event helped raise funds for the organization does not change the reporting requirement, though it could be noted in the filing.

Example 6: Registrant “B,” an industry organization, has an annual two-day “Washington fly-in” for its members. Among the events for its members is an event on “The Importance of Industry G to the U.S. Economy.” Senator “T” is listed on the invitation as a speaker at the event. Based on these facts alone, Registrant “B” would not need to report the event under this section. For a covered official to speak at such an event would not, in and of itself, form the basis for concluding that the official is to be honored or recognized. Supplemental facts might require reporting the cost of the event. For example, if Senator “T” were given a special award, recognition, or honor (which may not necessarily be through the receipt of a physical object) by the organization at the event, the cost of the event would have to be reported, even if the invitation did not indicate that such would be given. Simply designating a covered official as a “speaker” at an event at which the covered official receives a special award, recognition, or honor, will not permit the filer to avoid or evade reporting the expenses of the event.

Example 7: Senator “Y” and Representative “T” are “honorary co-hosts” of an event sponsored by Registrant “R” to raise funds for a charity, which is not established, financed, maintained, or controlled by either legislator. “Y” and “T’s” passive allowance of their names to be used as “co-hosts,” in and of itself, is not sufficient to be considered “honored or recognized.” The purpose of the event is to raise funds for Charity “V,” not to honor or recognize “Y” or “T.” Nor are these facts (i.e. being passive honorary co-hosts), in and of themselves, sufficient to treat the event as being held “by or in the name” of “Y” or “T.” Supplemental facts might require reporting the cost of the event.

Example 8: Registrant “R” sponsors an event to promote “Widget Awareness.” “The Honorable Cabinet Secretary Z” is listed on the invitation as an “attendee” or “special invitee” but will not receive an honor or award at the event. Based on these facts alone, “R” would not need to include the costs of this event on “R’s” disclosure under this section. Mere listing of “Z’s” anticipated attendance at an event the purpose of which is to promote Widget Awareness, in and of itself, is not sufficient to be considered “honored or recognized”. Use of the phrase “The Honorable” in this context is consistent with widely accepted notions of protocol applicable to

referencing certain very senior government officials. Supplemental facts might require reporting the cost of the event. For instance, if “Z” received a special award, honor, or recognition by “R” at the event, “R” would have to report the costs of the event noting that “Z” was being honored or recognized.

Example 9: Registrant “B” buys a table at a dinner event sponsored by a 501(c) organization to honor Representative “T” but Registrant “B” is not considered a sponsor of the event under House and Senate gift rules. Lobbyist “C” pays the \$150 individual ticket cost to attend the dinner, but is not considered a sponsor of the event under House and Senate gift rules. The purchase of a table or ticket to another entity’s event, in and of itself, is not sufficient to be considered paying the “cost of an event.” Supplemental facts might require reporting the cost of the event. For example, if (1) “B” or “C” undertake activities such that “B” or “C” becomes a sponsor of the event for House and/or Senate gift rule purposes; or (2) “B” or “C” purchase enough tickets/tables so that it would appear that they are paying the costs of the event and/or would not appear to be just ticket or table-buyers (regardless of whether “B” or “C” is a sponsor under House or Senate gift rules), then “B” or “C” would need to report the costs incurred by “B” or “C” (as the case may be) for the event, noting that Representative “T” was the honoree. In the case of filers purchasing multiple tickets and/or tables to an event, a case-by-case analysis will be needed to determine if the quantity is such that it would appear that the filer is paying the costs of the event.

Example 10: Lobbyists “C” and “D” serve on the board of a PAC as member and treasurer respectively. As board members, they are in positions that control direction of the PAC’s contributions. Since both are controlling to whom the PAC’s contributions are given, they must disclose applicable contributions of the PAC on their semiannual LD-203 reports. If “C” and “D” serve on the board of a Separate Segregated Fund (SSF), they may report that they are board members of an SSF in lieu of reporting the SSF’s applicable contributions as long as the SSF’s contributions are reported in the connected organization’s semiannual contribution report (LD-203).

Example 11: Registrant “L” holds an annual fundraising event that honors one person from each of the 50 states whom “L” deems to have played a significant role for the cause “L” supports. In 2015, four of the honorees were covered legislative and executive officials. “L” must disclose the total amount that it paid for the event, disclosing in the payee section “various vendors,” and disclosing the names of the four covered officials. Although not required, and thus at its option, “L” could note in the comments section that four of the 50 honorees were covered officials. This section of the LDA ([2 U.S.C. § 1604\(d\)](#)) does not contemplate a breakdown, delineation, or separation of expenses.

Example 12: Registrant “O” is a university. In June 2015, in conjunction with its commencement event, “O” conferred an honorary degree upon Senator “P.” “O” would report all payments relating to the commencement event (chair rental, lunch for honorees, etc.) on its semiannual contribution report (LD-203), listing “various vendors” as the payee, and Senator “P” as the honoree. Although not required, and thus at its option, “O” could comment that “P” received an honorary degree.

The semiannual contribution report (LD-203) requires a certification that the filer has read and is familiar with those provisions of the Standing Rules of the Senate and the Rules of the House of Representatives relating to the provisions of gifts and travel and has not provided, requested, or directed a gift, including travel, with knowledge that receipt of the gift would violate either Chamber's Rules. Filers check the box to make this certification, and the user's ID and password verifies the filer's identity.

**Each and every registrant and lobbyist is responsible for maintaining the confidentiality and use of the user password and for all filings made using their assigned user ID and password. Filers should notify the Secretary and Clerk immediately upon learning of any unauthorized use of a user ID and/or password, as it is presumed that filings are made by the filer.**

Please note that in the case of a registrant, a signatory is an individual who is responsible for the accuracy of the information contained in the lobbying registration or report. In all cases an individual lobbyist is responsible for all information contained in his or her report. Under the LDA ([2 U.S.C. § 1605](#)), the Secretary and Clerk refer to the U.S. Attorney the names of registrants and lobbyists who fail to provide an appropriate response within sixty (60) days to either officer's written communication rather than the name of the signatory. Both signatories and any third-party preparers should retain appropriate documentation to verify report contents. Third-party preparers should also retain appropriate documentation to demonstrate that they have authorization to make such filings on behalf of all filers (including lobbyist-employees of registrants) using their services.

Each registrant and active lobbyist, regardless of any contribution activity or any lack thereof, must file a semiannual contribution report (LD-203) due to the certification provision.

## **Section 8 – Termination of a Lobbyist/Termination of a Registrant**

### **Termination/Delisting of a Lobbyist**

The LDA is not specific as to how far into the future the registrant should project an expectation that an individual will act as a lobbyist. It seems neither realistic nor necessary to expect registrants to make such projections beyond the next succeeding quarterly reporting period. Accordingly, if a registrant reasonably expects an individual to meet the definition of a lobbyist in either the current or next quarterly period, the lobbyist should remain in an "active" status. If a registrant does not believe this to be the case, the lobbyist can be delisted from the list of lobbyists for the registrant or client. A registrant may terminate a lobbyist by delisting the name only when (i) that individual's lobbying activities on behalf of that client did not constitute at the end of the current quarter, and are not reasonably expected in the upcoming quarter to constitute, 20 percent of the time that such employee is engaged in total activities for that client; or (ii) that individual does not reasonably expect to make further lobbying contacts. In order to properly terminate/delist a lobbyist, the registrant must complete the Information Update page of the quarterly activity report (LD-2), which is used to Update Previously Reported Lobbyist names who are no longer expected to act as lobbyists for the client due to changed job duties, assignments, or employment status. Amending the registration (LD-1) or quarterly activity report

(LD-2) to *erase* a previously listed lobbyist, is not a proper lobbyist termination/delisting. **Simply omitting a lobbyist name from a quarterly activity report is not sufficient to terminate/delist a lobbyist name.**

Example 1: Lobbying Firm “Y” registers for Client “Z” on March 15, 2015, listing employees “A,” “B,” “C,” and “D” on the registration (LD-1). For the first quarterly reporting period in 2015, “Y” will list “A,” “B,” and “C” on the quarterly activity report (LD-2). “D” has no lobbying activities for that quarterly period, so he would not be listed. During the second quarter of 2015, “D” leaves firm “Y” to start his own lobbying business. For the second quarterly period, “Y” will report that “D” no longer meets the definition of “lobbyist” for Client “Z” and delist “D” in the Information Update page of the quarterly activity report (LD-2).

Example 2: Lobbying Firm “Y” registers for Client “Z” as above listing the aforementioned “A,” “B,” “C,” and “D” as lobbyists on March 15, 2015. One month after registration, “C” and “D,” who engaged in lobbying activities for “Z” as partners of “Y,” decide to leave the partnership effective June 1, 2015. On the Q2 Report for 2015, “Y” would report any lobbying activity for “C” and “D” on the quarterly activity report (LD-2). “Y” would also reflect “C” and “D’s” departure by delisting them on the Information Update page in the same report.

An individual who no longer meets the definition of lobbyist under [2 U.S.C. § 1602\(10\)](#) can be relieved from having to file a contribution report (LD-203) for future semiannual periods by properly delisting the lobbyist name on the quarterly activity report (LD-2). This is accomplished by the registrant listing such an individual on the Information Update page of the quarterly activity report (LD-2) for each client for which the individual was previously listed. The obligation to file a contribution report (LD-203) arises from being listed as a lobbyist and not being terminated/delisted by the registrant/employer. Thus, if a lobbyist has not been properly terminated/delisted on the Information Update page of the quarterly activity report (LD-2) for every client for which the lobbyist was listed, the Secretary and Clerk will expect to receive a semiannual contribution report from him/her.

Example: Registrant “A” employs Lobbyist “C” who has lobbying activity on behalf of Client “R” in January and February 2015. In March, Lobbyist “C” no longer expects to engage in lobbying activities for “R” or any other client in the firm, although “C” will continue to do non-lobbying consultation for numerous clients. “A” delists Lobbyist “C” as an active lobbyist by listing “C” on the Information Update page of the quarterly activity report (LD-2) for the Q1 reporting period, and “C” is not listed on subsequent quarterly activity reports. However in July, Lobbyist “C” is required to file a contribution report (LD-203) due July 30 disclosing his activity from January 1 through the date of his termination/delisting.

### **Termination of a Registrant/Client Relationship**

Under the LDA ([2 U.S.C. § 1603\(d\)](#)), a lobbying firm may terminate a registration for a particular client when it is no longer employed or retained by that client to conduct lobbying activities and anticipates no further lobbying activities for that client. An organization employing in-house lobbyists may terminate its registration when in-house lobbying activities have ceased and are not expected to resume. Similarly, in situations in which a registration is filed in

anticipation of meeting the registration threshold that subsequently is not met, a registrant also has the option of termination. The obligation to report quarterly under the LDA arises from active status as a registrant; a report disclosing the final lobbying activity of a registrant is mandatory. In order to terminate the registration, the registrant must file the quarterly activity report (LD-2) by the next quarterly filing date, checking the “Termination Report” box, and supplying the date that the lobbying activity terminated. A valid termination report discloses lobbying income or expenses **and** any lobbying activity by lobbyists during the period up to and including the termination date.

Example 1: Lobbying Firm “A” accepted a contract with Client “B” on January 1, 2015, began lobbying activities, and timely registered on or before February 14. On March 31, the contract with “B” ended. Lobbying Firm “A” must file a quarterly activity report (LD-2) by April 20, 2015, disclosing the lobbying income from and lobbying activity for Client “B” that took place during the period January 1 through March 31. In the filing system, the firm will select the First Quarter and check the box for a “Termination Report” and enter the termination date as “3/31/2015.”

Example 2: Corporation “C” filed its registration on February 14, 2015, listing employee “E” as its only lobbyist. Through March 31, “E” spends less than 20 percent of her total time in lobbying activities. “C” would not have filed a registration if it had foreseen that its lobbying activities would be so limited, and there is no expectation that “E” or any other employee of “C” will meet the [2 U.S.C. § 1602\(10\)](#) definition of “lobbyist” for the April–June quarterly period nor that lobbying expenses will exceed \$13,000. While Corporation “C” as a registrant must file a report for January–March 2015, “C” will check the “Termination Report” box and enter 3/31/15 as the termination date. “C” will also disclose the amount of expenses for the reporting period, and “E’s” lobbying activity for the reporting period.

## **Section 9 – Relationship of the LDA to Other Statutes**

### **Lobbying Disclosure and FARA**

The LDA reflects a determination that the Foreign Agents Registration Act (FARA) standards are appropriate for lobbying on behalf of foreign governments and political parties, but that LDA disclosure standards should apply to other foreign lobbying. An agent of a foreign commercial entity is exempt under FARA if the agent has engaged in lobbying activities and registers under the LDA ([2 U.S.C. § 1603](#)). An agent of a foreign commercial entity not required to register under the LDA (such as those not meeting the de minimis registration thresholds) may voluntarily register under the LDA. The statute affirms the bright line distinction between governmental and non-governmental representations, and is not meant to shroud foreign government enterprises. Questions relating to the Foreign Agents Registration Act must be directed to the Department of Justice Foreign Agent Registration Unit at (202) 233-0776 or (202) 233-0777, or by email at [fara.public@usdoj.gov](mailto:fara.public@usdoj.gov).

### **LDA and IRC**

Restrictions on lobbying by tax-exempt organizations are governed by the definitions in the Internal Revenue Code (IRC), not those of the LDA. The LDA and the IRC intersect in three different ways.

First, the LDA ([2 U.S.C. § 1610](#)) defines which registrants are eligible for the “safe harbor.” This allows entities that are required to report and do report lobbying expenditures under [26 U.S.C. § 6033\(b\)\(8\)](#) of the IRC to use IRC definitions for purposes of LDA sections [2 U.S.C. § 1603\(a\)\(3\)](#) and [2 U.S.C. § 1604\(b\)\(4\)](#). The LDA ([2 U.S.C. § 1610](#)) also allows entities that are subject to [26 U.S.C. § 162\(e\)](#) of the IRC to use IRC definitions for purposes of LDA sections [2 U.S.C. § 1603\(a\)\(3\)](#) and [2 U.S.C. § 1604\(b\)\(4\)](#).

Second, the LDA advises registrants regarding how they should use IRC definitions. Registrants who make the LDA expense election must use for other reporting the IRC definitions (including the IRC definition of a covered Executive Branch official) for Executive Branch lobbying, and the LDA definitions for Legislative Branch lobbying.

Third, the LDA allows electing registrants to insert the amount that is ultimately reportable to the Internal Revenue Service for LDA quarterly activity reports (LD-2).

### **LDA and False Statements Accountability Act of 1996**

The False Statements Accountability Act of 1996, amending [18 U.S.C. § 1001](#), makes it a crime knowingly and willfully: (1) to falsify, conceal, or cover up a material fact by trick, scheme, or device; (2) to make any materially false, fictitious, or fraudulent statement or representation; or (3) to make or use any false writing or document knowing it to contain any materially false, fictitious, or fraudulent statement or entry; with respect to matters within the jurisdiction of the Legislative, Executive, or Judicial branch. The False Statements Accountability Act does not assign any responsibilities to the Secretary and the Clerk.

### **LDA and Prohibitions on the Use of Federal Funds for Lobbying**

The LDA does not itself regulate lobbying by federal grantees, or contractors, though other laws, as well as contractual prohibitions, may apply. Questions concerning lobbying activities of federal grantees or contractors should be directed to the appropriate agency or office administering the contract or grant.

Note, however, that [2 U.S.C. § 1611](#) prohibits 501(c)(4) organizations which engage in lobbying activities from receiving federal funds through an award, grant, or loan.

### **Section 10 – Public Availability**

The LDA requires the Secretary of the Senate and the Clerk of the House of Representatives to make all registrations and reports available for public inspection over the Internet as soon as technically practicable after the report is filed.

Filers are encouraged to use the online databases of lobbying reports to verify compliance. Each database is searchable, sortable, and downloadable. Registrations and reports are available online at the House website at <http://lobbyingdisclosure.house.gov>, as well as the Senate website at <http://www.senate.gov/lobby>.

## **Section 11 – Review and Compliance**

The Secretary of the Senate (Office of Public Records) and the Clerk of the House (Legislative Resource Center) must review, verify, and request corrections in writing to ensure the accuracy, completeness, and timeliness of registrations and reports filed under the LDA.

## **Section 12 – Penalties**

Whoever knowingly fails: (1) to correct a defective filing within 60 days after notice of such a defect by the Secretary of the Senate or the Clerk of the House; or (2) to comply with any other provision of the Act, may be subject to a civil fine of not more than \$200,000, and whoever knowingly and corruptly fails to comply with any provision of this Act may be imprisoned for not more than 5 years or fined under Title 18, United States Code, or both.

## **For Further Information**

### **Senate Office of Public Records**

232 Hart Senate Office Building  
Washington, DC 20510  
(202) 224-0758  
<http://www.senate.gov/lobby>

### **Legislative Resource Center**

B-81 Cannon House Office Building  
Washington, DC 20515  
(202) 226-5200  
<http://lobbyingdisclosure.house.gov>

<sup>1</sup>The Secretary and the Clerk review the Guidance annually. Any questions, comments, and suggestions should be directed to the Senate Office of Public Records and the House Legislative Resource Center.

**THE SENATE CODE OF OFFICIAL CONDUCT**

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**SELECT COMMITTEE ON ETHICS**

**UNITED STATES SENATE**

**ONE HUNDRED FOURTEENTH CONGRESS**

**FIRST SESSION**

**MARCH 2015**



# SELECT COMMITTEE ON ETHICS

United States Senate

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THE SENATE CODE OF OFFICIAL CONDUCT  
(Rules 34 through 43 of the Standing Rules of the Senate)



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## RULE XXXIV

### PUBLIC FINANCIAL DISCLOSURE

1. For purposes of this rule, the provisions of Title I of the Ethics in Government Act of 1978 shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

2. (a)<sup>11</sup> The Select Committee on Ethics shall transmit a copy of each report filed with it under Title I of the Ethics in Government Act of 1978 (other than a report filed by a Member of Congress) to the head of the employing office of the individual filing the report.

(b) For purposes of this rule, the head of the employing office shall be—

(1) in the case of an employee of a Member, the Member by whom that person is employed;

(2) in the case of an employee of a Committee, the chairman and ranking minority member of such Committee;

(3) in the case of an employee on the leadership staff, the Member of the leadership on whose staff such person serves; and

(4) in the case of any other employee of the legislative branch, the head of the office in which such individual serves.

3.<sup>2</sup> In addition to the requirements of paragraph 1, Members, officers, and employees of the Senate shall include in each report filed under paragraph 1<sup>3</sup> the following additional information:

(a) For purposes of section 102(a)(1)(B) of the Ethics in Government Act of 1978 additional categories of income as follows:

(1) greater than \$1,000,000 but not more than \$5,000,000, or

(2) greater than \$5,000,000.

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*NOTE.—Financial disclosure requirements contained in the Ethics in Government Act as amended are codified at 5 U.S.C. App. 6. See Senate Manual Sec. 910, S. Doc. 107–1.*

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<sup>1</sup> Paragraph 2 added pursuant to S. Res. 236, 101–2, Jan. 30, 1990.

<sup>2</sup> Paragraphs 3 and 4 added pursuant to S. Res. 158, 104–1, July 28, 1995, effective Jan. 1, 1996, as amended by S. Res. 198, 104–1, Dec. 7, 1995.

<sup>3</sup> Renumbered pursuant to S. Res. 198, 104–1, Dec. 7, 1995.

(b) For purposes of section 102(d)(1) of the Ethics in Government Act of 1978 additional categories of value<sup>4</sup> as follows:

- (1) greater than \$1,000,000 but not more than \$5,000,000;
- (2) greater than \$5,000,000 but not more than \$25,000,000;
- (3) greater than \$25,000,000 but not more than \$50,000,000; and
- (4) greater than \$50,000,000.

(c) For purposes of this paragraph and section 102 of the Ethics in Government Act of 1978, additional categories with amounts or values greater than \$1,000,000 set forth in section 102(a)(1)(B) and 102(d)(1) shall apply to the income, assets, or liabilities of spouses and dependent children only if the income, assets, or liabilities are held jointly with the reporting individual. All other income, assets, or liabilities of the spouse or dependent children required to be reported under section 102 and this paragraph in an amount of value greater than \$1,000,000 shall be categorized only as an amount or value greater than \$1,000,000.

4.<sup>5</sup> In addition to the requirements of paragraph 1, Members, officers, and employees of the Senate shall include in each report filed under paragraph 1<sup>6</sup> an additional statement under section 102(a) of the Ethics in Government Act of 1978 listing the category of the total cash value of any interest of the reporting individual in a qualified blind trust as provided in section 102(d)(1) of the Ethics in Government Act of 1978, unless the trust instrument was executed prior to July 24, 1995 and precludes the beneficiary from receiving information on the total cash value of any interest in the qualified blind trust.

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<sup>4</sup>The word “value” replaced the word “income” pursuant to S. Res. 198, 104–1, Dec. 7, 1995.

<sup>5</sup>Effective with respect to reports filed under Title I of the Ethics in Government Act of 1978 for calendar year 1996 and thereafter.

<sup>6</sup>Renumbered pursuant to S. Res. 198, 104–1, Dec. 7, 1995.

**RULE XXXV****GIFTS<sup>7</sup>**

1. (a)(1) No Member, officer, or employee of the Senate shall knowingly accept a gift except as provided in this rule.

(2)(A)<sup>8</sup> A Member, officer, or employee may accept a gift (other than cash or cash equivalent) which the Member, officer, or employee reasonably and in good faith believes to have a value of less than \$50, and a cumulative value from one source during a calendar year of less than \$100. No gift with a value below \$10 shall count toward the \$100 annual limit. No formal recordkeeping is required by this paragraph, but a Member, officer, or employee shall make a good faith effort to comply with this paragraph.

(B) A Member, officer, or employee may not knowingly accept a gift from a registered lobbyist, an agent of a foreign principal, or a private entity that retains or employs a registered lobbyist or an agent of a foreign principal, except as provided in subparagraphs (c) and (d).

(b)(1) For the purpose of this rule, the term “gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

(2)(A) A gift to a family member of a Member, officer, or employee, or a gift to any other individual based on that individual’s relationship with the Member, officer, or employee, shall be considered a gift to the Member, officer, or employee if it is given with the knowledge and acquiescence of the Member, officer, or employee and the Member, officer, or employee has reason to believe the gift was given because of the official position of the Member, officer, or employee.

(B) If food or refreshment is provided at the same time and place to both a Member, officer, or employee and the spouse or dependent thereof, only the food or refreshment provided to the Member, officer, or employee shall be treated as a gift for purposes of this rule.

(c) The restrictions in subparagraph (a) shall not apply to the following:

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<sup>7</sup> Amended pursuant to S. Res. 158, 104–1, July 28, 1995, effective Jan. 1, 1996.

<sup>8</sup> Subparagraph (A) renumbered and (B) added pursuant to Pub. L. 110–81, Sep. 14, 2007.



(1)(A)<sup>9</sup> Anything for which the Member, officer, or employee pays the market value, or does not use and promptly returns to the donor.

(B) The market value of a ticket to an entertainment or sporting event shall be the face value of the ticket or, in the case of a ticket without a face value, the value of the ticket with the highest face value for the event, except that if a ticket holder can establish in advance of the event to the Select Committee on Ethics that the ticket at issue is equivalent to another ticket with a face value, then the market value shall be set at the face value of the equivalent ticket. In establishing equivalency, the ticket holder shall provide written and independently verifiable information related to the primary features of the ticket, including, at a minimum, the seat location, access to parking, availability of food and refreshments, and access to venue areas not open to the public. The Select Committee on Ethics may make a determination of equivalency only if such information is provided in advance of the event.

(C)(i)<sup>10</sup> Fair market value for a flight on an aircraft described in item (ii) shall be the pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size, as determined by dividing such cost by the number of Members, officers, or employees of Congress on the flight.

(ii) A flight on an aircraft described in this item is any flight on an aircraft that is not—

(I) operated or paid for by an air carrier or commercial operator certificated by the Federal Aviation Administration and required to be conducted under air carrier safety rules; or

(II) in the case of travel which is abroad, an air carrier or commercial operator certificated by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules.

(iii) This subclause shall not apply to an aircraft owned or leased by a governmental entity or by a Member of Congress or a Member's immediate family member (including an aircraft owned by an entity that is not a public corporation in which the Member or Member's immediate family member has an ownership interest), provided that the Member does not use the aircraft anymore than the Member's or immediate family member's proportionate share of ownership allows.

(2) A contribution, as defined in the Federal Election Campaign Act of 1971 (2 U.S.C. 431 et seq.) that is lawfully made under that Act, or

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<sup>9</sup> Subclause (A) renumbered and (B) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

<sup>10</sup> Subparagraph C added pursuant to Pub. L. 110–81, Sep. 14, 2007.

attendance at a fundraising event sponsored by a political organization described in section 527(e) of the Internal Revenue Code of 1986.

(3) A gift from a relative as described in section 109(16) of Title I of the Ethics Reform Act of 1989 (5 U.S.C. App. 6).<sup>11</sup>

(4)(A) Anything, including personal hospitality,<sup>12</sup> provided by an individual on the basis of a personal friendship unless the Member, officer, or employee has reason to believe that, under the circumstances, the gift was provided because of the official position of the Member, officer, or employee and not because of the personal friendship.

(B) In determining whether a gift is provided on the basis of personal friendship, the Member, officer, or employee shall consider the circumstances under which the gift was offered, such as:

(i) The history of the relationship between the individual giving the gift and the recipient of the gift, including any previous exchange of gifts between such individuals.

(ii) Whether to the actual knowledge of the Member, officer, or employee the individual who gave the gift personally paid for the gift or sought a tax deduction or business reimbursement for the gift.

(iii) Whether to the actual knowledge of the Member, officer, or employee the individual who gave the gift also at the same time gave the same or similar gifts to other Members, officers, or employees.

(5) A contribution or other payment to a legal expense fund established for the benefit of a Member, officer, or employee, that is otherwise lawfully made, subject to the disclosure requirements of the Select Committee on Ethics, except as provided in paragraph 3(c).

(6) Any gift from another Member, officer, or employee of the Senate or the House of Representatives.

(7) Food, refreshments, lodging, and other benefits—

(A) resulting from the outside business or employment activities (or other outside activities that are not connected to the duties of the Member, officer, or employee as an officeholder) of the Member, officer or employee, or the spouse of the Member, officer, or employee, if such benefits have not been offered or enhanced because of the official position of the Member, officer, or employee and are customarily provided to others in similar circumstances;

(B) customarily provided by a prospective employer in connection

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<sup>11</sup> As amended, S. Res. 198, 104–1, Dec. 7, 1995. See Senate Manual Sec. 918, S. Doc. 107–1, for definitions.

<sup>12</sup> The phrase “including personal hospitality” inserted pursuant to S. Res. 198, 104–1, Dec. 7, 1995.

with bona fide employment discussions; or

(C) provided by a political organization described in section 527(e) of the Internal Revenue Code of 1986 in connection with a fundraising or campaign event sponsored by such an organization.

(8) Pension and other benefits resulting from continued participation in an employee welfare and benefits plan maintained by a former employer.

(9) Informational materials that are sent to the office of the Member, officer, or employee in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication.

(10) Awards or prizes which are given to competitors in contests or events open to the public, including random drawings.

(11) Honorary degrees (and associated travel, food, refreshments, and entertainment) and other bona fide, nonmonetary awards presented in recognition of public service (and associated food, refreshments, and entertainment provided in the presentation of such degrees and awards).

(12) Donations of products from the State that the Member represents that are intended primarily for promotional purposes, such as display or free distribution, and are of minimal value to any individual recipient.

(13) Training (including food and refreshments furnished to all attendees as an integral part of the training) provided to a Member, officer, or employee, if such training is in the interest of the Senate.

(14) Bequests, inheritances, and other transfers at death.

(15) Any item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute.

(16) Anything which is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract.

(17) A gift of personal hospitality (as defined in section 109(14) of the Ethics in Government Act)<sup>13</sup> of an individual other than a registered lobbyist or agent of a foreign principal.

(18) Free attendance at a widely attended event permitted pursuant to subparagraph (d).

(19) Opportunities and benefits which are—

(A) available to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;

(B) offered to members of a group or class in which membership is unrelated to congressional employment;

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<sup>13</sup> See Senate Manual Sec. 918, S. Doc. 107-1, for definitions.

(C) offered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;

(D) offered to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;

(E) in the form of loans from banks and other financial institutions on terms generally available to the public; or

(F) in the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.

(20) A plaque, trophy, or other item that is substantially commemorative in nature and which is intended solely for presentation.

(21) Anything for which, in an unusual case, a waiver is granted by the Select Committee on Ethics.

(22) Food or refreshments of a nominal value offered other than as a part of a meal.

(23) An item of little intrinsic value such as a greeting card, baseball cap, or a T-shirt.

(24)<sup>14</sup> Subject to the restrictions in subparagraph (a)(2)(A), free attendance at a constituent event permitted pursuant to subparagraph (g).

(d)(1) A Member, officer, or employee may accept an offer of free attendance at a widely attended convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event, provided by the sponsor of the event, if—

(A) the Member, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the Member's, officer's, or employee's official position; or

(B) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer, or employee.

(2) A Member, officer, or employee who attends an event described in clause (1) may accept a sponsor's unsolicited offer of free attendance at the

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<sup>14</sup> Clause (24) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

event for an accompanying individual if others in attendance will generally be similarly accompanied or if such attendance is appropriate to assist in the representation of the Senate.

(3) A Member, officer, or employee, or the spouse or dependent thereof, may accept a sponsor's unsolicited offer of free attendance at a charity event, except that reimbursement for transportation and lodging may not be accepted in connection with an event that does not meet the standards provided in paragraph 2.

(4) For purposes of this paragraph, the term "free attendance" may include waiver of all or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event. The term does not include entertainment collateral to the event, nor does it include food or refreshments taken other than in a group setting with all or substantially all other attendees.

(5)<sup>15</sup> During the dates of the national party convention for the political party to which a Member belongs, a Member may not participate in an event honoring that Member, other than in his or her capacity as the party's presidential or vice presidential nominee or presumptive nominee, if such event is directly paid for by a registered lobbyist or a private entity that retains or employs a registered lobbyist.

(e) No Member, officer, or employee may accept a gift the value of which exceeds \$250 on the basis of the personal friendship exception in subparagraph (c)(4) unless the Select Committee on Ethics issues a written determination that such exception applies. No determination under this subparagraph is required for gifts given on the basis of the family relationship exception.

(f) When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed.

(g)(1)<sup>16</sup> A Member, officer, or employee may accept an offer of free attendance in the Member's home State at a conference, symposium, forum, panel discussion, dinner event, site visit, viewing, reception, or similar event, provided by a sponsor of the event, if—

(A) the cost of meals provided the Member, officer, or employee is less than \$50;

(B)(i) the event is sponsored by constituents of, or a group that consists primarily of constituents of, the Member (or the Member by whom the

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<sup>15</sup> Clause (5) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

<sup>16</sup> Subparagraph (g) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

officer or employee is employed); and

(ii) the event will be attended primarily by a group of at least 5 constituents of the Member (or the Member by whom the officer or employee is employed) provided that a registered lobbyist shall not attend the event; and

(C)(i) the Member, officer, or employee participates in the event as a speaker or a panel participant, by presenting information related to Congress or matters before Congress, or by performing a ceremonial function appropriate to the Member's, officer's, or employee's official position; or

(ii) attendance at the event is appropriate to the performance of the official duties or representative function of the Member, officer, or employee.

(2) A Member, officer, or employee who attends an event described in clause (1) may accept a sponsor's unsolicited offer of free attendance at the event for an accompanying individual if others in attendance will generally be similarly accompanied or if such attendance is appropriate to assist in the representation of the Senate.

(3) For purposes of this subparagraph, the term 'free attendance' has the same meaning given such term in subparagraph (d).

2.17(a)(1)<sup>18</sup> A reimbursement (including payment in kind) to a Member, officer, or employee from an individual other than a registered lobbyist or agent of a foreign principal or a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal for necessary transportation, lodging and related expenses for travel to a meeting, speaking engagement, factfinding trip or similar event in connection with the duties of the Member, officer, or employee as an officeholder shall be deemed to be a reimbursement to the Senate and not a gift prohibited by this rule, if the Member, officer, or employee complies with the requirements of this paragraph.

(2)(A)<sup>19</sup> Notwithstanding clause (1), a reimbursement (including payment in kind) to a Member, officer, or employee of the Senate from an individual, other than a registered lobbyist or agent of a foreign principal, that is a private entity that retains or employs 1 or more registered lobbyists or agents of a

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<sup>17</sup> (Note: amendments to paragraph (2) pursuant to Pub. L. 110-81, Sep. 14, 2007, take effect 60 days after enactment or the date that the Select Committee on Ethics issues new guidelines pertaining to this paragraph.)

<sup>18</sup> Subparagraph (a)(1) was amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

<sup>19</sup> Clause (2) was added pursuant to Pub. L. 110-81, Sep. 14, 2007.

foreign principal shall be deemed to be a reimbursement to the Senate under clause (1) if—

(i) the reimbursement is for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event described in clause (1) in connection with the duties of the Member, officer, or employee and the reimbursement is provided only for attendance at or participation for 1 day (exclusive of travel time and an overnight stay) at an event described in clause (1); or

(ii) the reimbursement is for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, factfinding trip, or similar event described in clause (1) in connection with the duties of the Member, officer, or employee and the reimbursement is from an organization designated under section 501(c)(3) of the Internal Revenue Code of 1986.

(B) When deciding whether to preapprove a trip under this clause, the Select Committee on Ethics shall make a determination consistent with regulations issued pursuant to section 544(b) of the Honest Leadership and Open Government Act of 2007. The committee through regulations to implement subclause (A)(i) may permit a longer stay when determined by the committee to be practically required to participate in the event, but in no event may the stay exceed 2 nights.

(3)<sup>20</sup> For purposes of clauses (1) and (2), events, the activities of which are substantially recreational in nature, shall not be considered to be in connection with duties of a Member, officer, or employee as an officeholder.

(b)<sup>21</sup> Before an employee may accept reimbursement pursuant to subparagraph (a), the employee shall receive advance written authorization from the Member or officer under whose direct supervision the employee works. Each advance authorization to accept reimbursement shall be signed by the Member or officer under whose direct supervision the employee works and shall include—

- (1) the name of the employee;
- (2) the name of the person who will make the reimbursement;
- (3) the time, place, and purpose of the travel; and
- (4) a determination that the travel is in connection with the duties of the employee as an officeholder and would not create the appearance that the employee is using public office for private gain.

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<sup>20</sup> Clause (3) was renumbered and amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

<sup>21</sup> Subparagraph (b) amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

(c)<sup>22</sup> Each Member, officer, or employee that receives reimbursement under this paragraph shall disclose the expenses reimbursed or to be reimbursed, the authorization under subparagraph (b) (for an employee), and a copy of the certification in subparagraph (e)(1) to the Secretary of the Senate not later than 30 days after the travel is completed. Each disclosure made under this subparagraph of expenses reimbursed or to be reimbursed shall be signed by the Member or officer (in the case of travel by that Member or officer) or by the Member or officer under whose direct supervision the employee works (in the case of travel by an employee) and shall include —

(1) a good faith estimate of total transportation expenses reimbursed or to be reimbursed;

(2) a good faith estimate of total lodging expenses reimbursed or to be reimbursed;

(3) a good faith estimate of total meal expenses reimbursed or to be reimbursed;

(4) a good faith estimate of the total of other expenses reimbursed or to be reimbursed;

(5) a determination that all such expenses are necessary transportation, lodging, and related expenses as defined in this paragraph;

(6)<sup>23</sup> a description of meetings and events attended; and

(7)<sup>24</sup> in the case of a reimbursement to a Member or officer, a determination that the travel was in connection with the duties of the Member or officer as an officeholder and would not create the appearance that the Member or officer is using public office for private gain.

(d)(1)<sup>25</sup> A Member, officer, or employee of the Senate may not accept a reimbursement (including payment in kind) for transportation, lodging, or related expenses under subparagraph (a) for a trip that was—

(A) planned, organized, or arranged by or at the request of a registered lobbyist or agent of a foreign principal; or

(B)(i) for trips described under subparagraph (a)(2)(A)(i) on which a registered lobbyist accompanies the Member, officer, or employee on any segment of the trip; or

(ii) for all other trips allowed under this paragraph, on which a registered lobbyist accompanies the Member, officer, or employee at any point

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<sup>22</sup> Subparagraph (c) amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

<sup>23</sup> Clause (6) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

<sup>24</sup> Clause (7) renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

<sup>25</sup> Subparagraph (d) added pursuant to Pub. L. 110–81, Sep. 14, 2007.



throughout the trip.

(2) The Select Committee on Ethics shall issue regulations identifying de minimis activities by registered lobbyists or foreign agents that would not violate this subparagraph.

(e)<sup>26</sup> A Member, officer, or employee shall, before accepting travel otherwise permissible under this paragraph from any source—

(1) provide to the Select Committee on Ethics a written certification from such source that—

(A) the trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;

(B) the source either—

(i) does not retain or employ registered lobbyists or agents of a foreign principal and is not itself a registered lobbyist or agent of a foreign principal; or

(ii) certifies that the trip meets the requirements of subclause (i) or (ii) of subparagraph (a)(2)(A);

(C) the source will not accept from a registered lobbyist or agent of a foreign principal or a private entity that retains or employs 1 or more registered lobbyists or agents of a foreign principal, funds earmarked directly or indirectly for the purpose of financing the specific trip; and

(D) the trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal and the traveler will not be accompanied on the trip consistent with the applicable requirements of subparagraph (d)(1)(B) by a registered lobbyist or agent of a foreign principal, except as permitted by regulations issued under subparagraph (d)(2); and

(2) after the Select Committee on Ethics has promulgated regulations pursuant to section 544(b) of the Honest Leadership and Open Government Act of 2007, obtain the prior approval of the committee for such reimbursement.

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<sup>26</sup> Subparagraph (e) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

(f)<sup>27</sup> For the purposes of this paragraph, the term “necessary transportation, lodging, and related expenses”—

(1) includes reasonable expenses that are necessary for travel for a period not exceeding 3 days exclusive of travel time within the United States or 7 days exclusive of travel time outside of the United States unless approved in advance by the Select Committee on Ethics;

(2) is limited to reasonable expenditures for transportation, lodging, conference fees and materials, and food and refreshments, including reimbursement for necessary transportation, whether or not such transportation occurs within the periods described in clause (1);

(3) does not include expenditures for recreational activities, nor does it include entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this rule; and

(4) may include travel expenses incurred on behalf of either the spouse or a child of the Member, officer, or employee, subject to a determination signed by the Member or officer (or in the case of an employee, the Member or officer under whose direct supervision the employee works) that the attendance of the spouse or child is appropriate to assist in the representation of the Senate.

(g) The Secretary of the Senate shall make all advance authorizations, certifications, and disclosures filed pursuant to this paragraph available for public inspection as soon as possible after they are received, but in no event prior to the completion of the relevant travel.

3. A gift prohibited by paragraph 1(a) includes the following:

(a) Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, officer, or employee.

(b) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, officer, or employee (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph 4.

(c) A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, officer, or employee.

(d) A financial contribution or expenditure made by a registered lobbyist

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<sup>27</sup> Subparagraph (f) renumbered and subparagraph (g) renumbered and amended pursuant to Pub. L. 110–81, Sep. 14, 2007.

or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, officers, or employees.

4. (a) A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal in lieu of an honorarium to a Member, officer, or employee shall not be considered a gift under this rule if it is reported as provided in subparagraph (b).

(b) A Member, officer, or employee who designates or recommends a contribution to a charitable organization in lieu of honoraria described in subparagraph (a) shall report within 30 days after such designation or recommendation to the Secretary of the Senate—

- (1) the name and address of the registered lobbyist who is making the contribution in lieu of honoraria;
- (2) the date and amount of the contribution; and
- (3) the name and address of the charitable organization designated or recommended by the Member.

The Secretary of the Senate shall make public information received pursuant to this subparagraph as soon as possible after it is received.

5. For purposes of this rule—

(a) the term “registered lobbyist” means a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute; and

(b) the term “agent of a foreign principal” means an agent of a foreign principal registered under the Foreign Agents Registration Act.

6. All the provisions of this rule shall be interpreted and enforced solely by the Select Committee on Ethics. The Select Committee on Ethics is authorized to issue guidance on any matter contained in this rule.

**RULE XXXVI<sup>28</sup>****OUTSIDE EARNED INCOME**

For purposes of this rule, the provisions of section 501 of the Ethics in Government Act of 1978 (5 U.S.C. App. 7 501) shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

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<sup>28</sup> Previous provisions of Rule XXXVI were repealed by S. Res. 512, 97–2, Dec. 14, 1982, effective Jan. 1, 1983. New Rule XXXVI language established by S. Res. 192, 102–1, Oct. 31, 1991, effective Aug. 14, 1991. See Senate Manual Secs. 922–926, S. Doc. 107–1, for provisions of 5 U.S.C. App. 7.

**RULE XXXVII****CONFLICT OF INTEREST**

1. A Member, officer, or employee of the Senate shall not receive any compensation, nor shall he permit any compensation to accrue to his beneficial interest from any source, the receipt or accrual of which would occur by virtue of influence improperly exerted from his position as a Member, officer, or employee.

2. No Member, officer, or employee shall engage in any outside business or professional activity or employment for compensation which is inconsistent or in conflict with the conscientious performance of official duties.

3. No officer or employee shall engage in any outside business or professional activity or employment for compensation unless he has reported in writing when such activity or employment commences and on May 15 of each year thereafter so long as such activity or employment continues, the nature of such activity or employment to his supervisor. The supervisor shall then, in the discharge of his duties, take such action as he considers necessary for the avoidance of conflict of interest or interference with duties to the Senate.

4. No Member, officer, or employee shall knowingly use his official position to introduce or aid the progress or passage of legislation, a principal purpose of which is to further only his pecuniary interest, only the pecuniary interest of his immediate family, or only the pecuniary interest of a limited class of persons or enterprises, when he, or his immediate family, or enterprises controlled by them, are members of the affected class.

5. (a)<sup>29</sup> No Member, officer, or employee of the Senate compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall (1) affiliate with a firm, partnership, association, or corporation for the purpose of providing professional services for compensation; (2) permit that individual's name to be used by such a firm, partnership, association or corporation; or (3) practice a profession for compensation to any extent during regular office hours of the Senate office in which employed. For the purposes of this paragraph, "professional services" shall include but not be limited to those which involve a fiduciary relationship.

(b) A Member or an officer or employee whose rate of basic pay is equal to or greater than 120 percent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule shall not—

(1) receive compensation for affiliating with or being employed by a

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<sup>29</sup> Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991, paragraph 5 renumbered 5(a) and subparagraph (b) added.

firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship; or

(4) receive compensation for teaching, without the prior notification and approval of the Select<sup>30</sup> Committee on Ethics.

6. (a)<sup>31</sup> No Member, officer, or employee of the Senate compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a calendar year shall serve as an officer or member of the board of any publicly held or publicly regulated corporation, financial institution, or business entity. The preceding sentence shall not apply to service of a Member, officer, or employee as—

(1) an officer or member of the board of an organization which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, if such service is performed without compensation;

(2) an officer or member of the board of an institution or organization which is principally available to Members, officers, or employees of the Senate, or their families, if such service is performed without compensation; or

(3) a member of the board of a corporation, institution, or other business entity, if (A) the Member, officer, or employee had served continuously as a member of the board thereof for at least two years prior to his election or appointment as a Member, officer, or employee of the Senate, (B) the amount of time required to perform such service is minimal, and (C) the Member, officer, or employee is not a member of, or a member of the staff of any Senate committee which has legislative jurisdiction over any agency of the Government charged with regulating the activities of the corporation, institution, or other business entity.

(b) A Member or an officer or employee whose rate of basic pay is equal to or greater than 120 percent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule shall not serve for compensation as an officer or member of the board of any association, corporation, or other entity.

7. An employee on the staff of a committee who is compensated at a rate in excess of \$25,000 per annum and employed for more than ninety days in a

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<sup>30</sup> Added pursuant to S. Res. 299, 106-2, Apr. 27, 2000.

<sup>31</sup> Pursuant to S. Res. 192, 102-1, Oct. 31, 1991, effective Aug. 14, 1991, paragraph 6 renumbered 6(a) and subparagraph (b) added.

calendar year shall divest himself of any substantial holdings which may be directly affected by the actions of the committee for which he works, unless the Select Committee, after consultation with the employee's supervisor, grants permission in writing to retain such holdings or the employee makes other arrangements acceptable to the Select Committee and the employee's supervisor to avoid participation in committee actions where there is a conflict of interest, or the appearance thereof.

8.<sup>32</sup> If a Member, upon leaving office, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, he shall not lobby Members, officers, or employees of the Senate for a period of two years after leaving office.

9. (a) If an employee on the staff of a Member, upon leaving that position, becomes a registered lobbyist under the Federal Regulation of Lobbying Act of 1946 or any successor statute, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the Member for whom he worked or that Member's staff for a period of one year after leaving that position.

(b) If an employee on the staff of a committee, upon leaving his position, becomes such a registered lobbyist or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby the members of the committee for which he worked, or the staff of that committee, for a period of one year after leaving his position.

(c)<sup>33</sup> If an officer of the Senate or an employee on the staff of a Member or on the staff of a committee whose rate of pay is equal to or greater than 75 percent of the rate of pay of a Member and employed at such rate for more than 60 days in a calendar year, upon leaving that position, becomes a registered lobbyist, or is employed or retained by such a registered lobbyist or an entity that employs or retains a registered lobbyist for the purpose of influencing legislation, such employee may not lobby any Member, officer, or employee of the Senate for a period of 1 year after leaving that position.

10.<sup>34</sup> Paragraphs 8 and 9 shall not apply to contacts with the staff of the

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<sup>32</sup> Paragraphs 8 and 9 amended pursuant to Pub. L. 110-81, Sep. 14, 2007.

<sup>33</sup> (Note: paragraph 9(c) shall apply to individuals who leave the office or employment to which such paragraph applies on or after the date of adjournment of the 1st session of the 110th Congress sine die or Dec. 31, 2007, whichever date is earlier.)

<sup>34</sup> Paragraphs 10 and 11 added pursuant to Pub. L. 110-81, Sep. 14, 2007.

Secretary of the Senate regarding compliance with the lobbying disclosure requirements of the Lobbying Disclosure Act of 1995.

11. (a) If a Member's spouse or immediate family member is a registered lobbyist, or is employed or retained by such a registered lobbyist or an entity that hires or retains a registered lobbyist for the purpose of influencing legislation, the Member shall prohibit all staff employed or supervised by that Member (including staff in personal, committee, and leadership offices) from having any contact with the Member's spouse or immediate family member that constitutes a lobbying contact as defined by section 3 of the Lobbying Disclosure Act of 1995 by such person.

(b) Members and employees on the staff of a Member (including staff in personal, committee, and leadership offices) shall be prohibited from having any contact that constitutes a lobbying contact as defined by section 3 of the Lobbying Disclosure Act of 1995 by any spouse of a Member who is a registered lobbyist, or is employed or retained by such a registered lobbyist.

(c) The prohibition in subparagraph (b) shall not apply to the spouse of a Member who was serving as a registered lobbyist at least 1 year prior to the most recent election of that Member to office or at least 1 year prior to his or her marriage to that Member.

12. (a)<sup>35</sup> Except as provided by subparagraph (b), any employee of the Senate who is required to file a report pursuant to rule XXXIV shall refrain from participating personally and substantially as an employee of the Senate in any contact with any agency of the executive or judicial branch of Government with respect to non-legislative matters affecting any non-governmental person in which the employee has a significant financial interest.

(b) Subparagraph (a) shall not apply if an employee first advises his supervising authority of his significant financial interest and obtains from his employing authority a written waiver stating that the participation of the employee is necessary. A copy of each such waiver shall be filed with the Select Committee.

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<sup>35</sup> Pursuant to S. Res. 236, 101-2, Jan. 30, 1990, paragraphs 10. and 11. were renumbered as 11. and 12. respectively and paragraph 10. was added. Paragraph renumbered pursuant to Pub. L. 110-81, Sep. 14, 2007.



13.36 For purposes of this rule—

(a) “employee of the Senate” includes an employee or individual described in paragraphs 2, 3, and 4(c) of rule XLI;

(b) an individual who is an employee on the staff of a subcommittee of a committee shall be treated as an employee on the staff of such committee; and

(c) the term “lobbying” means any oral or written communication to influence the content or disposition of any issue before Congress, including any pending or future bill, resolution, treaty, nomination, hearing, report, or investigation; but does not include—

(1) a communication (i) made in the form of testimony given before a committee or office of the Congress, or (ii) submitted for inclusion in the public record, public docket, or public file of a hearing; or

(2) a communication by an individual, acting solely on his own behalf, for redress of personal grievances, or to express his personal opinion.

14.<sup>37</sup> (a) A Member shall not negotiate or have any arrangement concerning prospective private employment until after his or her successor has been elected, unless such Member files a signed statement with the Secretary of the Senate, for public disclosure, regarding such negotiations or arrangements not later than 3 business days after the commencement of such negotiation or arrangement, including the name of the private entity or entities involved in such negotiations or arrangements, and the date such negotiations or arrangements commenced.

(b) A Member shall not negotiate or have any arrangement concerning prospective employment for a job involving lobbying activities as defined by the Lobbying Disclosure Act of 1995 until after his or her successor has been elected.

(c)(1) An employee of the Senate earning in excess of 75 percent of the salary paid to a Senator shall notify the Select Committee on Ethics that he or she is negotiating or has any arrangement concerning prospective private employment.

(2) The notification under this subparagraph shall be made not later than 3 business days after the commencement of such negotiation or arrangement.

(3) An employee to whom this subparagraph applies shall—

(A) recuse himself or herself from—

(i) any contact or communication with the prospective employer on

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<sup>36</sup> Paragraph 13 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

<sup>37</sup> Paragraph 14 added pursuant to Pub. L. 110–81, Sep. 14, 2007.

issues of legislative interest to the prospective employer; and

- (ii) any legislative matter in which there is a conflict of interest or an appearance of a conflict for that employee under this subparagraph; and
- (B) notify the Select Committee on Ethics of such recusal.

15.38 For purposes of this rule—

(a) a Senator or the Vice President is the supervisor of his administrative, clerical, or other assistants;

(b) a Senator who is the chairman of a committee is the supervisor of the professional, clerical, or other assistants to the committee except that minority staff members shall be under the supervision of the ranking minority Senator on the committee;

(c) a Senator who is a chairman of a subcommittee which has its own staff and financial authorization is the supervisor of the professional, clerical, or other assistants to the subcommittee except that minority staff members shall be under the supervision of the ranking minority Senator on the subcommittee;

(d) the President pro tempore is the supervisor of the Secretary of the Senate, Sergeant at Arms and Doorkeeper, the Chaplain, the Legislative Counsel, and the employees of the Office of the Legislative Counsel;

(e) the Secretary of the Senate is the supervisor of the employees of his office;

(f) the Sergeant at Arms and Doorkeeper is the supervisor of the employees of his office;

(g) the Majority and Minority Leaders and the Majority and Minority Whips are the supervisors of the research, clerical, or other assistants assigned to their respective offices;

(h) the Majority Leader is the supervisor of the Secretary for the Majority and the Secretary for the Majority is the supervisor of the employees of his office; and

(i) the Minority Leader is the supervisor of the Secretary for the Minority and the Secretary for the Minority is the supervisor of the employees of his office.

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<sup>38</sup> Paragraph 15 renumbered pursuant to Pub. L. 110–81, Sep. 14, 2007.

## RULE XXXVIII

### PROHIBITION OF UNOFFICIAL OFFICE ACCOUNTS

1. (a)<sup>39</sup> No Member may maintain or have maintained for his use an unofficial office account. The term “unofficial office account” means an account or repository into which funds are received for the purpose, at least in part, of defraying otherwise unreimbursed expenses allowable in connection with the operation of a Member’s office. An unofficial office account does not include, and expenses incurred by a Member in connection with his official duties shall be defrayed only from—

- (1) personal funds of the Member;
- (2) official funds specifically appropriated for that purpose;
- (3) funds derived from a political committee (as defined in section 301(d) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)); and
- (4) funds received as reasonable reimbursements for expenses incurred by a Member in connection with personal services provided by the Member to the organization making the reimbursement.

(b) Notwithstanding subparagraph (a), official expenses may be defrayed only as provided by subsections (d) and (i) of section 311 of the Legislative Appropriations Act, 1991 (Public Law 101–520).<sup>40</sup>

(c)<sup>41</sup> For purposes of reimbursement under this rule, fair market value of a flight on an aircraft shall be determined as provided in paragraph 1(c)(1)(C) of rule XXXV.

2. No contribution (as defined in section 301(e) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431)) shall be converted to the personal use of any Member or any former Member. For the purposes of this rule “personal use” does not include reimbursement of expenses incurred by a Member in connection with his official duties.

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<sup>39</sup> Pursuant to S. Res. 192, 102–1, Oct. 31, 1991, paragraph 1 was renumbered 1(a) and subparagraph (b) was added. Effective date revised to May 1, 1992, by a provision of Pub. L. 102–229, Dec. 12, 1991. Provisions of 2 U.S.C. 431 are contained in the Senate Manual at Sec. 515, S. Doc. 107–1.

<sup>40</sup> Section 311(d) of the Legislative Branch Appropriations Act, 1991, (2 U.S.C. 59e(d)), was amended by the Legislative Appropriations Act, 2002 (Pub. Law 107–68). 2 U.S.C. 59e—Senate Manual Sec. 302, S. Doc. 107–1.

<sup>41</sup> Subparagraph (c) added pursuant to Pub. L. 110–81, Sep. 14, 2007.

**RULE XXXIX****FOREIGN TRAVEL**

1. (a) Unless authorized by the Senate (or by the President of the United States after an adjournment sine die), no funds from the United States Government (including foreign currencies made available under section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754(b)) shall be received for the purpose of travel outside the United States by any Member of the Senate whose term will expire at the end of a Congress after—

(1) the date of the general election in which his successor is elected; or

(2) in the case of a Member who is not a candidate in such general election, the earlier of the date of such general election or the adjournment sine die of the second regular session of that Congress.

(b)<sup>42</sup> The travel restrictions provided by subparagraph (a) with respect to a Member of the Senate whose term will expire at the end of a Congress shall apply to travel by—

(1) any employee of the Member;

(2) any elected officer of the Senate whose employment will terminate at the end of a Congress; and

(3) any employee of a committee whose employment will terminate at the end of a Congress.

2. No Member, officer, or employee engaged in foreign travel may claim payment or accept funds from the United States Government (including foreign currencies made available under section 502(b) of the Mutual Security Act of 1954 (22 U.S.C. 1754(b)) for any expense for which the individual has received reimbursement from any other source; nor may such Member, officer, or employee receive reimbursement for the same expense more than once from the United States Government. No Member, officer, or employee shall use any funds furnished to him to defray ordinary and necessary expenses of foreign travel for any purpose other than the purpose or purposes for which such funds were furnished.

3. A per diem allowance provided a Member, officer, or employee in connection with foreign travel shall be used solely for lodging, food, and related expenses and it is the responsibility of the Member, officer, or employee receiving such an allowance to return to the United States Government that portion of the allowance received which is not actually used for necessary lodging, food, and related expenses.

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<sup>42</sup> Pursuant to S. Res. 80, 100-1, Jan. 28, 1987, paragraph 1 was renumbered as 1. (a) and subparagraph (b) was added.

**RULE XL****FRANKING PRIVILEGE AND RADIO AND TELEVISION STUDIOS<sup>43</sup>**

1. A Senator or an individual who is a candidate for nomination for election, or election, to the Senate may not use the frank for any mass mailing (as defined in section 3210(a)(6)(E)<sup>44</sup> of Title 39, United States Code) if such mass mailing is mailed at or delivered to any postal facility less than sixty days immediately before the date of any primary or general election (whether regular, special, or runoff) in which the Senator is a candidate for public office or the individual is a candidate for Senator, unless the candidacy of the Senator in such election is uncontested.<sup>45</sup>

2. A Senator shall use only official funds of the Senate, including his official Senate allowances, to purchase paper, to print, or to prepare any mass mailing material which is to be sent out under the frank.

3. (a) When a Senator disseminates information under the frank by a mass mailing (as defined in section 3210(a)(6)(E) of Title 39, United States Code), the Senator shall register quarterly<sup>46</sup> with the Secretary of the Senate such mass mailings. Such registration shall be made by filing with the Secretary a copy of the matter mailed and providing, on a form supplied by the Secretary, a description of the group or groups of persons to whom the mass mailing was mailed.

(b) The Secretary of the Senate shall promptly make available for public inspection and copying a copy of the mail matter registered, and a description of the group or groups of persons to whom the mass mailing was mailed.

4. Nothing in this rule shall apply to any mailing under the frank which is (a) in direct response to inquiries or requests from persons to whom the matter is mailed; (b) addressed to colleagues in Congress or to government officials (whether Federal, State, or local); or (c) consists entirely of news releases to the communications media.

5. The Senate computer facilities shall not be used (a) to store, maintain, or

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<sup>43</sup> Section 3210 of Title 39, U.S.C., contains statutory provisions are parallel to certain provisions of rule XL relating to the franking privilege. See Senate Manual Sec. 1096, S. Doc. 107-1.

<sup>44</sup> Citation corrected by S. Res. 187, 101-1, Oct. 2, 1989, pursuant to Pub. L. 97-69, Oct. 26, 1981.

<sup>45</sup> As amended, S. Res. 224, 103-2, June 21, 1994.

<sup>46</sup> Pursuant to Pub. L. 101-520, Nov. 5, 1990, 2 U.S.C. 59g, See Senate Manual Sec. 304. S. Doc. 107-1.

otherwise process any lists or categories of lists of names and addresses identifying the individuals included in such lists as campaign workers or contributors, as members of a political party, or by any other partisan political designation, (b) to produce computer printouts except as authorized by user guides approved by the Committee on Rules and Administration, or (c) to produce mailing labels for mass mailings, or computer tapes and discs, for use other than in service facilities maintained and operated by the Senate or under contract to the Senate. The Committee on Rules and Administration shall prescribe such regulations not inconsistent with the purposes of this paragraph as it determines necessary to carry out such purposes.

6. (a) The radio and television studios provided by the Senate or by the House of Representatives may not be used by a Senator or an individual who is a candidate for nomination for election, or election, to the Senate less than sixty days immediately before the date of any primary or general election (whether regular, special, or runoff) in which that Senator is a candidate for public office or that individual is a candidate for Senator, unless the candidacy of the Senator in such election is uncontested.<sup>47</sup>

(b) This paragraph shall not apply if the facilities are to be used at the request of, and at the expense of, a licensed broadcast organization or an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1954.

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<sup>47</sup> As amended, S. Res. 224, 103-2, June 21, 1994.

**RULE XLI****POLITICAL FUND ACTIVITY; DEFINITIONS**

1. No officer or employee of the Senate may receive, solicit, be a custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election, of any individual to be a Member of the Senate or to any other Federal office. This prohibition does not apply to three<sup>48</sup> assistants to a Senator, at least one of whom is in Washington, District of Columbia, who have been designated by that Senator to perform any of the functions described in the first sentence of this paragraph and who are compensated at an annual rate in excess of \$10,000 if such designation has been made in writing and filed with the Secretary of the Senate and if each such assistant files a financial statement in the form provided under rule XXXIV for each year during which he is designated under this rule. The Majority Leader and the Minority Leader may each designate an employee of their respective leadership office staff as one of the 3 designees referred to in the second sentence.<sup>49</sup> The Secretary of the Senate shall make the designation available for public inspection.

2. For purposes of the Senate Code of Official Conduct—

(a) an employee of the Senate includes any employee whose salary is disbursed by the Secretary of the Senate; and

(b) the compensation of an officer or employee of the Senate who is a reemployed annuitant shall include amounts received by such officer or employee as an annuity, and such amounts shall be treated as disbursed by the Secretary of the Senate.

3. Before approving the utilization by any committee of the Senate of the services of an officer or employee of the Government in accordance with paragraph 4<sup>50</sup> of rule XXVII or with an authorization provided by Senate resolution, the Committee on Rules and Administration shall require such officer or employee to agree in writing to comply with the Senate Code of Official Conduct in the same manner and to the same extent as an employee of the Senate. Any such officer or employee shall, for purposes of such Code, be treated as an employee of the Senate receiving compensation disbursed by the Secretary of the Senate in an amount equal to the amount of compensation he is receiving as an officer or employee of the Government.

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<sup>48</sup> As amended by S. Res. 258, 100-1, Oct. 1, 1987.

<sup>49</sup> Pursuant to S. Res. 236, 101-2, Jan. 30, 1990.

<sup>50</sup> Reference corrected by S. Res. 192, 102-1, Oct. 31, 1991.

4. No Member, officer, or employee of the Senate shall utilize the full-time services of an individual for more than ninety days in a calendar year in the conduct of official duties of any committee or office of the Senate (including a Member's office) unless such individual—

(a) is an officer or employee of the Senate,

(b) is an officer or employee of the Government (other than the Senate),

or

(c) agrees in writing to comply with the Senate Code of Official Conduct in the same manner and to the same extent as an employee of the Senate.

Any individual to whom subparagraph (c) applies shall, for purposes of such Code, be treated as an employee of the Senate receiving compensation disbursed by the Secretary of the Senate in an amount equal to the amount of compensation which such individual is receiving from any source for performing such services.

5. In exceptional circumstances for good cause shown, the Select Committee on Ethics may waive the applicability of any provision of the Senate Code of Official Conduct to an employee hired on a per diem basis.

6. (a) The supervisor of an individual who performs services for any Member, committee, or office of the Senate for a period in excess of four weeks and who receives compensation therefor from any source other than the United States Government shall report to the Select Committee on Ethics with respect to the utilization of the services of such individual.

(b) A report under subparagraph (a) shall be made with respect to an individual—

(1) when such individual begins performing services described in such subparagraph;

(2) at the close of each calendar quarter while such individual is performing such services; and

(3) when such individual ceases to perform such services. Each such report shall include the identity of the source of the compensation received by such individual and the amount or rate of compensation paid by such source.

(c) No report shall be required under subparagraph (a) with respect to an individual who normally performs services for a Member, committee, or office for less than eight hours a week.

(d) For purposes of this paragraph, the supervisor of an individual shall be determined under paragraph 15 of rule XXXVII.<sup>51</sup>

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<sup>51</sup> Redesignated pursuant to S. Res. 236, 101-2, Jan. 30, 1990 and S. Res. 299, 106-2, Apr. 27, 2000.



**RULE XLII****EMPLOYMENT PRACTICES**

1. No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

(a) fail or refuse to hire an individual;

(b) discharge an individual; or

(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.

2.<sup>52</sup> For purposes of this rule, the provisions of section 509(a) of the Americans With Disabilities Act of 1990 shall be deemed to be a rule of the Senate as it pertains to Members, officers, and employees of the Senate.

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<sup>52</sup> Added by S. Res. 192, 102-1, Oct. 31, 1991, effective July 26, 1990. ADA was subsequently amended by the Government Employee Rights Act of 1991 (Title 3, Civil Rights Act of 1991, Pub. L. 102-166, codified at 2 U.S.C. 1201 et seq.). See Senate Manual Secs. 672, 673, S. Doc. 107-1.

## RULE XLIII

### REPRESENTATION BY MEMBERS<sup>53</sup>

1. In responding to petitions for assistance, a Member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies.

2. At the request of a petitioner, a Member of the Senate, or a Senate employee, may communicate with an executive or independent government official or agency on any matter to—

- (a) request information or a status report;
- (b) urge prompt consideration;
- (c) arrange for interviews or appointments;
- (d) express judgments;

(e) call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy; or

(f) perform any other service of a similar nature consistent with the provisions of this rule.

3. The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political campaigns or to other organizations in which the Member has a political, personal, or financial interest.

4. A Member shall make a reasonable effort to assure that representations made in the Member's name by any Senate employee are accurate and conform to the Member's instructions and to this rule.

5. Nothing in this rule shall be construed to limit the authority of Members, and Senate employees, to perform legislative, including committee, responsibilities.

6.54 No Member, with the intent to influence solely on the basis of partisan political affiliation an employment decision or employment practice of any private entity, shall—

- (a) take or withhold, or offer or threaten to take or withhold, an official act; or
- (b) influence, or offer or threaten to influence the official act of another.

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<sup>53</sup> Rule established by S. Res. 273, 102-2, July 2, 1992.

<sup>54</sup> Paragraph 6 added pursuant to Pub. L. 110-81, Sep. 14, 2007.



## APPENDIX A

### ETHICS IN GOVERNMENT ACT TITLE I — FINANCIAL DISCLOSURE REQUIREMENTS OF FEDERAL PERSONNEL

#### **5 U.S.C. app. Sec. 101. Persons required to file**

(a) Within thirty days of assuming the position of an officer or employee described in subsection (f), an individual shall file a report containing the information described in section 102(b) [5 U.S.C. app. Sec. 102(b)] unless the individual has left another position described in subsection (f) within thirty days prior to assuming such new position or has already filed a report under this title [5 U.S.C. app. Sec. 101 et seq.] with respect to nomination for the new position or as a candidate for the position.

(b)(1) Within five days of the transmittal by the President to the Senate of the nomination of an individual (other than an individual nominated for appointment to a position as a Foreign Service Officer or a grade or rank in the uniformed services for which the pay grade prescribed by section 201 of title 37, United States Code, is 0-6 or below) to a position, appointment to which requires the advice and consent of the Senate, such individual shall file a report containing the information described in section 102(b) [5 U.S.C. app. Sec. 102(b)]. Such individual shall, not later than the date of the first hearing to consider the nomination of such individual, make current the report filed pursuant to this paragraph by filing the information required by section 102(a)(1)(A) [5 U.S.C. app. Sec. 102(a)(1)(A)] with respect to income and honoraria received as of the date which occurs five days before the date of such hearing. Nothing in this Act shall prevent any Congressional committee from requesting, as a condition of confirmation, any additional financial information from any Presidential nominee whose nomination has been referred to that committee.

(2) An individual whom the President or the President-elect has publicly announced he intends to nominate to a position may file the report required by paragraph (1) at any time after that public announcement, but not later than is required under the first sentence of such paragraph.

(c) Within thirty days of becoming a candidate as defined in section 301 of the Federal Campaign Act of 1971 [2 U.S.C. Sec. 431], in a calendar year for nomination or election to the office of President, Vice President, or Member of Congress, or on or before May 15 of that calendar year, whichever is later, but in no event later than 30 days before the election, and on or before May 15 of each successive year an individual continues to be a candidate, an individual other than an incumbent President, Vice President, or Member of Congress shall file a report containing the information described in section 102(b) [5

U.S.C. app. Sec. 102(b)]. Notwithstanding the preceding sentence, in any calendar year in which an individual continues to be a candidate for any office but all elections for such office relating to such candidacy were held in prior calendar years, such individual need not file a report unless he becomes a candidate for another vacancy in that office or another office during that year.

(d) Any individual who is an officer or employee described in subsection (f) during any calendar year and performs the duties of his position or office for a period in excess of sixty days in that calendar year shall file on or before May 15 of the succeeding year a report containing the information described in section 102(a) [5 U.S.C. app. Sec. 102(a)].

(e) Any individual who occupies a position described in subsection (f) shall, on or before the thirtieth day after termination of employment in such position, file a report containing the information described in section 102(a) [5 U.S.C. app. Sec. 102(a)] covering the preceding calendar year if the report required by subsection (d) has not been filed and covering the portion of the calendar year in which such termination occurs up to the date the individual left such office or position, unless such individual has accepted employment in another position described in subsection (f).

(f) The officers and employees referred to in subsections (a), (d), and (e) are—

- (1) the President;
- (2) the Vice President;
- (3) each officer or employee in the executive branch, including a special Government employee as defined in section 202 of title 18, United States Code, who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule; each member of a uniformed service whose pay grade is at or in excess of 0-7 under section 201 of title 37 United States Code; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification;
- (4) each employee appointed pursuant to section 3105 of title 5, United States Code;
- (5) any employee not described in paragraph (3) who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policymaking character, except that the Director of the Office of Government Ethics may, by regulation, exclude from the application of this paragraph any individual, or group of individuals, who are in such positions, but only in cases in which the Director determines such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the

Government;

(6) the Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Rate Commission who occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule;

(7) the Director of the Office of Government Ethics and each designated agency ethics official;

(8) any civilian employee not described in paragraph (3), employed in the Executive Office of the President (other than a special government employee) who holds a commission of appointment from the President;

(9) a Member of Congress as defined under section 109(12) [5 U.S.C. app. Sec. 109(12)];

(10) an officer or employee of the Congress as defined under section 109(13) [5 U.S.C. app. Sec. 109(13)];

(11) a judicial officer as defined under section 109(10) [5 U.S.C. app. Sec. 109(10)]; and

(12) a judicial employee as defined under section 109(8) [5 U.S.C. app. Sec. 109(8)].

(g)(1) Reasonable extensions of time for filing any report may be granted under procedures prescribed by the supervising ethics office for each branch, but the total of such extensions shall not exceed ninety days.

(2)(A) In the case of an individual who is serving in the Armed Forces, or serving in support of the Armed Forces, in an area while that area is designated by the President by Executive order as a combat zone for purposes of section 112 of the Internal Revenue Code of 1986 [26 U.S.C. Sec. 112], the date for the filing of any report shall be extended so that the date is 180 days after the later of—

(i) the last day of the individual's service in such area during such designated period; or

(ii) the last day of the individual's hospitalization as a result of injury received or disease contracted while serving in such area.

(B) The Office of Government Ethics, in consultation with the Secretary of Defense, may prescribe procedures under this paragraph.

(h) The provisions of subsections (a), (b), and (e) shall not apply to an individual who, as determined by the designated agency ethics official or Secretary concerned (or in the case of a Presidential appointee under subsection (b), the Director of the Office of Government Ethics), the congressional ethics committees, or the Judicial Conference, is not reasonably expected to perform the duties of his office or position for more than sixty days in a calendar year, except that if such individual performs the duties of his office or position for

more than sixty days in a calendar year—

(1) the report required by subsections (a) and (b) shall be filed within fifteen days of the sixtieth day, and

(2) the report required by subsection (e) shall be filed as provided in such subsection.

(i) The supervising ethics office for each branch may grant a publicly available request for a waiver of any reporting requirement under this section for an individual who is expected to perform or has performed the duties of his office or position less than one hundred and thirty days in a calendar year, but only if the supervising ethics office determines that—

(1) such individual is not a full-time employee of the Government,

(2) such individual is able to provide services specially needed by the Government,

(3) it is unlikely that the individual's outside employment or financial interests will create a conflict of interest, and

(4) public financial disclosure by such individual is not necessary in the circumstances.

## **5 U.S.C. app. Sec. 102. Contents of reports**

(a) Each report filed pursuant to section 101(d) and (e) [5 U.S.C. app. Sec. 101(d), (e)] shall include a full and complete statement with respect to the following:

(1)(A) The source, type, and amount or value of income (other than income referred to in subparagraph (B)) from any source (other than from current employment by the United States Government), and the source, date, and amount of honoraria from any source, received during the preceding calendar year, aggregating \$200 or more in value and, effective January 1, 1991, the source, date, and amount of payments made to charitable organizations in lieu of honoraria, and the reporting individual shall simultaneously file with the applicable supervising ethics office, on a confidential basis, a corresponding list of recipients of such payments, together with the dates and amounts of such payments.

(B) The source and type of income which consists of dividends, rents, interest, and capital gains, received during the preceding calendar year which exceeds \$200 in amount or value, and an indication of which of the following categories the amount or value of such item of income is within:

(i) not more than \$1,000,

(ii) greater than \$1,000 but not more than \$2,500,

(iii) greater than \$2,500 but not more than \$5,000,

(iv) greater than \$5,000 but not more than \$15,000,

(v) greater than \$15,000 but not more than \$50,000,

(vi) greater than \$50,000 but not more than \$100,000,

- (vii) greater than \$100,000 but not more than \$1,000,000, or
- (viii) greater than \$1,000,000.

(2)(A) The identity of the source, a brief description, and the value of all gifts aggregating more than the minimal value as established by section 7342(a)(5) of title 5, United States Code, or \$250, whichever is greater, received from any source other than a relative of the reporting individual during the preceding calendar year, except that any food, lodging, or entertainment received as personal hospitality of an individual need not be reported, and any gift with a fair market value of \$100 or less, as adjusted at the same time and by the same percentage as the minimal value is adjusted, need not be aggregated for purposes of this subparagraph.

(B) The identity of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than the minimal value as established by section 7342(a)(5) of title 5, United States Code, or \$250, whichever is greater and received during the preceding calendar year.

(C) In an unusual case, a gift need not be aggregated under subparagraph (A) if a publicly available request for a waiver is granted.

(3) The identity and category of value of any interest in property held during the preceding calendar year in a trade or business, or for investment or the production of income, which has a fair market value which exceeds \$1,000 as of the close of the preceding calendar year, excluding any personal liability owed to the reporting individual by a spouse, or by a parent, brother, sister, or child of the reporting individual or of the reporting individual's spouse, or any deposits aggregating \$5,000 or less in a personal savings account. For purposes of this paragraph, a personal savings account shall include any certificate of deposit or any other form of deposit in a bank, savings and loan association, credit union, or similar financial institution.

(4) The identity and category of value of the total liabilities owed to any creditor other than a spouse, or a parent, brother, sister or child of the reporting individual or of the reporting individual's spouse which exceed \$10,000 at any time during the preceding calendar year, excluding—

(A) any mortgage secured by real property which is a personal residence of the reporting individual or his spouse; and

(B) any loan secured by a personal motor vehicle, household furniture, or appliances, which loan does not exceed the purchase price of the item which secures it.

With respect to revolving charge accounts, only those with an outstanding liability which exceeds \$10,000 as of the close of the preceding calendar year need be reported under this paragraph.

(5) Except as provided in this paragraph, a brief description, the date,



and category of value of any purchase, sale or exchange during the preceding calendar year which exceeds \$1,000—

(A) in real property, other than property used solely as a personal residence of the reporting individual or his spouse; or

(B) in stocks, bonds, commodities futures, and other forms of securities.

Reporting is not required under this paragraph of any transaction solely by and between the reporting individual, his spouse, or dependent children.

(6)(A) The identity of all positions held on or before the date of filing during the current calendar year (and, for the first report filed by an individual, during the 2-year period preceding such calendar year) as an officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States. This subparagraph shall not require the reporting of positions held in any religious, social, fraternal, or political entity and positions solely for an honorary nature.

(B) If any person, other than the United States Government, paid a nonelected reporting individual compensation in excess of \$5,000 in any of the two calendar years prior to the calendar year during which the individual files his first report under this title [5 U.S.C. app. Sec. 101 et seq.], the individual shall include in the report—

(i) the identity of each source of such compensation; and

(ii) a brief description of the nature of the duties performed or services rendered by the reporting individual for each such source.

The preceding sentence shall not require any individual to include in such report any information which is considered confidential as a result of a privileged relationship, established by law, between such individual and any person nor shall it require an individual to report any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was directly involved in the provision of such services.

(7) A description of the date, parties to, and terms of any agreement of arrangement with respect to (A) future employment; (B) a leave of absence during the period of the reporting individual's Government service; (C) continuation of payments by a former employer other than the United States Government; and (D) continuing participation in an employee welfare or benefit plan maintained by a former employer.

(b)(1) Each report filed pursuant to subsections (a), (b), and (c) of section 101 [5 U.S.C. app. Sec. 101(a)-(c)] shall include a full and complete statement

with respect to the information required by—

(A) paragraph (1) of subsection (a) for the year of filing and the preceding calendar year,

(B) paragraphs (3) and (4) of subsection (a) as of the date specified in the report but which is less than thirty-one days before the filing date, and

(C) paragraphs (6) and (7) of subsection (a) of the filing date but for periods described in such paragraphs.

(2)(A) In lieu of filling out one or more schedules of a financial disclosure form, an individual may supply the required information in an alternative format, pursuant to either rules adopted by the supervising ethics office for the branch in which such individual serves or pursuant to a specific written determination by such office for a reporting individual.

(B) In lieu of indicating the category of amount or value of any item contained in any report filed under this title [5 U.S.C. app. Sec. 101 et seq.], a reporting individual may indicate the exact dollar amount of such item.

(c) In the case of any individual described in section 101(e) [5 U.S.C. app. Sec. 101(e)], any reference to the preceding calendar year shall be considered also to include that part of the calendar year of filing up to the date of the termination of employment.

(d)(1) The categories for reporting the amount of value of the items covered in paragraphs (3), (4) and (5) of subsection (a) are as follows:

(A) not more than \$15,000;

(B) greater than \$15,000 but not more than \$50,000;

(C) greater than \$50,000 but not more than \$100,000;

(D) greater than \$100,000 but not more than \$250,000;

(E) greater than \$250,000 but not more than \$500,000;

(F) greater than \$500,000 but not more than \$1,000,000; and

(G) greater than \$1,000,000.

(2) For the purposes of paragraph (3) of subsection (a) if the current value of an interest in real property (or an interest in a real estate partnership) is not ascertainable without an appraisal, an individual may list (A) the date of purchase and the purchase price of the interest in the real property, or (B) the assessed value of the real property for tax purposes, adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of such market value, but such individual shall include in his report a full and complete description of the method used to determine such assessed value, instead of specifying a category of value pursuant to paragraph (1) of this subsection. If the current value of any other item required to be reported under paragraph (3) of subsection (a) is not ascertainable without an appraisal, such individual may list the book value of a corporation whose stock is not publicly traded, the net worth of a business partnership, the equity value of an individually owned business, or with respect

to other holdings, any recognized indication of value, but such individual shall include in his report a full and complete description of the method used in determining such value. In lieu of any value referred to in the preceding sentence, an individual may list the assessed value of the item for tax purposes, adjusted to reflect the market value of the item used for the assessment if the assessed value is computed at less than 100 percent of such market value, but a full and complete description of the method used in determining such assessed value shall be included in the report.

(e)(1) Except as provided in the last sentence of this paragraph, each report required by section 101 [5 U.S.C. app. Sec. 101] shall also contain information listed in paragraphs (1) through (5) of subsection (a) of this section respecting the spouse or dependent child of the reporting individual as follows:

(A) The source of items of earned income earned by a spouse from any person which exceed \$1,000 and the source and amount of any honoraria received by a spouse, except that, with respect to earned income (other than honoraria), if the spouse is self-employed in business or a profession, only the nature of such business or profession need be reported.

(B) All information required to be reported in subsection (a)(1)(B) with respect to income derived by a spouse or dependent child from any asset held by the spouse or dependent child and reported pursuant to subsection (a)(3).

(C) In the case of any gifts received by a spouse or dependent child which are not received totally independent of the relationship of the spouse or dependent child to the reporting individual, the identity of the source and a brief description of gifts of transportation, lodging, food, or entertainment and a brief description and the value of other gifts.

(D) In the case of any reimbursements received by a spouse or dependent child which are not received totally independent of the relationship of the spouse or dependent child to the reporting individual, the identity of the source and a brief description of each such reimbursement.

(E) In the case of items described in paragraphs (3) through (5) of subsection (a), all information required to be reported under these paragraphs other than items (i) which the reporting individual certifies represent the spouse's or dependent child's sole financial interest or responsibility and which the reporting individual has no knowledge of, (ii) which are not in any way, past or present, derived from the income, assets, or activities of the reporting individual, and (iii) from which the reporting individual neither derives, nor expects to derive, any financial or economic benefit.

Reports required by subsections (a), (b), and (c) of section 101 [5 U.S.C. app. Sec. 101(a)-(c)] shall, with respect to the spouse and dependent child of the reporting individual, only contain information listed in paragraphs (1), (3), and

(4) of subsection (a), as specified in this paragraph.

(2) No report shall be required with respect to a spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation; or with respect to any income or obligations of an individual arising from the dissolution of his marriage or the permanent separation from his spouse.

(f)(1) Except as provided in paragraph (2), each reporting individual shall report the information required to be reported pursuant to subsections (a), (b), and (c) of this section with respect to the holdings of and the income from a trust or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, such individual, his spouse, or any dependent child.

(2) A reporting individual need not report the holdings of or the source of income from any of the holdings of—

(A) any qualified blind trust (as defined in paragraph (3));

(B) a trust—

(i) which was not created directly by such individual, his spouse, or any dependent child, and

(ii) the holdings or sources of income of which such individual, his spouse, and any dependent child have no knowledge of; or

(C) an entity described under the provisions of paragraph (8), but such individual shall report the category of the amount of income received by him, his spouse, or any dependent child from the trust or other entity under subsection (a)(1)(B) of this section.

(3) For purposes of this subsection, the term “qualified blind trust” includes any trust in which a reporting individual, his spouse, or any minor or dependent child has a beneficial interest in the principal or income, and which meets the following requirements:

(A) (i) The trustee of the trust and any other entity designated in the trust instrument to perform fiduciary duties is a financial institution, an attorney, a certified public accountant, a broker, or an investment advisor who—

(I) is independent of and not associated with any interested party so that the trustee or other person cannot be controlled or influenced in the administration of the trust by any interested party; and

(II) is not and has not been an employee of or affiliated with any interested party and is not a partner, of, or involved in any joint venture or other investment with, any interested party; and

(III) is not a relative of any interested party.

(ii) Any officer or employee of a trustee or other entity who is involved in the management or control of the trust—

(I) is independent of and not associated with any interested party so that such officer or employee cannot be controlled or influenced in

the administration of the trust by any interested party;

(II) is not a partner of, or involved in any joint venture or other investment with, any interested party; and

(III) is not a relative of any interested party.

(B) Any asset transferred to the trust by an interested party is free of any restriction with respect to its transfer or sale unless such restriction is expressly approved by the supervising ethics office of the reporting individual.

(C) The trust instrument which establishes the trust provides that—

(i) except to the extent provided in subparagraph (B) of this paragraph, the trustee in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party;

(ii) the trust shall not contain any asset the holding of which by an interested party is prohibited by any law or regulation;

(iii) the trustee shall promptly notify the reporting individual and his supervising ethics office when the holdings of any particular asset transferred to the trust by any interested party are disposed of or when the value of such holding is less than \$1,000;

(iv) the trust tax return shall be prepared by the trustee or his designee, and such return and any information relating thereto (other than the trust income summarized in appropriate categories necessary to complete an interested party's tax return), shall not be disclosed to any interested party;

(v) an interested party shall not receive any report on the holdings and sources of income of the trust, except a report at the end of each calendar quarter with respect to the total cash value of the interest of the interested party in the trust or the net income or loss of the trust or any reports necessary to enable the interested party to complete an individual tax return required by law or to provide the information required by subsection (a)(1) of this section, but such report shall not identify any asset or holding;

(vi) except for communications which solely consist of requests for distributions of cash or other unspecified assets of the trust, there shall be no direct or indirect communication between the trustee and an interested party with respect to the trust unless such communications is in writing and unless it relates only (I) to the general financial interest and needs of the interested party (including, but not limited to, an interest in maximizing income or long-term capital gain), (II) to the notification of the trustee of a law or regulation subsequently applicable to the reporting individual which prohibits the interested party from holding an asset, which notification directs that the asset not be held by

the trust, or (III) to directions to the trustee to sell all of an asset initially placed in the trust by an interested party which in the determination of the reporting individual creates a conflict of interest or the appearance thereof due to the subsequent assumptions of duties by the reporting individual (but nothing herein shall require any such direction); and

(vii) the interested parties shall make no effort to obtain information with respect to the holdings of the trust, including obtaining a copy of any trust tax return filed or any information relating thereto except as otherwise provided in this subsection.

(D) The proposed trust instrument and the proposed trustee is approved by the reporting individual's supervising ethics office.

(E) For purposes of this subsection, "interested party" means a reporting individual, his spouse, and any minor or dependent child; "broker" has the meaning set forth in section 3(a)(4) of the Securities and Exchange Act of 1934 (15 U.S.C. Sec. 78c(a)(4)); and "investment adviser" includes any investment adviser who, as determined under regulations prescribed by the supervising ethics office, is generally involved in his role as such an adviser in the management of control of trusts.

(F) Any trust qualified by a supervising ethics office before the effective date of title II of the Ethics Reform Act of 1989 shall continue to be governed by the law and regulations in effect immediately before such effective date.

(4)(A) An asset placed in a trust by an interested party shall be considered a financial interest of the reporting individual for the purposes of any applicable conflict of interest statutes, regulations, or rules of the Federal Government (including section 208 of title 18, United States Code), until such time as the reporting individual is notified by the trustee that such asset has been disposed of, or has a value of less than \$1,000.

(B)(i) The provisions of subparagraph (A) shall not apply with respect to a trust created for the benefit of a reporting individual, or the spouse, dependent child, or minor child of such a person, if the supervising ethics office for such reporting individual finds that—

(I) the assets placed in the trust consist of a well-diversified portfolio of readily marketable securities;

(II) none of the assets consist of securities of entities having substantial activities in the area of the reporting individual's primary area of responsibility;

(III) the trust instrument prohibits the trustee, notwithstanding the provisions of paragraphs (3)(C) (iii) and (iv) of this subsection, from making public or informing any interested party of the sale of any securities;

(IV) the trustee is given power of attorney, notwithstanding the

provisions of paragraph (3)(C)(v) of this subsection, to prepare on behalf of any interested party the personal income tax returns and similar returns which may contain information relating to the trust; and

(V) except as otherwise provided in this paragraph, the trust instrument provides (or in the case of a trust established prior to the effective date of this Act which by its terms does not permit amendment, the trustee, the reporting individual, and any other interested party agree in writing) that the trust shall be administered in accordance with the requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A).

(ii) In any instance covered by subparagraph (B) in which the reporting individual is an individual whose nomination is being considered by a congressional committee, the reporting individual shall inform the congressional committee considering his nomination before or during the period of such individual's confirmation hearing of his intention to comply with this paragraph. (5)(A) The reporting individual shall, within thirty days after a qualified blind trust is approved by his supervising ethics office, file with such office a copy of—

(i) the executed trust instrument of such trust (other than those provisions which relate to the testamentary disposition of the trust assets), and

(ii) a list of the assets which were transferred to such trust, including the category of value of each asset as determined under subsection (d) of this section.

This subparagraph shall not apply with respect to a trust meeting the requirements for being considered a qualified blind trust under paragraph (7) of this subsection.

(B) The reporting individual shall, within thirty days of transferring an asset (other than cash) to a previously established qualified blind trust, notify his supervising ethics office of the identity of each such asset and the category of value of each asset as determined under subsection (d) of this section.

(C) Within thirty days of the dissolution of a qualified blind trust, a reporting individual shall—

(i) notify his supervising ethics office of such dissolution, and

(ii) file with such office a copy of a list of the assets of the trust at the time of such dissolution and the category of value under subsection (d) of this section of each such asset.

(D) Documents filed under subparagraphs (A), (B), and (C) of this paragraph and the lists provided by the trustee of assets placed in the trust by an interested party which have been sold shall be made available to the public in the same manner as a report is made available under section 105 [5 U.S.C. app. Sec. 105] and the provisions of that section shall apply with respect to

such documents and lists.

(E) A copy of each written communication with respect to the trust under paragraph (3)(C)(vi) shall be filed by the person initiating the communication with the reporting individual's supervising ethics office within five days of the date of the communication.

(6)(A) A trustee of a qualified blind trust shall not knowingly and willfully, or negligently,

(i) disclose any information to an interested party with respect to such trust that may not be disclosed under paragraph (3) of this subsection;

(ii) acquire any holding the ownership of which is prohibited by the trust instrument;

(iii) solicit advice from any interested party with respect to such trust, which solicitation is prohibited by paragraph (3) of this subsection or the trust agreement; or

(iv) fail to file any document required by this subsection.

(B) A reporting individual shall not knowingly and willfully, or negligently, (i) solicit or receive any information with respect to a qualified blind trust of which he is an interested party that may not be disclosed under paragraph (3)(C) of this subsection or (ii) fail to file any document required by this subsection.

(C)(i) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed \$10,000.

(ii) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of subparagraph (A) or (B) of this paragraph. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed \$5,000.

(7) Any trust may be considered to be a qualified blind trust if—

(A) the trust instrument is amended to comply with the requirements of paragraph (3) or, in the case of a trust instrument which does not by its terms permit amendment, the trustee, the reporting individual, and any other interested party agree in writing that the trust shall be administered in accordance with the requirements of this subsection and the trustee of such trust meets the requirements of paragraph (3)(A); except that in the case of any interested party who is a dependent child, a parent or guardian of such child may execute the agreement referred to in this subparagraph;

(B) a copy of the trust instrument (except testamentary provisions) and a copy of the agreement referred to in subparagraph (A), and a list of the assets held by the trust at the time of approval by the supervising ethics



office, including the category of value of each asset as determined under subsection (d) of this section, are filed with such office and made available to the public as provided under paragraph (5)(D) of this subsection; and

(C) the supervising ethics office determines that approval of the trust arrangement as a qualified blind trust is in the particular case appropriate to assure compliance with applicable laws and regulations.

(8) A reporting individual shall not be required to report the financial interests held by a widely held investment fund (whether such fund is a mutual fund, regulated investment company, pension or deferred compensation plan, or other investment fund), if—

(A)(i) the fund is publicly traded; or

(ii) the assets of the fund are widely diversified; and

(B) the reporting individual neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(g) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed pursuant to this title [5 U.S.C. app. Sec. 101 et seq.].

(h) A report filed pursuant to subsection (a), (d), or (e) of section 101 [5 U.S.C. app. Sec. 101(a), (d), or (e)] need not contain the information described in subparagraphs (A), (B), and (C) of subsection (a)(2) with respect to gifts and reimbursements received in a period when the reporting individual was not an officer or employee of the Federal Government.

(i) A reporting individual shall not be required under this title [5 U.S.C. app. Sec. 101 et seq.] to report—

(1) financial interests in or income derived from—

(A) any retirement system under title 5, United States Code (including the Thrift Savings Plan under subchapter III of chapter 84 of such title [5 U.S.C. Sec. 8431 et seq.]); or

(B) any other retirement system maintained by the United States for officers or employees of the United States, including the President, or for members of the uniformed services; or

(2) benefits received under the Social Security Act [42 U.S.C. Sec. 301 et seq.].

### **5 U.S.C. app. Sec. 103. Filing of reports**

(a) Except as otherwise provided in this section, the reports required under this title [5 U.S.C. app. Sec. 101 et seq.] shall be filed by the reporting individual with the designated agency ethics official at the agency by which he is employed (or in the case of an individual described in section 101(e) [5 U.S.C. app. Sec. 101(e)], was employed) or in which he will serve. The date any report is received (and the date of receipt of any supplemental report) shall be noted on such report by such official.

(b) The President, the Vice President, and independent counsel and persons appointed by independent counsel under chapter 40 of title 28, United States Code [28 U.S.C. Sec. 591 et seq.], shall file reports required under this title with the Director of the Office of Government Ethics.

(c) Copies of the reports required to be filed under this title [5 U.S.C. app. Sec. 101 et seq.] by the Postmaster General, the Deputy Postmaster General, the Governors of the Board of Governors of the United States Postal Service, designated agency ethics officials, employees described in section 105(a)(2)(A) or (B), 106(a)(1)(A) or (B) or 107(a)(1)(A) or (b)(1)(A)(i), of title 3, United States Code, candidates for the office of President or Vice President and officers and employees in (and nominees to) offices or positions which require confirmation by the Senate or by both Houses of Congress other than individuals nominated to be judicial officers and those referred to in subsection (f) shall be transmitted to the Director of the Office of Government Ethics. The Director shall forward a copy of the report of each nominee to the congressional committee considering the nomination.

(d) Reports required to be filed under this title [5 U.S.C. app. Sec. 101 et seq.] by the Director of the Office of Government Ethics shall be filed in the Office of Government Ethics and, immediately after being filed, shall be made available to the public in accordance with this title [5 U.S.C. app. Sec. 101 et seq.].

(e) Each individual identified in section 101(c) [5 U.S.C. app. Sec. 101(c)] who is a candidate for nomination or election to the Office of President or Vice President shall file the reports required by this title [5 U.S.C. app. Sec. 101 et seq.] with the Federal Election Commission.

(f) Reports required of members of the uniformed services shall be filed with the Secretary concerned.

(g) Each supervising ethics office shall develop and make available forms for reporting the information required by this title [5 U.S.C. app. Sec. 101 et seq.].

(h)(1) The reports required under this title [5 U.S.C. app. Sec. 101 et seq.] shall be filed by a reporting individual with—

(A)(i)(I) the Clerk of the House of Representatives, in the case of a Representative in Congress, a Delegate to Congress, the Resident Commissioner from Puerto Rico, an officer or employee of the Congress whose compensation is disbursed by the Clerk of the House of Representatives, an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the Congressional Budget Office, the Government Printing Office, the Library of Congress, or the Copyright Royalty Tribunal (including any individual terminating service, under section 101(e) [5 U.S.C. app. Sec. 101(e)], in any office or position referred to in this subclause), or an individual described in section 101(c) [5 U.S.C.

app. Sec. 101(c)] who is a candidate for nomination or election as a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico; and

(II) the Secretary of the Senate, in the case of a Senator, an officer or employee of the Congress whose compensation is disbursed by the Secretary of the Senate, an officer or employee of the General Accounting Office, the Office of Technology Assessment, or the Office of the Attending Physician (including any individual terminating service, under section 101(e) [5 U.S.C. app. Sec. 101(e)], in any office or position referred to in this subclause), or an individual described in section 101(c) [5 U.S.C. app. Sec. 101(c)] who is a candidate for nomination or election as a Senator; and

(ii) in the case of an officer or employee of the Congress as described under section 101(f)(10) [5 U.S.C. app. Sec. 101(f)(10)] who is employed by an agency or commission established in the legislative branch after the date of the enactment of the Ethics Reform Act of 1989 [enacted Nov. 30, 1989]—

(I) the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, as designated in the statute establishing such agency or commission; or

(II) if such statute does not designate such committee, the Secretary of the Senate for agencies and commissions established in even numbered calendar years, and the Clerk of the House of Representatives for agencies and commissions established in odd numbered calendar years; and

(B) the Judicial Conference with regard to a judicial officer or employee described under paragraphs (11) and (12) of section 101(f) [5 U.S.C. app. Sec. 101(f)(11), (12)] (including individuals terminating service in such office or position under section 101(e) [5 U.S.C. app. Sec. 101(e)] or immediately preceding service in such office or position).

(2) The date any report is received (and the date of receipt of any supplemental report) shall be noted on such report by such committee.

(i) A copy of each report filed under this title [5 U.S.C. app. Sec. 101 et seq.] by a Member or an individual who is a candidate for the office of Member shall be sent by the Clerk of the House of Representatives or Secretary of the Senate, as the case may be, to the appropriate State officer designated under section 316(a) of the Federal Election Campaign Act of 1971 [2 U.S.C. Sec. 439(a)] of the State represented by the Member or in which the individual is a candidate, as the case may be, within the 30-day period beginning on the day the report is filed with the Clerk or Secretary.

(j)(1) A copy of each report filed under this title [5 U.S.C. app. Sec. 101 et seq.] with the Clerk of the House of Representatives shall be sent by the Clerk to the Committee on Standards of Official Conduct of the House of

Representatives within the 7-day period beginning on the day the report is filed.

(2) A copy of each report filed under this title [5 U.S.C. app. Sec. 101 et seq.] with the Secretary of the Senate shall be sent by the Secretary to the Select Committee on Ethics of the Senate within the 7-day period beginning on the day the report is filed.

(k) In carrying out their responsibilities under this title [5 U.S.C. app. Sec. 101 et seq.] with respect to candidates for office, the Clerk of the House of Representatives and the Secretary of the Senate shall avail themselves of the assistance of the Federal Election Commission. The Commission shall make available to the Clerk and the Secretary on a regular basis a complete list of names and addresses of all candidates registered with the Commission, and shall cooperate and coordinate its candidate information and notification program with the Clerk and the Secretary to the greatest extent possible.

#### **5 U.S.C. app. Sec. 104. Failure to file or filing false reports**

(a) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 102 [5 U.S.C. app. Sec. 102]. The court in which such action is brought may assess against such individual a civil penalty in any amount, not to exceed \$10,000.

(b) The head of each agency, each Secretary concerned, the Director of the Office of Government Ethics, each congressional ethics committee, or the Judicial Conference, as the case may be, shall refer to the Attorney General the name of any individual which such official or committee has reasonable cause to believe has willfully failed to file a report or has willfully falsified or willfully failed to file information required to be reported. Whenever the Judicial Conference refers a name to the Attorney General under this subsection, the Judicial Conference also shall notify the judicial council of the circuit in which the named individual serves of the referral.

(c) The President, the Vice President, the Secretary concerned, the head of each agency, the Office of Personnel Management, a congressional ethics committee, and the Judicial Conference, may take any appropriate personnel or other action in accordance with applicable law or regulation against any individual failing to file a report or falsifying or failing to report information required to be reported.

(d)(1) Any individual who files a report required to be filed under this title [5 U.S.C. app. Sec. 101 et seq.] more than 30 days after the later of—

(A) the date such report is required to be filed pursuant to the provisions of this title [5 U.S.C. app. Sec. 101 et seq.] and the rules and regulations promulgated thereunder; or

(B) if a filing extension is granted to such individual under section 101(g) [5 U.S.C. app. Sec. 101(g)], the last day of the filing extension period,

shall, at the direction of and pursuant to regulations issued by the supervising ethics office, pay a filing fee of \$200. All such fees shall be deposited in the miscellaneous receipts of the Treasury. The authority under this paragraph to direct the payment of a filing fee may be delegated by the supervising ethics office in the executive branch to other agencies in the executive branch.

(2) The supervising ethics office may waive the filing fee under this subsection in extraordinary circumstances.

### **5 U.S.C. app. Sec. 105. Custody of and public access to reports**

(a) Each agency, each supervising ethics office in the executive or judicial branch, the Clerk of the House of Representatives, and the Secretary of the Senate shall make available to the public, in accordance with subsection (b), each report filed under this title [5 U.S.C. app. Sec. 101 et seq.] with such agency or office or with the Clerk or the Secretary of the Senate, except that—

(1) this section does not require public availability of a report filed by any individual in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States, if the President finds or has found that, due to the nature of the office or position occupied by such individual, public disclosure of such report would, be [by] revealing the identity of the individual or other sensitive information, compromise the national interest of the United States; and such individuals may be authorized, notwithstanding section 104(a) [5 U.S.C. app. Sec. 104(a)], to file such additional reports as are necessary to protect their identity from public disclosure if the President first finds or has found that such filing is necessary in the national interest; and

(2) any report filed by an independent counsel whose identity has not been disclosed by the division of the court under chapter 40 of title 28, United States Code, and any report filed by any person appointed by that independent counsel under such chapter, shall not be made available to the public under this title [5 U.S.C. app. Sec. 101 et seq.]

(b)(1) Except as provided in the second sentence of this subsection, each agency, each supervising ethics office in the executive or judicial branch, the Clerk of the House of Representatives, and the Secretary of the Senate shall, within thirty days after any report is received under this title [5 U.S.C. app. Sec. 101 et seq.] by such agency or office or by the Clerk or the Secretary of the Senate, as the case may be, permit inspection of such report by or furnish a copy of such report to any person requesting such inspection or copy. With

respect to any report required to be filed by May 15 of any year, such report shall be made available for public inspection within 30 calendar days after May 15 of such year or within 30 days of the date of filing of such a report for which an extension is granted pursuant to section 101(g). The agency, office, Clerk, or Secretary of the Senate, as the case may be may require a reasonable fee to be paid in any amount which is found necessary to recover the cost of reproduction or mailing of such report excluding any salary of any employee involved in such reproduction or mailing. A copy of such report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest.

(2) Notwithstanding paragraph (1), a report may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating—

- (A) that person's name, occupation and address;
- (B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and
- (C) that such person is aware of the prohibitions on the obtaining or use of the report.

Any such application shall be made available to the public throughout the period during which the report is made available to the public.

(c)(1) It shall be unlawful for any person to obtain or use a report—

- (A) for any unlawful purpose;
- (B) for any commercial purpose, other than by news and communications media for dissemination to the general public;
- (C) for determining or establishing the credit rating of any individual; or
- (D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) The Attorney General may bring a civil action against any person who obtains or uses a report for any purpose prohibited in paragraph (1) of this subsection. The court in which such action is brought may assess against such person a penalty in any amount not to exceed \$10,000. Such remedy shall be in addition to any other remedy available under statutory or common law.

(d) Any report filed with or transmitted to an agency or supervising ethics office or to the Clerk of the House of Representatives or the Secretary of the Senate pursuant to this title [5 U.S.C. app. Sec. 101 et seq.] shall be retained by such agency or office or by the Clerk or the Secretary of the Senate, as the case may be. Such report shall be made available to the public for a period of six years after receipt of the report. After such 6-year period the report shall be destroyed unless needed in an ongoing investigation, except that in the case of an individual who filed the report pursuant to section 101(b) [5 U.S.C. app. Sec. 101(b)] and was not subsequently confirmed by the Senate, or who filed

the report pursuant to section 101(c) [5 U.S.C. app. Sec. 101(c)] and was not subsequently elected, such reports shall be destroyed one year after the individual either is no longer under consideration by the Senate or is no longer a candidate for nomination or election to the Office of President, Vice President, or as a Member of Congress, unless needed in an ongoing investigation.

### **5 U.S.C. app. Sec. 106. Review of reports**

(a)(1) Each designated agency ethics official or Secretary concerned shall make provisions to ensure that each report filed with him under this title [5 U.S.C. app. Sec. 101 et seq.] is reviewed within sixty days after the date of such filing, except that the Director of the Office of Government Ethics shall review only those reports required to be transmitted to him under this title [5 U.S.C. app. Sec. 101 et seq.] within sixty days after the date of transmittal.

(2) Each congressional ethics committee and the Judicial Conference shall make provisions to ensure that each report filed under this title [5 U.S.C. app. Sec. 101 et seq.] is reviewed within sixty days after the date of such filing.

(b)(1) If after reviewing any report under subsection (a), the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by the congressional ethics committee, or a person designated by the Judicial Conference, as the case may be, is of the opinion that on the basis of information contained in such report the individual submitting such report is in compliance with applicable laws and regulations, he shall state such opinion on the report, and shall sign such report.

(2) If the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by the congressional ethics committee, or a person designated by the Judicial Conference, after reviewing any report under subsection (a)—

(A) believes additional information is required to be submitted, he shall notify the individual submitting such report what additional information is required and the time by which it must be submitted, or

(B) is of the opinion, on the basis of information submitted, that the individual is not in compliance with applicable laws and regulations, he shall notify the individual, afford a reasonable opportunity for a written or oral response, and after consideration of such response, reach an opinion as to whether or not, on the basis of information submitted, the individual is in compliance with such laws and regulations.

(3) If the Director of the Office of Government Ethics, the Secretary concerned, the designated agency ethics official, a person designated by a congressional ethics committee, or a person designated by the Judicial Conference, reaches an opinion under paragraph (2)(B) that an individual is not in compliance with applicable laws and regulations, the official or committee

shall notify the individual of that opinion and, after an opportunity for personal consultation (if practicable), determine and notify the individual of which steps, if any, would in the opinion of such official or committee be appropriate for assuring compliance with such laws and regulations and the date by which such steps should be taken. Such steps may include, as appropriate—

- (A) divestiture,
- (B) restitution,
- (C) the establishment of a blind trust,
- (D) request for an exemption under section 208(b) of title 18, United States Code, or
- (E) voluntary request for transfer, reassignment, limitation of duties, or resignation.

The use of any such steps shall be in accordance with such rules or regulations as the supervising ethics office may prescribe.

(4) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by an individual in a position in the executive branch (other than in the Foreign Service or the uniformed services), appointment to which requires the advice and consent of the Senate, the matter shall be referred to the President for appropriate action.

(5) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by a member of the Foreign Service or the uniformed services, the Secretary concerned shall take appropriate action.

(6) If steps for assuring compliance with applicable laws and regulations are not taken by the date set under paragraph (3) by any other officer or employee, the matter shall be referred to the head of the appropriate agency, the congressional ethics committee, or the Judicial Conference, for appropriate action; except that in the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken.

(7) Each supervising ethics office may render advisory opinions interpreting this title [5 U.S.C. app. Sec. 101 et seq.] within its respective jurisdiction. Notwithstanding any other provision of law, the individual to whom a public advisory opinion is rendered in accordance with this paragraph, and any other individual covered by this title [5 U.S.C. app. Sec. 101 et seq.] who is involved in a fact situation which is indistinguishable in all material aspects, and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of such act, be subject to any penalty or sanction provided by this title [5 U.S.C. app. Sec. 101 et seq.]

## **5 U.S.C. app. Sec. 107. Confidential reports and other additional**



**requirements**

(a)(1) Each supervising ethics office may require officers and employees under its jurisdiction (including special Government employees as defined in section 202 of title 18, United States Code) to file confidential financial disclosure reports, in such form as the supervising ethics office may prescribe. The information required to be reported under this subsection by the officers and employees of any department or agency shall be set forth in rules or regulations prescribed by the supervising ethics office, and may be less extensive than otherwise required by this title [5 U.S.C. app. Sec. 101 et seq.], or more extensive when determined by the supervising ethics office to be necessary and appropriate in light of sections 202 through 209 of title 18, United States Code, regulations promulgated thereunder, or the authorized activities of such officers or employees. Any individual required to file a report pursuant to section 101 [5 U.S.C. app. Sec. 101] shall not be required to file a confidential report pursuant to this subsection, except with respect to information which is more extensive than information otherwise required by this title [5 U.S.C. app. Sec. 101 et seq.] Subsections (a), (b), and (d) of section 105 [5 U.S.C. app. Sec. 105(a), (b), (d)] shall not apply with respect to any such report.

(2) Any information required to be provided by an individual under this subsection shall be confidential and shall not be disclosed to the public.

(3) Nothing in this subsection exempts any individual otherwise covered by the requirement to file a public financial disclosure report under this title [5 U.S.C. app. Sec. 101 et seq.] from such requirement.

(b) The provisions of this title [5 U.S.C. app. Sec. 101 et seq.] requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. Such provisions of this title [5 U.S.C. app. Sec. 101 et seq.] shall not supersede the requirements of section 7342 of title 5, United States Code.

(c) Nothing in this Act requiring reporting of information shall be deemed to authorize the receipt of income, gifts, or reimbursements; the holding of assets, liabilities, or positions; or the participation in transactions that are prohibited by law, Executive order, rule, or regulation.

**5 U.S.C. app. Sec. 108. Authority of Comptroller General**

(a) The Comptroller General shall have access to financial disclosure reports filed under this title [5 U.S.C. app. Sec. 101 et seq.] for the purposes of carrying out his statutory responsibilities.

(b) No later than December 31, 1992, and regularly thereafter, the Comptroller General shall conduct a study to determine whether the provisions of this title are being carried out effectively.

## **5 U.S.C. app. Sec. 109. Definitions**

For the purposes of this title [5 U.S.C. app. Sec. 101 et seq.], the term—

(1) “congressional ethics committees” means the Select Committee on Ethics of the Senate and the Committee on Standards of Official Conduct of the House of Representatives;

(2) “dependent child” means, when used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who—

(A) is unmarried and under age 21 and is living in the household of such reporting individual; or

(B) is a dependent of such reporting individual within the meaning of section 152 of the Internal Revenue Code of 1986 [26 U.S.C. Sec. 152];

(3) “designated agency ethics official” means an officer or employee who is designated to administer the provisions of this title within an agency;

(4) “executive branch” includes each Executive agency (as defined in section 105 of title 5, United States Code), other than the General Accounting Office, and any other entity or administrative unit in the executive branch;

(5) “gift” means a payment, advance, forbearance, rendering, or deposit of money, or any thing of value, unless consideration of equal or greater value is received by the donor, but does not include—

(A) bequest and other forms of inheritance;

(B) suitable mementos of a function honoring the reporting individual;

(C) food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(D) food and beverages which are not consumed in connection with a gift of overnight lodging;

(E) communications to the offices of a reporting individual, including subscriptions to newspapers and periodicals; or

(F) consumable products provided by home-State businesses to the offices of a reporting individual who is an elected official, if those products are intended for consumption by persons other than such reporting individual;

(6) “honoraria” has the meaning given such term in section 505 of this Act [5 U.S.C. app. Sec. 505];

(7) “income” means all income from whatever source derived, including but not limited to the following items: compensation for services, including fees, commissions, and similar items; gross income derived from business

(and net income if the individual elects to include it); gains derived from dealings in property; interest; rents; royalties; dividends; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; and income from an interest in an estate or trust;

(8) “judicial employee” means any employee of the judicial branch of the Government, of the United States Sentencing Commission, of the Tax Court, of the Claims Court, of the Court of Veterans Appeals, or of the United States Court of Military Appeals, who is not a judicial officer and who is authorized to perform adjudicatory functions with respect to proceedings in the judicial branch, or who occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule;

(9) “Judicial Conference” means the Judicial Conference of the United States;

(10) “judicial officer” means the Chief Justice of the United States, the Associate Justices of the Supreme Court, and the judges of the United States courts of appeals, United States district courts, including the district courts in Guam, the Northern Mariana Islands, and the Virgin Islands, Court of Appeals for the Federal Circuit, Court of International Trade, Tax Court, Claims Court, Court of Veterans Appeals, United States Court of Military Appeals, and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior;

(11) “legislative branch” includes—

(A) the Architect of the Capitol;

(B) the Botanical Gardens;

(C) the Congressional Budget Office;

(D) the General Accounting Office;

(E) the Government Printing Office;

(F) the Library of Congress;

(G) the United States Capitol Police;

(H) the Office of Technology Assessment; and

(I) any other agency, entity, office or commission established in the legislative branch;

(12) “Member of Congress” means a United States Senator, a Representative in Congress, a Delegate to Congress, or the Resident Commissioner from Puerto Rico;

(13) “officer or employee of the Congress” means—

(A) any individual described under subparagraph (B), other than a Member of Congress or the Vice President, whose compensation is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives;

(B)(i) each officer or employee of the legislative branch who, for at least 60 days, occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule; and

(ii) at least one principal assistant designated for purposes of this paragraph by each Member who does not have an employee who occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule;

(14) “personal hospitality of any individual” means hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of that individual or his family or on property or facilities owned by that individual or his family;

(15) “reimbursement” means any payment or other thing of value received by the reporting individual, other than gifts, to cover travel-related expenses of such individual other than those which are—

(A) provided by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(B) required to be reported by the reporting individual under section 7342 of title 5, United States Code; or

(C) required to be reported under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. Sec. 434);

(16) “relative” means an individual who is related to the reporting individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or grandmother of the spouse of the reporting individual, and shall be deemed to include the fiance or fiancée of the reporting individual;

(17) “Secretary concerned” has the meaning set forth in section 101(8) of title 10, United States Code, and, in addition, means—

(A) the Secretary of Commerce, with respect to matters concerning the National Oceanic and Atmospheric Administration;

(B) the Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(C) the Secretary of State, with respect to matters concerning the Foreign Service;

(18) “supervising ethics office” means—

(A) the Select Committee on Ethics of the Senate, for Senators,

officers and employees of the Senate, and other officers or employees of the legislative branch required to file financial disclosure reports with the Secretary of the Senate pursuant to section 103(h) of this title [5 U.S.C. app. Sec. 103(h)];

(B) the Committee on Standards of Official Conduct of the House of Representatives, for Members, officers and employees of the House of Representatives and other officers or employees of the legislative branch required to file financial disclosure reports with the Clerk of the House of Representatives pursuant to section 103(h) of this title [5 U.S.C. app. Sec. 103(h)];

(C) the Judicial Conference for judicial officers and judicial employees; and

(D) the Office of Government Ethics for all executive branch officers and employees; and

(19) “value” means a good faith estimate of the dollar value if the exact value is neither known nor easily obtainable by the reporting individual.

### **5 U.S.C. app. Sec. 110. Notice of actions taken to comply with ethics agreements**

(a) In any case in which an individual agrees with that individual's designated agency ethics official, the Office of Government Ethics, a Senate confirmation committee, a congressional ethics committee, or the Judicial Conference, to take any action to comply with this Act or any other law or regulation governing conflicts of interest of, or establishing standards of conduct applicable with respect to, officers or employees of the Government, that individual shall notify in writing the designated agency ethics official, the Office of Government Ethics, the appropriate committee of the Senate, the congressional ethics committee, or the Judicial Conference, as the case may be, of any action taken by the individual pursuant to that agreement. Such notification shall be made not later than the date specified in the agreement by which action by the individual must be taken, or not later than three months after the date of the agreement, if no date for action is so specified.

(b) If an agreement described in subsection (a) requires that the individual recuse himself or herself from particular categories of agency or other official action, the individual shall reduce to writing those subjects regarding which the recusal agreement will apply and the process by which it will be determined whether the individual must recuse himself or herself in a specific instance. An individual shall be considered to have complied with the requirements of subsection (a) with respect to such recusal agreement if such individual files a copy of the document setting forth the information described in the preceding sentence with such individual's designated agency ethics official or the appropriate supervising ethics office within the time prescribed in the last

sentence of subsection (a).

**5 U.S.C. app. Sec. 111. Administration of provisions**

The provisions of this title [5 U.S.C. app. Sec. 101 et seq.] shall be administered by—

(1) the Director of the Office of Government Ethics, the designated agency ethics official, or the Secretary concerned, as appropriate, with regard to officers and employees described in paragraphs (1) through (8) of section 101(f) [5 U.S.C. app. Sec. 101(f)(1)-(8)];

(2) the Select Committee on Ethics of the Senate and the Committee on Standards of Official Conduct of the House of Representatives, as appropriate, with regard to officers and employees described in paragraphs (9) and (10) of section 101(f) [5 U.S.C. app. Sec. 101(f)(9), (10)]; and

(3) the Judicial Conference in the case of an officer or employee described in paragraphs (11) and (12) of section 101(f) [5 U.S.C. app. Sec. 101(f)(11), (12)].

The Judicial Conference may delegate any authority it has under this title [5 U.S.C. app. Sec. 101 et seq.] to an ethics committee established by the Judicial Conference.

**5 U.S.C. app. Sec. 112**

[Sec. 112 was repealed by P.L. 101-280, Sec. 3(10)(A), May 4, 1990, 104 Stat. 157.] [Titles II and III were repealed by P.L. 101-194, Sec. 201, Nov. 30, 1989, 103 Stat. 1724.]



# HOUSE ETHICS MANUAL

COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

110<sup>TH</sup> Congress, 2d Session



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**(Supersedes All Prior Editions)**

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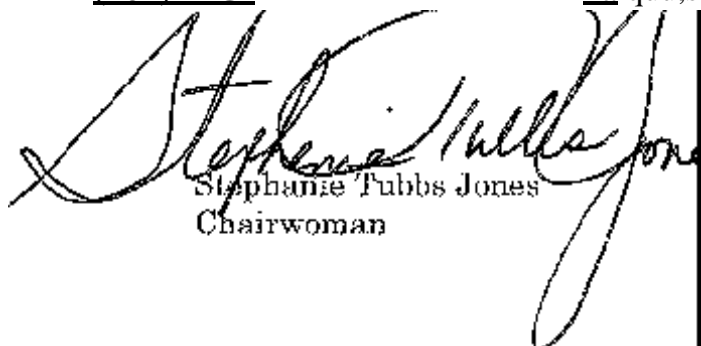
## PREFACE

This is the first complete revision of the House Ethics Manual since 1992. Since that time, the Committee on Standards of Official Conduct has issued revised versions of the following: Chapter 2 (Gifts and Travel) and the former Chapter 1 (Campaign Activity), as well as numerous advisory memoranda regarding changes to the applicable rules and standards of conduct.

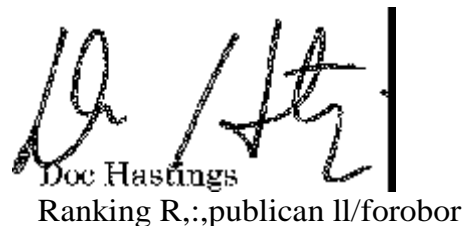
This Manual supersedes (and incorporates where appropriate) all such prior guidance. The Committee will continue to issue advisory memoranda and other formal and informal guidance when necessary and helpful, and readers of this Manual should go to the Committee's website at [www.house.gov/ethics](http://www.house.gov/ethics) to ensure they have the most current information regarding ethics rules and standards of conduct.

This version of the Manual has been reorganized from the 1992 version. The chapters have been reorganized and rewritten, and, among other changes, the former Chapter 2 on Gifts and Travel has been incorporated into Chapter 1.

Our primary intent in writing this revision is to ensure that the Committee's written guidance is current, and that members, officers and staff of the House of Representatives, have an educational resource to assist them in conforming their conduct to the highest ethical standards. The Manual explains the operation and role of the Committee in administering and enforcing the applicable laws, rules and standards. The Committee will continue to provide written guidance to Members, officers, and staff who submit a written request for guidance, and Members, officers and staff are encouraged to contact the Committee at [\(202\) 225-3800](tel:(202)225-3800).



Stephanie Tubbs Jones  
Chairwoman



Doc Hastings  
Ranking Member, Republican



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# GENERAL ETHICAL STANDARDS

## Overview

Members, officers, and employees of the House should:

- Conduct themselves at all times in a manner that reflects creditably on the House;
- Abide by the spirit as well as the letter of the House rules; and
- Adhere to the broad ethical standards expressed in the Code of Ethics for Government Service.

They should not in any way use their office for private gain. Nor should they attempt to circumvent any House rule or standard of conduct.

Employees must observe any additional rules, regulations, standards, or practices established by their employing Members.

The Committee on Standards of Official Conduct urges Members, officers, and employees of the House to call or to write the Committee with any questions regarding the propriety of any current or proposed conduct. The Committee's Office of Advice and Education will provide confidential, informal advice over the telephone, and the Committee will provide confidential, formal written opinions to any Member, officer, or employee with a question within its jurisdiction.

## General Ethical Standards

Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people.

HENRY CLAY<sup>1</sup>

That —public office is a public trust|| has long been a guiding principle of government.<sup>2</sup> To uphold this trust, Congress has bound itself to abide by certain standards of conduct, expressed in the Code of Official Conduct (House Rule 23)<sup>3</sup> and the Code of Ethics for Government Service.<sup>4</sup> These codes provide that Members, officers, and employees are to conduct themselves in a manner that will reflect creditably on the House, work earnestly and thoughtfully for their salary, and that they may not seek to profit by virtue of their public office, allow themselves to be improperly influenced, or discriminate unfairly by the dispensing of special favors. This chapter discusses the overarching principles that inform both codes, the penalties for violating their provisions, and the history and procedures of the Committee on Standards of Official Conduct.

Appropriate standards of conduct enhance the legislative process and build citizen confidence. —Ethics rules, if reasonably drafted and reliably enforced, increase the likelihood that legislators (and other officials) will make decisions and policies on the basis of the merits of issues, rather than on the basis of factors (such as personal gain) that should be irrelevant.||<sup>5</sup> Members, officers, and employees should, at a minimum, familiarize themselves with the Code of Official Conduct and

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<sup>1</sup> Speech at Ashland, Kentucky, March 1829. Henry Clay was Speaker of the House of Representatives during 1811-1814, 1815-1820, and 1823-1825.

<sup>2</sup> Code of Ethics for Government Service ¶ 10, H. Con. Res. 175, 72 Stat., pt. 2, B12 (adopted July 11, 1958) (contained in the appendices to this Manual). This creed, the motto of the Grover Cleveland administration, has been voiced by such notables as Edmund Burke (*Reflections on the Revolution in France* (1790)), Charles Sumner (speech, U.S. Senate (May 31, 1872)), as well as Henry Clay (*see note 1, supra*).

<sup>3</sup> House rules are formally referenced by Roman numerals. For ease of reading, this manual uses the more familiar Arabic numerals throughout. All citations are to the House rules for the 110<sup>th</sup> Congress, unless specifically stated otherwise.

<sup>4</sup> *See note 2, supra*.

<sup>5</sup> *Congressional Ethics Reform: Hearings Before the Bipartisan Task Force on Ethics, U.S. House of Representatives*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 113 (1989) (statement of Dennis F. Thompson, Alfred North Whitehead Professor of Political Philosophy in the Kennedy School of Government and the Department of Government, Harvard University, and Director of the Harvard University Program in Ethics and the Professions).

the Code of Ethics for Government Service. The Code of Official Conduct and the Code of Ethics for Government Service not only state aspirational goals for public officials, but violations of provisions contained therein may also provide the basis for disciplinary action in accordance with House rules.

## Violations of Ethical Standards

Violations of ethical standards may lead to various penalties. The U.S. Constitution authorizes each House of Congress to punish its Members for disorderly behavior and, with the concurrence of two thirds, to expel a Member.<sup>6</sup> The House may also punish a Member by censure, reprimand, condemnation, reduction of seniority, fine, or other sanction determined to be appropriate.<sup>7</sup>

A House rule specifically authorizes the Standards Committee to enforce standards of conduct for Members, officers, and employees; to investigate alleged violations of any law, rule, or regulation pertaining to official conduct; and to make recommendations to the House for further action.<sup>8</sup> Committee rules reflect the Committee's authority to issue letters of reproof and to take other administrative action.<sup>9</sup> House rules further provide that either with approval of the House or by an affirmative vote of two-thirds of its Members, the Committee may report substantial evidence of violation by a Member, officer, or employee to the appropriate federal or state authorities.<sup>10</sup>

Some standards of conduct derive from criminal law. Violations of these standards may lead to a fine or imprisonment, or both. In some instances, such as conversion of government funds or property to one's own use or false claims concerning expenses or allowances, the Department of Justice may seek restitution.

Among the sanctions that the Committee may recommend be imposed upon a Member in a disciplinary matter is the —[d]enial or limitation of any right, power, privilege, or immunity of the Member if under the Constitution the House may impose such denial or limitation.<sup>11</sup> The Committee may also recommend sanctions

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<sup>6</sup> U.S. Const., art. I, § 5, cl. 2.

<sup>7</sup> See generally Joint Comm. on Congressional Operations, House of Representatives Exclusion, Censure, and Expulsion Cases from 1789 to 1973, 93d Cong., 1<sup>st</sup> Sess. (Comm. Print 1973); Committee Rule 24(e).

<sup>8</sup> See House Rule 10, cl. 1(q); House Rule 11, cl. 3.

<sup>9</sup> See Comm. Rule 24(d) and (e)(6).

<sup>10</sup> See House Rule 11, cl. 3(a)(3); Committee Rule 28. See also 5 U.S.C. app. 4 § 104(b), authorizing the Committee to refer to the Attorney General — without seeking approval of the House — individuals who have willfully failed to file or falsified information required to be reported on Financial Disclosure Statements.

<sup>11</sup> See Comm. Rule 24(e)(5).

be imposed by the House against an officer or employee of the House. Such sanctions could include dismissal from employment, reprimand, fine, or other appropriate sanction.<sup>12</sup>

Charges of unethical conduct can be evaluated only on a case-by-case basis. As the Committee has noted, —it was for the very purpose of evaluating particular situations against existing standards, and of weeding out baseless charges from legitimate ones, that this committee was created.¶<sup>13</sup>

### History of the Committee

The first recorded instance of the House of Representatives attempting to take disciplinary action against a Member occurred in 1798. On January 30, Matthew Lyon (of Vermont) spat upon Roger Griswold (of Connecticut) during a vote. A letter of apology was sent; nevertheless, the Committee of the Whole heard the evidence and recommended expulsion. The vote fell two short of the two-thirds majority necessary to expel a Member.<sup>14</sup>

From 1798 until 1967, the House undertook disciplinary action against Members over 40 times, with no standardized approach. The offenses ranged from dueling to inserting obscene material in the *Congressional Record*. Some cases were handled directly on the House floor without Committee action, others through the creation of select investigating committees. In at least one case, the accused Member was not allowed to speak on his own behalf or to present any defense.<sup>15</sup> There were even attempts to punish former Members who had resigned.<sup>16</sup>

Beginning in the late 1940s, Senators Wayne Morse and Paul Douglas and Representative Charles Bennett advocated the enactment of an official code of conduct. In 1958, the Code of Ethics for Government Service was approved.<sup>17</sup> In 1964, following the investigation of Bobby Baker, Secretary to the Majority in the Senate, the Senate created a Select Committee on Standards of Conduct.

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<sup>12</sup> See Comm. Rule 24(f).

<sup>13</sup> House Comm. on Standards of Official Conduct, *In the Matter of a Complaint Against Representative Robert L.F. Sikes*, H. Rep. 94-1364, 94<sup>th</sup> Cong., 2d Sess. 8 (1976).

<sup>14</sup> II A. Hinds, *Hinds' Precedents of the House of Representatives of the United States*, §§ 1642-1643 (1907).

<sup>15</sup> *Id.* at § 1256 (In the Matter of Representative Joshua R. Giddings).

<sup>16</sup> *Id.* at §§ 1239 (In the Matter of Representative John T. Deweese), 1273 (In the Matter of Representative Benjamin F. Whittimore).

<sup>17</sup> See note 2, *supra*.

During the 89<sup>th</sup> Congress, two different actions prompted the creation of the House Committee on Standards of Official Conduct. In 1965, the Joint Committee on the Organization of Congress held hearings in which considerable testimony addressed the ethical conduct of Members, the need for codes of conduct and financial disclosure regulations, and the need for an ethics committee. In its final report, the Joint Committee's recommendations included the creation of a House Committee on Standards and Conduct.<sup>18</sup>

The other action involved an investigation by the Special Subcommittee on Contracts of the Committee on House Administration into the expenditures of the Committee on Education and Labor and the conduct of its chairman, Representative Adam Clayton Powell, Jr., of New York. The Subcommittee's report concluded that the chairman and certain employees had deceived House authorities as to travel expenses and also noted strong evidence that the chairman had directed certain illegal salary payments to his wife.<sup>19</sup> No formal action was taken during the 89<sup>th</sup> Congress against Representative Powell. In the 90<sup>th</sup> and 91<sup>st</sup> Congresses, however, he was removed from his chairmanship, denied his seniority, and fined,<sup>20</sup> and an attempt was made to exclude him.<sup>21</sup>

Against this backdrop, a Select Committee on Standards and Conduct was established in the closing days of the 89<sup>th</sup> Congress. The Select Committee's authority was limited to (1) recommending additional rules or regulations to ensure that Members, officers, and employees of the House adhere to proper standards of conduct in the discharge of their official duties; and (2) reporting violations of any law to the proper federal and state authorities.<sup>22</sup>

The Select Committee's term was limited.<sup>23</sup> On April 13, 1967, the House established the Committee on Standards of Official Conduct, to be composed of six members of the majority party and six members of the minority party. The Committee was directed to recommend such changes in laws, rules, and regulations as necessary to establish and to enforce standards of official conduct for Members,

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<sup>18</sup> Joint Comm. on the Organization of Congress, *Final Report pursuant to S. Con. Res. 2*, S. Rep. 1414, 89<sup>th</sup> Cong., 2d Sess. 48 (1966).

<sup>19</sup> H. Rep. 2349, 89<sup>th</sup> Cong., 2d Sess. 6-7 (1966).

<sup>20</sup> See H. Rep. 27, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1967); H. Res. 2, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess., 115 *Cong. Rec.* H21 (Jan. 3, 1969).

<sup>21</sup> 113 *Cong. Rec.* 26-27 (Mar. 1, 1967).

<sup>22</sup> H.R. 1013; see also House Comm. on Rules, Creating a Select Committee on Standards and Conduct, Report to Accompany H.R. 1013, H. Rep. 2012, 89<sup>th</sup> Cong., 2d Sess. (1966).

<sup>23</sup> See generally House Select Comm. on Standards of Official Conduct, *Report Under the Authority of H.R. 1013*, H. Rep. 2338, 89<sup>th</sup> Cong., 2d Sess. (1966).

officers, and employees.<sup>24</sup> One year later, the House Rules were amended to include a Code of Conduct (currently codified as House Rule 23) and an annual financial disclosure requirement (currently codified as House Rule 26).<sup>25</sup> At the same time, the Committee was made a permanent standing committee with authority to investigate alleged violations of the Code of Conduct and to issue advisory opinions interpreting its provisions.<sup>26</sup>

Four ad hoc groups have influenced the Committee's work: (1) The Commission on Administrative Review (generally known as the —Obey Commission); (2) the Select Committee on Ethics; (3) the Bipartisan Task Force on Ethics; and (4) the Ethics Reform Task Force. The work of each group is summarized below.

The Obey Commission was established in July 1976 (95<sup>th</sup> Congress), in the aftermath of Watergate, and directed to make recommendations to the House concerning ethical practices, financial accountability, and administrative operations of the House. These recommendations were set forth in a report entitled *Financial Ethics*<sup>27</sup> and a resolution, H. Res. 287. The House's adoption, on March 2, 1977, of H. Res. 287 changed the House rules governing financial disclosure, outside earned income, acceptance of gifts, unofficial office accounts, franking privileges, and travel. The Commission also recommended the creation of a select committee with legislative jurisdiction over these areas.

Based on the Obey Commission's recommendation, the House established the Select Committee on Ethics in March 1977 to provide guidelines and interpretations concerning House rules currently codified as House Rules 23, 24, 25, and 26, and to report legislation. The Select Committee and the Committee on Standards of Official Conduct operated simultaneously, with different jurisdictions. During the two years of the Select Committee's existence, it issued 13 formal Advisory Opinions interpreting the new House rules and recommended that the House rules pertaining to financial disclosure and franking (current House Rules 24 and 26) be enacted into law, which occurred in 1978.<sup>28</sup> When the Select Committee completed its task, it issued a *Final Report*,<sup>29</sup> and its records and materials were transferred to the Committee on Standards of Official Conduct to assist the latter in rendering

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<sup>24</sup> H. Res. 418, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1967).

<sup>25</sup> H. Res. 1099, 90<sup>th</sup> Cong., 2d Sess. (1968).

<sup>26</sup> *Id.*

<sup>27</sup> H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977).

<sup>28</sup> See Ethics in Government Act of 1978, now codified, as amended, at 5 U.S.C. app. 4 §§ 101-111 and 39 U.S.C. §§ 3210-3220.

<sup>29</sup> H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess. (1979).



advisory opinions and interpreting House rules relating to financial ethics and standards of conduct.

On February 2, 1989, the Speaker and the Republican Leader of the 101<sup>st</sup> Congress appointed a Bipartisan Task Force on Ethics to conduct a comprehensive review of House ethics rules and regulations. Co-chaired by Representatives Vic Fazio and Lynn Martin, the Task Force looked anew at the rules concerning gifts, honoraria, outside earned income, financial disclosure, and the use of official resources, as well as considered issues relating to ethics committee procedures and the compensation of Members and other senior government officials. After four public hearings and much internal study, the Task Force issued a report<sup>30</sup> and a bill, H.R. 3660. This bill became the Ethics Reform Act of 1989, Pub. L. 101-194, signed into law on November 30, 1989, and amended with technical corrections by Pub. L. 101-280 on May 4, 1990.

The Ethics Reform Act enacted a total ban on honoraria, revisions to the outside earned income limits, new post-employment restrictions, changes to the gift and travel limits, and financial disclosure revisions. The Ethics Reform Act also contained several provisions affecting the Committee on Standards of Official Conduct. In 1990, an Office of Advice and Education was established within the Committee to provide confidential advice to Members, officers, and employees. A statute of limitations of three terms was enacted for investigations of alleged violations. In 1991, the Committee's membership increased from 12 to 14, and it adopted procedures ensuring that the same members do not both recommend charges and sit in judgment of those charges.

In February 1997, following the resolution of a Committee investigation of the Speaker of the House,<sup>31</sup> the House of Representatives established the Ethics Reform Task Force, chaired by Representatives Robert L. Livingston and Benjamin L. Cardin. The task force was directed to review procedures governing the ethics process and to recommend appropriate reforms. On September 18, 1997, the House adopted the recommendations of the Ethics Reform Task Force with amendments (H.R. 168). The recommended changes to the House ethics rules proposed by the Ethics Reform Task Force were designed to —improve the trust and confidence that the Members, and the American people, have in the House standards process.¶ The recommendations adopted by the House included a requirement that Standards Committee staff be nonpartisan, professional, and available as a resource to all Members of the Committee. Other recommendations adopted by the House

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<sup>30</sup> House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. (Comm. Print, Comm. on Rules 1989), *reprinted in* 135 *Cong. Rec.* H9253 (daily ed. Nov. 21, 1989).

<sup>31</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Newt Gingrich*, H. Rep. 105-1, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Jan. 17, 1997).

included reducing the size of the Committee from 14 to 10 Members, expanding due process for respondents, and establishing a pool of 20 members (10 from each party) to be available to serve on an investigative subcommittee as needed by the Committee.<sup>32</sup>

## Committee Procedures

The Rules of the Committee on Standards of Official Conduct<sup>33</sup> have been periodically revised since the Committee was established to reflect changes in Committee structure and procedures implemented by the House. Current rules also reflect changes necessitated following experience under prior rules. The current rules provide for an Office of Advice and Education within the Committee and the bifurcation of the Committee investigatory and disciplinary process. The rules also govern the issuance of advisory opinions, the receipt of complaints, and the conduct of Committee investigations.

Committee rules now set forth the following requirements for complaints filed with the Committee:<sup>34</sup>

- A complaint must be in writing, dated, and properly verified.<sup>35</sup>
- A complaint must set forth the following in simple, concise, and direct statements: the name and legal address of the party filing the complaint; the name and position or title of the respondent; the nature of the alleged violation of the Code of Official Conduct or of other law, rule, regulation, or other standard of conduct applicable to the performance of duties or discharge of responsibilities; and the facts alleged to give rise to the violation.
- A complaint shall not contain innuendo, speculative assertions, or conclusory statements.<sup>36</sup>
- Information offered as a complaint by a Member of the House of Representatives may be transmitted directly to the Committee; however,

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<sup>32</sup> *Report of the Ethics Reform Task Force on H. Res. 168*, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Comm. Print June 17, 1997).

<sup>33</sup> House Comm. on Standards of Official Conduct, Rules, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Comm. Print 2007) (hereinafter —Comm. Rule(s) ), *reprinted in 153 Cong. Rec.* H7331-37 (June 27, 2007). The Committee’s rules are also available on the Committee’s website.

<sup>34</sup> *See generally* Comm. Rule 15.

<sup>35</sup> Committee Rule 15(a) provides that a document will be considered properly verified when a notary executes it with the language, —Signed and sworn to (or affirmed) before me on (date) by (the name of the person).||

<sup>36</sup> *See* House Comm. on Standards of Official Conduct *Summary of Activities for the One Hundred Eighth Congress*, H. Rep. 108-806, 2d Sess. (Jan. 3, 2005) at 21 (concerning content of complaint filed by Representative Chris Bell).

information offered as a complaint by an individual not a Member of the House may be transmitted to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee.

- A complaint must be accompanied by a certification, which may be unsworn, that the complainant has provided an exact copy of the filed complaint and all attachments to the respondent.
- The Committee shall not accept, and shall return to the complainant, any complaint submitted within the 60 days prior to an election in which the subject of the complaint is a candidate.
- The Committee shall not consider a complaint, nor shall any investigation be undertaken by the Committee, of any alleged violation which occurred before the third previous Congress unless the Committee determines that the alleged violation is directly related to an alleged violation which occurred in a more recent Congress.

Committee rules also contain requirements and procedures that follow the filing of a complaint. Initially, a determination is made by the Chairman and Ranking Minority Member of the Committee as to whether a complaint is in compliance with House and Committee rules.<sup>37</sup> If it is determined that the complaint submitted meets the requirements for what constitutes a complaint, Committee rules provide for notification of that determination to the respondent, and for an opportunity for the respondent to provide a response.<sup>38</sup> The Chairman and Ranking Minority Member may establish an investigative subcommittee or make recommendations to the full Committee as to the disposition of the complaint.<sup>39</sup> The recommendations that the Chairman and Ranking Minority Member of the Committee may make include recommending that the Committee dismiss the complaint or any portion thereof, or that it establish an investigative subcommittee.<sup>40</sup> The rules permit the Chairman and Ranking Minority Member to jointly gather additional information concerning alleged conduct which is the basis for a complaint until the Committee has established an investigative subcommittee or placed the issue of establishing an investigative subcommittee on the agenda of Committee meeting.<sup>41</sup>

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<sup>37</sup> Comm. Rule 16(a).

<sup>38</sup> Comm. Rule 17(a) and (b).

<sup>39</sup> Comm. Rule 16(b).

<sup>40</sup> *Id.*

<sup>41</sup> Comm. Rule 17(c).

The rules also permit, notwithstanding the absence of a filed complaint, the Committee to consider any information in its possession indicating that a Member, officer, or employee may have committed a violation of the Code of Official Conduct or any law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, officer, or employee in the performance of his or her duties or the discharge of his or her responsibilities.<sup>42</sup> Further, the Chairman and Ranking Minority Member may jointly gather additional information concerning such an alleged violation unless and until an investigative subcommittee has been established.<sup>43</sup>

If an investigative subcommittee is established, the Chairman and Ranking Minority Member designate four Members of the House (with equal representation from the majority and minority parties) to serve on the subcommittee. One of the Members of the investigative subcommittee is designated by the Chairman of the Committee to serve as Chairman of the investigative subcommittee. The Ranking Minority Member of the Committee designates one Member of the investigative subcommittee to be its Ranking Minority Member.<sup>44</sup>

Once appointed, the investigative subcommittee gathers evidence relating to the matter under investigation. Any evidence relevant to the inquiry is admissible unless it is privileged under House rules.<sup>45</sup> The investigative subcommittee may, by a majority vote of its Members, compel by subpoena the attendance and testimony of witnesses and the production of documents it deems necessary to conduct its inquiry.<sup>46</sup> In addition, investigative subcommittee staff may interview witnesses and examine documents, among other investigative measures.<sup>47</sup> The proceedings of the investigative subcommittee, including the taking of witness testimony, are conducted in executive session.<sup>48</sup> All witnesses and the respondent in an inquiry may be represented by counsel.<sup>49</sup>

At the conclusion of its inquiry, the investigative subcommittee may —adopt a Statement of Alleged Violation if it determines that there is substantial reason to believe that a violation . . . has occurred.||<sup>50</sup> The Statement of Alleged Violation

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<sup>42</sup> Comm. Rule 18(a).

<sup>43</sup> *Id.*

<sup>44</sup> Comm. Rule 19(a).

<sup>45</sup> Comm. Rule 19(c)(1).

<sup>46</sup> Comm. Rule 19(b)(5).

<sup>47</sup> Comm. Rule 19(b)(4).

<sup>48</sup> Comm. Rule 19(b)(1).

<sup>49</sup> Comm. Rules 19(b)(2), 26(c), and 26(m).

<sup>50</sup> Comm. Rule 19(f).

must contain a plain and concise statement of facts and a reference to the particular standard of conduct violated by the respondent.<sup>51</sup> Prior to adopting the Statement of Alleged Violation, the investigative subcommittee must make exculpatory information received by the investigative subcommittee available to the respondent.<sup>52</sup> The rules permit a respondent to submit an answer, in writing and under oath, to the Statement of Alleged Violation, as well as to file a Motion for a Bill of Particulars and a Motion to Dismiss.<sup>53</sup> If an investigative subcommittee does not adopt a Statement of Alleged Violation, it shall transmit a report to the Committee that contains a summary of the information received during the inquiry along with the conclusions and recommendations, if any, of the investigative subcommittee.<sup>54</sup>

Unless otherwise resolved under Committee and House rules, the next step of the disciplinary process requires the allegations in the Statement of Alleged Violation to be put before an adjudicatory subcommittee that consists of all Members of the Committee who did not serve on the investigative subcommittee.<sup>55</sup> In a public adjudicatory hearing to determine whether the alleged violations have been proven by clear and convincing evidence, both the respondent and Committee counsel may present evidence.<sup>56</sup> The burden of proof rests on Committee counsel to establish the facts alleged in the Statement of Alleged Violation by clear and convincing evidence.<sup>57</sup>

If a majority of the members of an adjudicatory subcommittee find that any count of in a Statement of Alleged Violation has been proven by clear and convincing evidence, a public sanction hearing is held before all of the members of the Standards Committee to determine the appropriate sanction to adopt or to recommend to the House.<sup>58</sup>

As noted, the Committee may recommend one or more of several different sanctions to the House of Representatives, including expulsion from the House of Representatives, censure, or reprimand.<sup>59</sup> The Committee may also send a Letter of

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<sup>51</sup> *Id.*

<sup>52</sup> Comm. Rule 25.

<sup>53</sup> Comm. Rule 22(a), (b), and (c).

<sup>54</sup> Comm. Rule 19(g).

<sup>55</sup> Comm. Rule 23(a).

<sup>56</sup> Comm. Rule 23(j).

<sup>57</sup> Comm. Rule 23(n).

<sup>58</sup> Comm. Rule 24(b).

<sup>59</sup> Comm. Rule 24(e).

Reproval to a respondent without recommending further action by the full House.<sup>60</sup> A Letter of Reproval is —intended to be a rebuke of a Member’s conduct issued by a body of that Member’s peers acting, as the Standards Committee, on behalf of the House of Representatives.¶<sup>61</sup>

In the entire history of the House of Representatives, five Members have been expelled. Of the five Members, three of them were expelled for conduct traitorous to the Union in the Civil War era. Michael J. Myers was expelled from the House in 1980 following his conviction for bribery in connection with the ABSCAM scandal.<sup>62</sup> James A. Traficant, Jr., was expelled from the House in 2002, following his trial and conviction for conspiring to violate the bribery statute (18 U.S.C. § 201), acceptance of gratuities, obstruction of justice, conspiracy to defraud the United States, filing false federal income tax returns, and racketeering.<sup>63</sup> Since the establishment of this Committee, four Members have been censured by the House after Committee investigations, and seven have been reprimanded. In addition, the Committee has issued five public letters of reproval, without recommending action by the full House, and has publicly admonished several other Members for their conduct. Ten Members left the House after charges were brought by the Committee or court convictions were returned but before House action could be concluded.

### **Conduct Reflecting Creditably on the House**

A Member, Delegate, Resident Commissioner, officer, or employee of the House shall conduct himself at all times in a manner that shall reflect creditably on the House. [House Rule 23, clause 1.]

Members, officers, and employees of the House must observe the broad ethical standards articulated in the Code of Official Conduct (Rule 23) of the Rules of the House of Representatives. The most comprehensive provision, Clause 1, states that a —Member, Delegate, Resident Commissioner, officer, or employee of the House shall conduct himself at all times in a manner that shall reflect creditably on the House.¶

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<sup>60</sup> Comm. Rule 24(d).

<sup>61</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative E.G. —Budll Shuster*, H. Rep. 106-979, 106<sup>th</sup> Cong., 2d Sess. (Oct. 16, 2000) at 113; *see also* House Comm. on Standards of Official Conduct, *In the Matter of Representative Earl F. Hilliard*, H. Rep. 107-130, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (July 10, 2001) at xi-xii.

<sup>62</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Michael J. Myers*, H. Rep. 96-1387, 96<sup>th</sup> Cong., 2d Sess. (Sept. 24, 1980).

<sup>63</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant, Jr.*, H. Rep. 107-594, 107<sup>th</sup> Cong., 2d Sess., Vols. I-VI (July 19, 2002).

In interpreting Clause 1 of the Code when first adopted, the Select Committee on Standards of Official Conduct of the 90<sup>th</sup> Congress noted that this standard was included within the Code to deal with —flagrantll violations of the law that reflect on —Congress as a whole,ll and that might otherwise go unpunished.<sup>64</sup> During floor debate preceding the adoption of the Code, however, Representative Price of Illinois, Chairman of the Select Committee on Standards of Official Conduct, rejected the notion that violations of law are simultaneous violations of the Code:

The committee endeavored to draft a code that would have a deterrent effect against improper conduct and at the same time be capable of enforcement if violated. Initially the committee considered making violations of law simultaneous violations of the code, but such a direct tie-in eventually was ruled out for the reason that it might open the door to stampedes for investigation of every minor complaint or purely personal accusation made against a Member. At the same time there was a need for retaining the ability to deal with any given act or accumulation of acts which, in the judgment of the committee, are severe enough to reflect discredit on the Congress. Stated purposefully in subjective language, this standard [clause 1] provides both assurances.<sup>65</sup>

Later in the floor discussion, another member of the Select Committee, Representative Arends of Illinois, emphasized that the committee intended the proposed rules to focus on official, rather than personal, conduct:

[T]he Congress has the constitutional right to determine its own rules. And this right, too, has its limitations. The rules are applicable only in connection with the operation of the Congress itself. Somehow a line must be drawn as between what is personal conduct and what is official conduct.<sup>66</sup>

During the 110<sup>th</sup> Congress, the House adopted House Resolution 451,<sup>67</sup> which provided that

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<sup>64</sup> House Comm. on Standards of Official Conduct, *Report under the Authority of H. Res. 418*, H. Rep. 1176, 90<sup>th</sup> Cong., 2d Sess. 17 (1968).

<sup>65</sup> 114 *Cong. Rec.* 8778 (Apr. 3, 1968).

<sup>66</sup> 114 *Cong. Rec.* 8785 (Apr. 3, 1968).

<sup>67</sup> 153 *Cong. Rec.* 7331 (June 27, 2007).

[W]henever a Member of the House of Representatives, including a Delegate or Resident Commission to the Congress, is indicted or otherwise informally charged with criminal conduct in a court of the United States or any State, the Committee on Standards of Official Conduct shall, not later than 30 days after the date of such indictment or charge—

(1) empanel an investigative subcommittee to review the allegations; or

(2) if the Committee does not empanel an investigative subcommittee to review the allegations, submit a report to the House describing its reasons for not empanelling such an investigative subcommittee, together with the actions, if any, the Committee has taken in response to the allegations.

The resolution mandates some action by the Committee (either a report to the House or the empanelment of an investigative subcommittee) whenever a Member is charged with criminal conduct, and does not distinguish between felony and misdemeanor criminal charges.

To date, the Committee or the House has invoked Rule 23, clause 1, in investigating or disciplining Members for:

- Failure to report campaign contributions<sup>68</sup> and making false statements to the Committee<sup>69</sup> in connection with the Korean Influence Investigation;<sup>70</sup>
- Criminal convictions for bribery<sup>71</sup> or accepting illegal gratuities;<sup>72</sup>

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<sup>68</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative John J. McFall*, H. Rep. 95-1742, 95<sup>th</sup> Cong., 2d Sess. 2-3 (1978) (Count 1); House Comm. on Standards of Official Conduct, *In the Matter of Representative Edward R. Roybal*, H. Rep. 95-1743, 95<sup>th</sup> Cong., 2d Sess. 2-3 (1978) (Count 1).

<sup>69</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles H. Wilson (of California)*, H. Rep. 95-1741, 95<sup>th</sup> Cong., 2d Sess. 4-5 (1978); H. Rep. 95-1743, *supra* note 66, at 3-4 (Counts 3-4).

<sup>70</sup> See 124 *Cong. Rec.* 36976-84, 37005-17 (Oct. 13, 1978) (House reprimand).

<sup>71</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative John W. Jenrette, Jr.*, H. Rep. 96-1537, 96<sup>th</sup> Cong., 2d Sess. 4 (1980) (Member resigned); House Comm. on Standards of Official Conduct, *In the Matter of Representative Raymond F. Lederer*, H. Rep. 97-110, 97<sup>th</sup> Cong., 1st Sess. 4, 16-17 (1981) (Member resigned after Committee recommended expulsion); H. Rep. 96-1387, *supra* note 61, at 2, 5 (vote of expulsion). In another case, the Committee issued a  
(con't next page)



- Criminal convictions for conspiring to violate the federal bribery statute, acceptance of gratuities, obstruction of justice, conspiracy to defraud the United States, filing false federal income tax returns, and racketeering;<sup>73</sup>
- Inflating the salaries of congressional employees in order to enable them to pay the Member's personal, political, or congressional expenses;<sup>74</sup>
- Accepting gifts from persons with interest in legislation in violation of the gift rule (Rule 43, clause 4);<sup>75</sup>
- Engaging in sexual relationships with House pages;<sup>76</sup>
- Making improper sexual advances to a Peace Corps volunteer;<sup>77</sup>
- Writing a misleading memorandum that could have influenced a personal associate's probation and arranging for the improper administrative dismissal of parking tickets;<sup>78</sup>
- Engaging in a pattern and practice of conduct in which campaign funds were converted to personal use;<sup>79</sup>

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Statement of Alleged Violation concerning bribery and perjury, but took no further action when the Member resigned (House Comm. on Standards of Official Conduct, *In the Matter of Representative Daniel J. Flood*, H. Rep. 96-856, 96th Cong., 2d Sess. 4-16, 125-126 (1980)).

<sup>72</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Mario Biaggi*, H. Rep. 100-506, 100th Cong., 2d Sess. 7, 9 (1988) (Member resigned while expulsion resolution was pending); H. Rep. 107-594, *supra* note 63 (vote of expulsion).

<sup>73</sup> H. Rep. 107-594, *supra* note 63.

<sup>74</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles C. Diggs, Jr.*, H. Rep. 96-351, 96th Cong., 1st Sess. (1979); see 125 *Cong. Rec.* 21584-92 (July 31, 1979) (Member censured and required to make restitution); see also House Comm. on Standards of Official Conduct, *Summary of Activities, 100th Cong.*, H. Rep. 100-1125, 100th Cong., 2d Sess. 15-16 (1989) (*In the Matter of Delegate Fofo I.F. Sunia*) (Member and aide pleaded guilty to conspiracy to defraud the government and resigned).

<sup>75</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles H. Wilson (of California)*, H. Rep. 96-930, 96th Cong. 2d Sess. 4-5 (1980); see 126 *Cong. Rec.* 13801-20 (June 10, 1980) (vote of censure); former House Rule 43 cl. 4.

<sup>76</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Gerry E. Studds*, H. Rep. 98-295, 98th Cong., 1st Sess. (1983); House Comm. on Standards of Official Conduct, *In the Matter of Representative Daniel B. Crane*, H. Rep. 98-296, 98th Cong., 1st Sess. (1983); see 129 *Cong. Rec.* H5280-95 (daily ed. July 20, 1983) (Committee recommended reprimand; House voted censure).

<sup>77</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Gus Savage*, H. Rep. 101-397, 101st Cong., 2d Sess. 14 (1990) (Committee publicly disapproved conduct; no House action).

<sup>78</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Barney Frank*, H. Rep. 101-610, 101st Cong., 2d Sess. (1990) (Member reprimanded by House).

- Violations of the House gift rule, the performance of campaign work in an official congressional office by congressional employees on official time, and the failure to maintain adequate records to verify the legitimacy of expenditures of campaign funds;<sup>80</sup> and
- Making statements that impugned the reputation of the House, failing to cooperate fully with fact-finding being undertaken by the Chairman and Ranking Minority Member of the Committee on Standards of Official Conduct, threatening to retaliate against a fellow Member because of the Member's vote on particular legislation, and offering a political endorsement for a relative of a Member in exchange for vote by the Member in favor of particular legislation.<sup>81</sup>

A review of these cases indicates that the Committee has historically viewed clause 1 as encompassing violations of law and abuses of one's official position.<sup>82</sup>

### **The Spirit and the Letter of the Rules**

A Member, Delegate, Resident Commissioner, officer, or employee of the House shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof. [House Rule 23, clause 2.]

House Rule 23, clause 2, provides that Members, officers, and employees shall adhere to the spirit and the letter of House and committee rules. The Select Committee on Standards of Official Conduct of the 90<sup>th</sup> Congress recommended this provision in part to emphasize —the importance of the precedents of decorum and consideration that have evolved in the House over the years.¶ <sup>83</sup>

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<sup>79</sup> H. Rep. 107-130, *supra* note 61, at 3-9 (Member's conduct was also found to violate provision of Code of Official Conduct prohibiting conversion of campaign funds to personal use and prohibiting expenditure of campaign funds that are not attributable to bona fide campaign or political purposes. *See* House Rule 23, clause 6).

<sup>80</sup> H. Rep. 106-979, *supra* note 61, at 6-7.

<sup>81</sup> House Comm. on Standards of Official Conduct, *Investigation of Certain Allegations Related to Voting on the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, H. Rep. 108-722, 108<sup>th</sup> Cong., 2d Sess. (Oct. 4, 2004).

<sup>82</sup> In one other case, the Committee never reached a determination as to whether what is now codified as Rule 23, clause 1 would encompass a criminal conviction for contributing to the unruliness of a minor and allegations of improper sexual advances to a congressional employee because the Member resigned prior to the conclusion of the Preliminary Inquiry. *See* Staff of House Comm. on Standards of Official Conduct, *In the Matter of Representative Donald E. Lukens*, 101<sup>st</sup> Cong., 2d Sess. (Comm. Print 1990).

<sup>83</sup> H. Rep. 1176, *supra* note 64, at 17.

Beyond this genteel goal, however, the drafters did assume that the rule would provide a basis for congressional discipline. As summarized by Chairman Price:

This standard was drafted also in general terms rather than attempting to deal more specifically with such things as unfair and dilatory legislative tactics. It did not appear practicable to the committee to attempt to regulate these areas more closely. This standard should provide the House the means to deal with infractions that rise to trouble it without burdening it with defining specific charges that would be difficult to state with precision.<sup>84</sup>

The practical effect of Clause 2 of the Code has been to provide a device for construing other provisions of the Code and House rules. It has been interpreted to mean that Members, officers, and employees may not do indirectly what they would be barred from doing directly. Individuals should thus read House rules broadly. The Select Committee on Ethics of the 95<sup>th</sup> Congress cited this provision to show that a narrow technical reading of a House rule should not overcome its —spiritll and the intent of the House in adopting that and other rules of conduct.<sup>85</sup>

In addition to using Clause 2 as an aid to interpreting other House rules, this Committee cited its violation in recommending expulsion for two Members convicted in separate cases of bribery in the 96<sup>th</sup> and 97<sup>th</sup> Congresses, one Member convicted of accepting illegal gratuities in the 100<sup>th</sup> Congress,<sup>86</sup> and one Member convicted during the 107<sup>th</sup> Congress of conspiring to violate the bribery statute (18 U.S.C. § 201), accepting gratuities, obstructing justice, conspiring to defraud the United States, filing false federal income tax returns, and racketeering.<sup>87</sup>

### **Refraining From Legislative Activity After Conviction**

On April 16, 1975, the House adopted an amendment to the Code of Official Conduct pertaining to convictions. That provision, now clause 10 of Rule 23, states that

A Member, Delegate, or Resident Commissioner who has been convicted by a court of record for the commission of a crime for which a

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<sup>84</sup> 114 *Cong. Rec.* 8778 (Apr. 3, 1968); *see also* 114 *Cong. Rec.* 8799 (statement of Representative Teague, member of the House Comm. on Standards of Official Conduct, 90<sup>th</sup> Cong.).

<sup>85</sup> *See* House Select Comm. on Ethics, *Advisory Opinion No. 4*, included as an appendix to H. Rep. 95-1837, *supra* note 29, at 61, and in the appendices of this Manual.

<sup>86</sup> H. Rep. 96-1387, *supra* note 62, at 5; H. Rep. 97-110, *supra* note 71, at 16 n.8; H. Rep. 100-506, *supra* note 72, at 7.

<sup>87</sup> H. Rep. 107-594, *supra* note 63.

sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member, and a Member should refrain from voting on any question at a meeting of the House or of the Committee of the Whole House on the state of the Union, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is reelected to the House after the date of such conviction

The Committee cited this rule in 2002 in a publicly-released letter to former Representative James A. Traficant, Jr., following Representative Traficant's conviction in a federal district court of ten felony counts related to public corruption. Citing House Rule 23, clause 10, Representative Traficant was admonished by the Committee that if he violated this provision he would risk disciplinary action by the Committee and the House. The Committee advised Representative Traficant that such disciplinary action would be in addition to any proceedings initiated in connection with his criminal convictions. The *Congressional Record* confirmed that other than during a vote on the House floor to postpone a vote on a resolution to expel him from the House, Representative Traficant did not vote in the House after the date of his criminal convictions.

This Committee's report on the measure noted that the Committee will not, as a rule, take action on a complaint of a statutory violation by a Member while the authorities charged with the statute's enforcement are pursuing the case. However, where the case raises allegations of abuse of official position or where law enforcement authorities do not appear to be acting —expeditiously,|| the Committee may choose not to defer:

[W]here an allegation is that one has abused his direct representational or legislative position — or his —official conduct|| has been questioned — the committee concerns itself forthwith, because there is no other immediate avenue of remedy. But where an allegation involves a possible violation of statutory law, and the committee is assured that the charges are known to and are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course. This is not to say the committee abandons concern in statutory matters — rather, it feels it normally should not undertake duplicative investigations pending judicial resolution of such cases.<sup>88</sup>

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<sup>88</sup> House Comm. on Standards of Official Conduct, *Policy of the House of Representatives with respect to Actions by Members Convicted of Certain Crimes*, H. Rep. 94-76, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2 (1975).

Even if the judicial process has not entirely run its course, such as when appeals are pending, the House may take notice of guilty pleas or verdicts against a Member, since the Member cannot at that point claim the presumption of innocence. As the Committee report noted:

For the House to withhold any action whatever until ultimate disposition of a judicial proceeding could mean, in effect, the barring of any legislative branch action, since the appeals processes often do, or can be made to, extend over a period longer than the two-year term of the Member.

Since Members of Congress are not subject to recall . . . public opinion could well interpret inaction as indifference on the part of the House.

The Committee recognizes a very distinguishable link in the chain of due process — that is, the point at which the defendant no longer has claim to the presumption of innocence. This point is reached in a criminal prosecution upon a plea of guilty or upon conviction by a jury or by a judge (or judges) if jury trial is waived. It is to this condition, and only to this condition, that the proposed resolution is directed.<sup>89</sup>

Where the gravamen of the charges is abuse of official position, the full House may choose to take disciplinary action against a Member even though all appeals in the criminal process have not been exhausted.<sup>90</sup> Thus, while a Committee rule compels the Committee to undertake an inquiry —with regard to any felony conviction of a Member, officer, or employee of the House of Representatives in a Federal, State, or local court who has been sentenced,<sup>91</sup> under the same rule, the Committee has the discretion to initiate an inquiry at any time prior to conviction or sentencing.<sup>92</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> See H. Rep. 96-351, *supra* note 74; H. Rep. 96-1387, *supra* note 62. In several other cases, Members resigned after conviction but before the House could act. See H. Rep. 96-1537, *supra* note 71; H. Rep. 97-110, *supra* note 71; H. Rep. 100-506, *supra* note 72; House Comm. on Standards of Official Conduct, *Summary of Activities, 101<sup>st</sup> Cong.*, H. Rep. 101-995, *101<sup>st</sup> Cong.*, 2d Sess. 12-13 (1990) (*In the Matter of Representative Robert Garcia*); see also H. Rep. 107-594, *supra* note 63.

<sup>91</sup> Comm. Rule 18(e).

<sup>92</sup> *Id.*

## Code of Ethics for Government Service

The Code of Ethics for Government Service articulates broad ethical guidelines for —all Government employees, including officeholders.¶ The 85<sup>th</sup> Congress adopted this Code in 1958.<sup>93</sup> Among other things, the Code stresses that any person in government service should:

- Adhere to the highest moral principles;
- Give a full day’s labor for a full day's pay;
- Never discriminate unfairly by dispensing special favors;
- Never accept favors or benefits that might be construed as influencing the performance of governmental duties;
- Make no private promises binding on the duties of office;
- Engage in no business with the Government inconsistent with the performance of governmental duties;
- Never use information received confidentially in the performance of governmental duties for making private profit; and
- Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.

The Code of Ethics for Government Service was adopted as a concurrent resolution expressing the —sense of Congress,¶ <sup>94</sup> rather than as a statute. This Committee has concluded, however, that the ethical precepts set forth in this code —represent continuing traditional standards of ethical conduct to be observed by Members of the House at all times.¶ <sup>95</sup>

Formal charges may be brought against Members of the House for violating this code. Among the violations charged against former Representative Traficant during the disciplinary proceedings that led to his expulsion was that he violated the requirement of the Code of Ethics for Government Service that Members uphold the laws of the United States and never be a party to the evasion of those laws.<sup>96</sup> In another instance, the House reprimanded a Member based on charges concerning his use of his official position for pecuniary gain and receipt of benefits under circumstances that might have been construed as influencing official duties. There

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<sup>93</sup> See note 2, *supra*.

<sup>94</sup> L. Deschler & W. Brown, *Procedure in the U.S. House of Representatives*, 97<sup>th</sup> Cong., 2d Sess. 373, ch. 24, § 1.3 (4th ed. 1982).

<sup>95</sup> H. Rep. 94-1364, *supra* note 13, at 3.

<sup>96</sup> H. Rep. 107-594, *supra* note 63; see also Code of Ethics for Government Service, *supra* note 2, at ¶ 2.

the Member took official actions that enhanced the value of his personal financial holdings.<sup>97</sup> In another matter, the House reprimanded a Member found responsible for permitting official resources to be diverted to his former law partner (by allowing him use of government furniture, photocopy services, supplies, and long distance telephone service over a nine-year period) in violation of paragraph 5 of the Code of Ethics for Government Service and 31 U.S.C. § 1301(a) (—[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law).<sup>98</sup>

## Rules of Members, Officers, Supervisors, and Committees

The standards enforced by this Committee constitute a —floor of minimally acceptable behavior. Individual Members or supervisors may set more rigorous standards in their own offices. Therefore, employees of the House should ensure that their behavior complies with any additional rules, regulations, or practices that apply to the specific office or unit where they work.

## Advisory Opinions

The Committee on Standards of Official Conduct urges individuals to call or to write with any questions regarding the appropriateness of contemplated activity. House rules authorize the Committee —to give consideration to the request of any Member, officer, or employee of the House for an advisory opinion with respect to the general propriety of any current or proposed conduct of such Member, officer, or employee.<sup>99</sup> The Ethics Reform Act of 1989 guarantees that no one may be put in jeopardy by making such a request. Anyone who acts in good faith in accordance with a written advisory opinion from the Committee may not then be investigated by the Committee based on the conduct addressed in the opinion,<sup>100</sup> and courts may consider reliance on such an opinion a defense to prosecution by the Justice Department.<sup>101</sup> All such inquiries and their responses will be kept confidential by the Committee.

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<sup>97</sup> H. Rep. 94-1364, *supra* note 13, at 3; *see also* Code of Ethics for Government Service at ¶ 5.

<sup>98</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representatives Austin J. Murphy*, H. Rep. 100-485, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1987).

<sup>99</sup> House Rule 10, cl. 4(e)(1)(D).

<sup>100</sup> 2 U.S.C. § 29d(i)(4); 5 U.S.C. app. 4 § 504(b); Comm. Rule 3(j)-(k).

<sup>101</sup> *See United States v. Hedges*, 912 F.2d 1397, 1404-06 (11th Cir. 1990); 5 U.S.C. app. 4 § 504(b).





# GIFTS

## Overview

Congress has recognized that —public office is a public trust.¶<sup>1</sup> Members of Congress hold office to represent the interests of their constituents and the public at large. Members are assisted in these efforts by officers and employees who are paid from United States Treasury funds. The public has a right to expect Members, officers, and employees to exercise impartial judgment in performing their duties.<sup>2</sup> The receipt of gifts or favors from certain persons or special interests may interfere with this impartial judgment. The recipient of a gift will naturally feel grateful, and the giver may expect favorable treatment or consideration in return.<sup>3</sup>

A 1951 report entitled *Ethical Standards in Government*, issued by a Senate subcommittee headed by Senator Paul H. Douglas, articulated some of the basic concerns that arise regarding acceptance of gifts by public officials:

What is it proper to offer to public officials, and what is it proper for them to receive? A cigar, a box of candy, a modest lunch . . . ? Is any one of these improper? It is difficult to believe so. They are usually a courteous gesture, an expression of good will, or a simple convenience, symbolic rather than intrinsically significant. Normally they are not taken seriously by the giver nor do they mean very much to the receiver. At the point at which they do begin to mean something, however, do they not become improper? Even small gratuities can be significant if they are repeated and come to be expected . . . .

Expensive gifts, lavish or frequent entertainment, paying hotel or travel costs, valuable services, inside advice as to investments, discounts and allowances in purchasing are in an entirely different category. They are clearly improper. . . . The difficulty comes in drawing the line between the innocent or proper and that which is

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<sup>1</sup> Code of Ethics for Government Service ¶ 10, H. Con. Res. 175, 85<sup>th</sup> Cong., 2d Sess., 72 Stat., pt. 2, B 12 (1958).

<sup>2</sup> *Id.* ¶ 5. See also 135 *Cong. Rec.* H8764 (daily ed. Nov. 16, 1989) (debate on Ethics Reform Act of 1989, quoting Paul Volcker, Chairman of the National Commission on the Public Service); *United States v. Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977), *aff'd*, 572 F.2d 31 (2d Cir. 1978).

<sup>3</sup> See Paul H. Douglas, *Ethics in Government* 48-49 (1952).

designing or improper. At the moment a doubt arises as to propriety, the line should be drawn.<sup>4</sup>

In 1989 the House Bipartisan Task Force on Ethics articulated the additional concern that gifts to Members may create an appearance of impropriety that may undermine the public's faith in government:

Regardless of any actual corruption or undue influence upon a Member or employee of Congress, the receipt of gifts or favors from private interests may affect public confidence in the integrity of the individual and in the institution of the Congress. Legitimate concerns of favoritism or abuse of public position may be raised by disclosure of frequent or expensive gifts from representatives of special interests, or valuable gifts from anyone other than a relative or personal friend.<sup>5</sup>

In a 1994 Senate committee report on a gift reform proposal, provisions imposing special restrictions on gifts from lobbyists were justified as follows:

[I]t seems appropriate to single out registered lobbyists and foreign agents for special treatment, because this category includes people who are, by definition, in the business of seeking to influence the outcome of public policy decisions. Because registered lobbyists and foreign agents are paid to influence the actions of public officials, including legislative branch officials, their gifts are uniquely susceptible to the appearance that they are intended to purchase access or influence.<sup>6</sup>

However, as the Douglas Subcommittee also recognized, Members and staff historically have been offered a number of gifts that do not raise any genuine ethical concern, including relatively inexpensive gifts that are presented merely as a souvenir of a visit or as a mark of honor or respect. Particularly where the offeror is either a constituent or an acquaintance who is not seeking any official action from the Member, a rule requiring Members to decline gifts of this nature could result in needless embarrassment or hurt feelings.

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<sup>4</sup> Special Subcomm. on the Establishment of a Comm'n on Ethics in Gov't, Senate Comm. on Labor and Public Welfare, *Ethical Standards in Government*, 82d Cong., 1<sup>st</sup> Sess. 23 (Comm. Print 1951).

<sup>5</sup> House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 6 (Comm. Print, Comm. on Rules 1989), *reprinted in 135 Cong. Rec.* 30740, 30742 (1989) (hereinafter —*Bipartisan Task Force Report*|| ).

<sup>6</sup> S. Rep. 255, 103d Cong., 2d Sess. 3-4 (1994).

Since 1968 the House rules have included provisions that impose explicit limits on the ability of Members, officers, and employees to accept gifts. This chapter is devoted to the gift rule currently in effect. However, the gift rule also includes a number of provisions relating to travel by Members, officers, and employees, including travel paid by a private source, a state or local government, or a foreign government. Those gift rule provisions are addressed in Chapter 3 on travel.

Since 1989 there has been a statutory underpinning to the House gift rule. A provision of the Ethics Reform Act of 1989, codified at 5 U.S.C. § 7353, generally prohibits federal officials, including House Members and staff, from soliciting or accepting anything of value, except as provided in rules and regulations issued by their supervising ethics office. Under that statute, both the Committee on Standards of Official Conduct and the House as a whole constitute the supervising ethics office for House Members, officers, and employees. Thus, the House gift rule defines the gifts that Members, officers, and employees may accept consistent with the provisions of 5 U.S.C. § 7353.

## Statutory Prohibitions

The statutory gift provision, 5 U.S.C. § 7353, also reflects two key prohibitions regarding gifts that each House Member, officer, and employee should be familiar with, as follows:

**1. Never accept a gift that is linked to any official action you have taken, or that you are being asked to take.** One provision of the gift statute states, —No gift may be accepted [pursuant to gift rules or regulations] in return for being influenced in the performance of an official act.|| <sup>7</sup> Moreover, accepting a gift in these circumstances may constitute a serious violation of criminal law. The criminal statutes on bribery and illegal gratuities are discussed below in the section on —Bribery and Illegal Gratuities.||

**2. Never solicit a gift from any person who has interests before the House.** 5 U.S.C. § 7353 limits not only what government officials may **accept**, but also that for which they may **ask**. The statute provides in pertinent part:

- (a) Except as permitted by [applicable gift rules or regulations], no Member of Congress or officer or employee of the executive, legislative, or judicial branch shall **solicit** or accept anything of value from a person —

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<sup>7</sup> 5 U.S.C. § 7353(b)(2)(B).

(1) seeking official action from, doing business with, or . . . conducting activities regulated by, the individual's employing agency; or

(2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties. [Emphasis added.]

While the House gift rule defines what Members, officers, and employees may **accept** in the way of gifts, the rule does not authorize them to **ask for** any gift. The prohibition against solicitation is very broad. It applies to the solicitation not only of money, but —anything of value.¶ In addition, the prohibition covers solicitations of things for the personal benefit of the Member, officer, or employee, as well as things that would involve no personal benefit. However, as is explained in a Standards Committee advisory memorandum of April 25, 1997, the Committee has determined that Members and staff **may** solicit on behalf of charitable organizations qualified under § 170(c) of the Internal Revenue Code, subject to certain restrictions.<sup>8</sup> The Committee will consider requests to make solicitations for other purposes, but as a general rule, the Committee will not approve a solicitation that would result in any personal or financial benefit to Members or staff.

**Example 1.** An office is throwing a farewell party for a departing staff member, and the office knows of individuals in the private sector, with whom the staff member has worked, who would probably be willing to donate refreshments. The office may **not** request donations from those individuals.

**Example 2.** One of the cable channels recently showed a documentary that relates to some legislation before a committee. A committee staff person may call the company to inquire if the committee may purchase a tape of the show, but may not request a free copy.

**Other prohibitions.** Under the Code of Official Conduct, a Member, officer, or employee is expressly prohibited from accepting any gift —except as provided by clause 5 of rule 25.¶<sup>9</sup> The Code of Official Conduct also prohibits a Member, officer, or employee from receiving any benefit —by virtue of influence improperly exerted from his position in Congress.¶<sup>10</sup> Similarly, the Code of Ethics for Government Service (¶ 5) admonishes every Government employee, —Never discriminate unfairly

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<sup>8</sup>The solicitation guidelines are discussed in detail in Chapter 10 on official and outside organizations.

<sup>9</sup>House Rule 23, cl. 4.

<sup>10</sup>House Rule 23, cl. 3.

by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for [oneself] or [one's] family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.¶

This Committee has cautioned all Members —to avoid situations in which even an inference might be drawn suggesting improper action.¶<sup>11</sup> Members, officers, and employees must always exercise discretion concerning the acceptance of gifts or favors from persons who are not relatives, and particularly gifts or favors that would not have been offered —but for¶ the individual's position in Congress. Among the factors that one must consider are the source and value of a gift, the frequency of gifts from one source, the possible motives of the donor, and possible conflicts of interest with official duties.<sup>12</sup>

### Gift Rule History

The first House Code of Official Conduct, which was approved as House Rule 43 in 1968, included, in clause 4, the first House gift rule. From 1968 to 1990, the gift rule restricted the ability of Members, officers, and employees to accept gifts from persons with a direct interest in legislation. When the Bipartisan Task Force on Ethics reviewed the gift rule in 1989, however, it found that standard to be subjective and unworkable: —It is often impractical, if not impossible, for Members to ascertain whether a donor has a direct interest in legislation, particularly in cases where the Member and donor have a long-standing personal relationship.¶<sup>13</sup> The Ethics Reform Act of 1989, as amended by the Legislative Branch Appropriations Act for fiscal year 1992,<sup>14</sup> amended the rule to eliminate the need to make this determination, and substituted instead overall limits on the value of gifts that could be accepted from virtually anyone during a year.

From January 1, 1992, through December 31, 1995, the gift rule prohibited a Member, officer, or employee from accepting gifts worth a total of more than \$250 from any one source in any one year. However, under that rule, Members and staff could accept a range of gifts without regard to this annual limitation, including any

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<sup>11</sup> House Comm. on Standards of Official Conduct, *Investigation of Financial Transactions Participated in and Gifts of Transportation Accepted by Representative Fernand J. St Germain*, H. Rep. 100-46, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3, 9, 43 (1987).

<sup>12</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles H. Wilson (of California)*, H. Rep. 96-930, 96<sup>th</sup> Cong., 2d Sess. 4-5, 19-20 (1980). See also *In the Matter of Representative Daniel J. Flood*, H. Rep. 96-856, 96<sup>th</sup> Cong., 2d Sess. 5-15 (1980).

<sup>13</sup> *Bipartisan Task Force Report*, *supra* note 5, 135 *Cong. Rec.* 30742.

<sup>14</sup> Pub. L. 101-194, § 801(a), 103 Stat. 1716, 1771 (1989), as amended by Pub. L. 102-90, § 314(d), 105 Stat. 447, 469 (1991).

gift worth \$100 or less, gifts of personal hospitality, and gifts from relatives.<sup>15</sup> Also exempted from the annual limitation, pursuant to § 801(e) of the Ethics Reform Act, were —gifts of food and beverages consumed not in connection with gifts of lodging,|| *i.e.*, —local meals,|| without any restriction as to cost or the source of the payment.

From 1993 to 1995, proposals to tighten the gift rules were considered in both the House and the Senate, and in late 1995, the House approved a new gift rule that imposed significant, new limitations on the ability of Members, officers, and employees to accept gifts.<sup>16</sup> That rule took effect on January 1, 1996, as House Rule 52. The rule was renumbered as House Rule 51 in the 105<sup>th</sup> Congress, and it was amended and renumbered as clause 5 of House Rule 26 in the 106<sup>th</sup> Congress. The report of the House Rules Committee on the proposed rule stated three reasons for the action taken by the House in 1995:

- —First, public opinion holds Congress as an institution in low esteem. Much of the rationale for the historic decline in public trust in the institution is due to a perception that special interest groups maintain undue influence over the legislative process, and Members of Congress are granted perquisites and privileges unavailable to average Americans.||
- —Second, there is a recognition that Congress has fallen behind the executive branch in the area of gift reform. For example, executive branch employees are permitted to accept unsolicited gifts having a market value of \$20 or less per occasion, provided that the aggregate market value of individual gifts received from any one person shall not exceed \$50 in a calendar year.||
- —Third, the Senate has already enacted a comprehensive gift ban rule,|| referring to the action of the Senate in July 1995 in adopting a gift rule nearly identical to that reported by the Rules Committee.<sup>17</sup>

One of the proponents of tightening the gift rule argued that the regular acceptance of meals and tickets from lobbyists was objectionable not merely because it created an appearance problem. Rather, he argued, such conduct is also objectionable because it impacts policy, albeit in a subtle and indirect way. Through such gifts, he asserted, lobbyists —are buying access, and access is power. . . . [T]hey buy good will, even if they do not buy access directly. And good will is also power. It can mean the difference between getting your calls returned or your letter

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<sup>15</sup> From January 1, 1990 through December 31, 1991, the gift rule banned the acceptance of gifts worth more than \$200 from any one source in any one year, excepting gifts worth \$75 or less.

<sup>16</sup> 141 *Cong. Rec.* H13073-95 (daily ed. Nov. 16, 1995); *id.* H13844-45 (daily ed. Nov. 30, 1995).

<sup>17</sup> H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 8 (1995).

taken seriously, and that can translate to millions, even billions of dollars, at the expense of ordinary Americans who have no lobbyists to represent them.<sup>18</sup>

The gift rule approved by the House in late 1995 differed in several respects from that approved by the Senate earlier in the year. The most significant of these was that the House rule did **not** include a general provision allowing the acceptance of gifts valued below a specific dollar figure. Instead, all of the categories of acceptable gifts in the House rule were descriptive categories. In contrast, the Senate gift rule that took effect on January 1, 1996, included a provision that generally allowed the acceptance of any gift valued below \$50, with a limitation of less than \$100 in gifts from any single source in a calendar year. However, as detailed below, at the start of the 106<sup>th</sup> Congress in 1999, the House amended its gift rule so as to incorporate this provision of the Senate rule.<sup>19</sup> The rule was redesignated as Rule 25 in the 107<sup>th</sup> Congress. As is detailed below, the House Rules for the 108<sup>th</sup> Congress included two amendments – one on perishable food sent to House offices for staff, and the other on Member and staff travel to charity events.

At the beginning of the 110<sup>th</sup> Congress, the House amended the gift rule in the wake of several public corruption investigations, and subsequent prosecutions, involving the provision of various high-priced gifts and travel to certain Members, congressional staff, and executive branch officials by lobbyists. One of the proponents of the gift rule amendments described their effect as follows:

Among other things, we will ban gifts, including meals and tickets, from lobbyists and the organizations that employ them. We will ban lobbyists and the organizations that employ them from financing travel for Members or their staffs, except for one-day travel to visit a site, attend a forum, participate in a panel, or give a speech, all obviously in the pursuance of the Members' duties. We will require Members and staff to obtain preapproval from the Ethics Committee for permitted travel.<sup>20</sup>

Specifically, the gift rule was amended to prohibit the acceptance of gifts under the less than \$50 provision—from a registered lobbyist or agent of a foreign principal or from a private entity that retains or employs registered lobbyists or

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<sup>18</sup> S. 885 – To Modify Congressional Restrictions on Gifts: Hearing Before the Subcomm. on Oversight of the Senate Comm. On Governmental Affairs, 103d Cong., 1<sup>st</sup> Sess. 5-6 (statement of Sen. Lautenberg).

<sup>19</sup> 145 *Cong. Rec.* H208-H211 (daily ed. Jan. 6, 1999).

<sup>20</sup> 153 *Cong. Rec.* H23 (daily ed. Jan. 4, 2007) (statement of Rep. Steny H. Hoyer).

agents of a foreign principal.<sup>21</sup> The amendment resulted in significantly limiting the range of gifts that were previously acceptable by House Members, officers, and employees. Changes that were made to the travel provisions of the gift rule are discussed in Chapter 3 concerning travel.

One provision of the gift rule states that all of its provisions are to be interpreted and enforced solely by the Standards Committee (House Rule 25, clause 5(h)). That provision also authorizes the Committee to issue guidance on any matter contained in the rule.

### The House Gift Rule

The House gift rule provides that a Member, officer, or employee may not knowingly accept any gift except as provided in the rule. The rule is comprehensive, *i.e.*, a House Member or staff person may not accept **anything** of value from **anyone** – whether in one’s personal life or one’s official life – unless acceptance is allowed under one of the rule’s provisions.

As is detailed below, the rule includes one **general** provision on acceptable gifts, and 23 provisions that describe additional, **specific** kinds of gifts that may be accepted.

- The general gift rule provision states that a Member, officer, or employee may **not** accept a gift from a registered lobbyist, agent or a foreign principal, or private entity that retains or employs such individuals. Definitions of the terms registered lobbyist and agent of a foreign principal are provided in the section —Definitions of Registered Lobbyist and Agent of a Foreign Principal.<sup>22</sup>
- The general provision goes on to state that a Member, officer, or employee may accept from any other source virtually any gift valued below \$50, with a limitation of less than \$100 in gifts from any single source in a calendar year. Gifts having a value of less than \$10 do not count toward the annual limit.
- The other 23 categories of acceptable gifts are descriptive categories, not tied to any specific dollar figure. Among those categories are, for example,

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<sup>21</sup> *Id.* at H19, H26. The new gift rule was effective when passed. (As discussed in Chapter 3 concerning travel, amended rules concerning the acceptance of privately-sponsored, officially-connected travel became effective on March 1, 2007.) The gift rule was amended later in the 110<sup>th</sup> Congress to clarify the events for which a gift of free attendance is permitted. H. Res. 437 (153 *Cong. Rec.* H5738 (daily ed. May 24, 2007)).

<sup>22</sup> Other gifts from lobbyists and agents of a foreign principal that are expressly prohibited by the gift rule are discussed below in the section —Other Expressly Prohibited Lobbyist Gifts.



informational materials, commemorative items, and free attendance at certain kinds of events.

A gift that satisfies all of the requirements of one of the 23 **specific** categories is acceptable even if its value is \$50 or more, and the value of such a gift does not count against the donor's annual gift limit established under the general gift provision. A gift falling within one of these categories may be accepted even from a registered lobbyist, agent of a foreign principal, or a private entity that retains or employs such individuals.

Gifts from registered lobbyists, foreign agents, and private entities that retain or employ such individuals are **prohibited** under the general gift rule provision. As a result, it is impermissible for Members and staff to accept **small group and one-on-one meals, tickets to (or free attendance at) sporting events and shows, and recreational activities**, such as a round of golf, when such offers originate from a lobbyist, the client of a lobbyist, or another prohibited source. Gifts of these kinds are rarely acceptable under one of the 23 specific categories of acceptable gifts. The prohibition under the general gift rule provision applies not only to gifts given by individual registered lobbyists and foreign agents, but it also applies to gifts given by entities that retain lobbyists or lobbying firms or entities that employ in-house lobbyists. Members and staff should bear in mind that many, if not most, organizations with interests before the House retain or employ lobbyists, including corporations, trade associations, advocacy groups, unions, and other special interest groups. Other lobbyist gifts that are expressly prohibited by the rule are discussed below.

Discussion of each of the provisions of the House gift rule follows. A number of them are based on provisions of the Executive Branch gift rules (5 C.F.R. Part 2635, Subpart B), which were originally issued in 1992. In applying the provisions of the House gift rule, bear in mind that under the House Code of Official Conduct (House Rule 23, clause 2), Members and staff must adhere not only to the letter, **but also to the spirit** of the rules of the House and its committees. Technical readings of the House gift rule should be avoided. It should also be noted that Members are entirely free to establish and maintain, for themselves and their staff, rules on the acceptance of gifts that are more restrictive than those set forth in the House gift rule.

### *What is a Gift?*

The rule defines the term —gift‖ in an extremely broad manner:

. . . a gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. [House Rule 25, clause 5(a)(2)(A).]

This provision goes on to state,

The term includes gifts of services, training, transportation, lodging, and meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

Accordingly, when a Member, officer, or employee is offered a tangible item, a service, or anything else, he or she must first determine whether the item has monetary value. If it does, then the individual may accept it only in accordance with provisions of the gift rule. This is so even if the donor obtained the gift without charge.

**Example 3.** A Member has been invited to play golf by an acquaintance who belongs to a country club, and under the rules of the club, the guest of a club member plays without any fee. Nevertheless, the Member's use of the course would be deemed a gift to the Member from his host, having a value of the amount that the country club generally charges for a round of golf.

As a general matter, mere attendance at an event such as a meeting or a briefing will not be deemed to have monetary value, unless the sponsoring organization charges an admission fee for the event. However, any food or refreshments served at the event will have monetary value and may be accepted only pursuant to one of the provisions of the gift rule. Accordingly, there may be circumstances in which a Member may attend an event, but the Member would be required to decline or to pay for a meal that is served at the event.

As detailed below, the restrictions of the gift rule do not apply to —[a]nything for which the [official] pays the market value<sup>23</sup> (House Rule 25, clause 5(a)(3)(A)). Accordingly, there can be an improper gift to a Member, officer, or employee when, for example, he or she is sold property at less than market value, or receives more than market value in selling property. There can also be an improper gift when a Member or staff person is given a loan at a below-market interest rate, or, in the context of outside employment, when a Member, officer, or employee is compensated in an amount greater than the value of the services rendered.

### ***Who Is Subject to the Gift Rule?***

**In General.** The rule by its terms applies to all Members, Delegates, officers, and employees of the House, and the Resident Commissioner of Puerto Rico.<sup>23</sup> Under clauses 4 and 18(a) of House Rule 23, the term —officer or employeell means

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<sup>23</sup> For the sake of convenience, the term —Memberll as used hereafter in this publication refers to House Members, the Delegates to the House, and the Resident Commissioner.

**any** individual whose compensation is disbursed by the Chief Administrative Officer of the House. In addition, under clause 18(b) of House Rule 23, individuals whose services are compensated by the House pursuant to a consultant contract are subject to the gift rule. As a general rule, a newly elected House Member becomes subject to the House rules when his or her pay and allowances begin: on January 3 for those elected in a regular election, and the day following a special election for those elected to fill a vacant seat.<sup>24</sup>

The gift rule applies with full force to **every** employee of the House – employees in district offices as well as those in the Washington office; and permanent employees as well as non-permanent employees, including part-time employees, paid interns, and employees who are on Leave Without Pay status.

As a general matter, the gift rule does not by its terms apply to an individual who serves in a House office without being paid by the House, *i.e.*, a volunteer, fellow, or unpaid intern. However, the Standards Committee strongly advises that each office using the services of such an individual require that he or she adhere to all of the rules applicable to House employees, including the gift rule.

As to executive branch fellows, the Standards Committee understands that they continue to be bound by the gift and travel rules of their employing agency. Executive branch employees who are detailed to a House committee under 2 U.S.C. § 72a(f) should consult with both their Designated Agency Ethics Official and the Standards Committee on the rules applicable to them.

**Applicability to Spouses, Family Members, and Others.** Under certain circumstances, a gift to a family member of a Member, officer, or employee – or, for that matter, any other individual – will be deemed a gift to the official, and hence will be subject to the restrictions of the gift rule. Under clause 5(a)(2)(B)(i) of House Rule 25, a gift to a family member or another individual will be deemed to be a gift to the official when two circumstances are present:

- The gift was given with the knowledge and acquiescence of the Member or staff person; and
- The Member or staff person has —reason to believe the gift was given because of his official position|| with the House.

**Example 4.** A Member is throwing a graduation party for her daughter. A lobbyist who does not know the Member’s daughter offers

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<sup>24</sup> While a newly elected House Member generally is not subject to the gift rule, a Member-elect is subject to the statutory ethics provisions – *e.g.*, bribery, illegal gratuity. See 18 U.S.C. § 201(a). For further information on these provisions is provided later in this chapter.

to buy the daughter a television. The television would be considered a gift to the Member and must be declined.

**Example 5.** A lawyer offers tickets to a sporting event to a Member without charge. The Member does not want the tickets, and he suggests instead that the lawyer give them to a friend of the Member. In these circumstances, a gift of the tickets to the Member's friend would be deemed a gift to the Member himself and would be permissible only if the Member himself could accept the tickets under the gift rule.

However, a different rule (House Rule 25, clause 5(a)(2)(B)(ii)) applies when a **meal** is provided to a Member or staff person and his or her spouse at the same time and place. Under this provision, when a meal is provided to a Member or staff member and his or her spouse or dependent at the same time and place, only the value of the meal provided to the Member or staff member is treated as a gift and counts against the dollar limitations of this provision.

Additionally, the statutory limitations on accepting certain gifts from a **foreign government or an international organization** are also applicable to a spouse or dependent of a Member or employee.

### *Gifts Valued at Less Than \$50*

A Member, officer, or employee may accept a gift, other than cash or cash equivalent, having a value of less than \$50, **provided** that the source of the gift is not a registered lobbyist, foreign agent, or private entity that retains or employs such individuals. The cumulative value of gifts that may be accepted from any one source in a calendar year must be less than \$100. Gifts having a value of less than \$10 do not count toward the annual limit. While the rule does not require Members and staff to maintain formal records of the gifts accepted under this provision, the rule does require that Members and staff make a good faith effort to comply with its terms (House Rule 25, clause 5(a)(1)(B)).

The figures of \$50, \$100, and \$10 are actually dollar limits of, respectively, \$49.99, \$99.99, and \$9.99. Gifts of —cash or cash equivalent— are not acceptable under this provision. Hence, under this provision, one may not accept a gift of cash or, for example, a check, use of a credit card, or a security, even if the gift would be within the stated dollar limitations. The Standards Committee has determined that **gift cards** which are redeemable for purchases at a retail establishment or restaurant are the equivalent of cash and therefore may **not** be accepted under the gift rule.

**Definitions of Registered Lobbyist and Agent of a Foreign Principal.** The gift rule defines the term —registered lobbyist— as —a lobbyist registered under the

Federal Regulation of Lobbying Act or any successor statute, and the term —agent of a foreign principal as —an agent registered under the Foreign Agents Registration Act (House Rule 25, clause 5(g)).

With regard to registered lobbyists, the Lobbying Disclosure Act of 1995 (Pub. L. 104-65) is a successor statute to the Federal Regulation of Lobbying Act. The Lobbying Disclosure Act in turn defines the term —lobbyist to mean —any individual who engages in certain activities set forth in the act. 2 U.S.C. § 1602(10). Accordingly, the Committee interprets the prohibitions on registered lobbyists that are set forth in the gift rule to apply to the **individuals** who are registered as lobbyists under that Act, as well as to lobbying firms.

### *Application of the Rule in Specific Circumstances*

In accepting any gift under the general gift rule provision, a Member, officer, or employee must comply with the following interpretative rules:

**No—Buydowns.** A Member or staff person may not —buy down the value of a gift in order to bring it within the dollar limitations of the provision.

**Example 6.** A staff member taken to a restaurant by a local businessman may not order an expensive meal and simply pay his host the amount by which the bill for his food and beverages exceeds \$49.99. If the bill for his food and beverages exceeds \$49.99, he must pay the entire bill himself.

**Example 7.** A Member is offered a skybox ticket to a baseball game valued at \$60. The Member may **not** accept the ticket simply by paying the offeror \$11. If the Member wishes to accept the ticket, he must pay the offeror \$60.

**Example 8.** During the year, a staff member has accepted meals and other gifts from a corporation that does not retain or employ lobbyists or registered foreign agents, each of which had a value of \$10 or more, and the cumulative value of which is \$85. The staff member may not then accept a meal having a value of \$20 from that corporation simply by paying the corporation \$6. Instead, he must either decline the meal or personally pay its cost in full.

However, when an individual is offered a gift with a value of \$50 or more that is naturally divisible — such as multiple tickets to an event, or bottles of wine — the individual may accept one or more items that total less than \$50 in value and either pay market value for or decline the others.

**Example 9.** A staff person is offered four tickets to a baseball game, each having a value of \$15. The staff person may accept three of the tickets, but he must either decline or pay the full price of the fourth ticket.

**The —Source of a Gift.** A gift received from an individual affiliated with an organization counts against the annual gift limitation of **both** the individual and the organization.

**Example 10.** A committee staff person accepts a lunch valued at \$15 from a representative of a nonprofit organization that does not retain or employ lobbyists or registered foreign agents. Both the representative and the organization are deemed to be the —source of the lunch, and the annual gift limit of both for that staff person will be reduced accordingly.

**—Simultaneous Gifts.** Generally, when multiple items, each individually worth less than \$50, are offered simultaneously to any individual, the —gift being offered is deemed to be the aggregate of all the items.

**Example 11.** A corporation that does not retain or employ lobbyists or registered foreign agents sends a Member a box of samples of its products. The box includes 6 products, each of which has a value of about \$10.00. The box cannot be accepted under this provision, as its total value exceeds the per-gift limit of less than \$50.

**Valuation of Gifts.** Under the gift rule, items are generally valued at their retail, rather than wholesale, price. The lowest price at which an item is available to the public may be used. However, for the purpose of simplicity, tax that would be imposed on the sale of the item, as well as gratuities, are excluded in determining the value of any gift.

For further information on the valuation of gifts – including tickets to sporting events and shows – see the section below entitled —Pay Market Value for the Gift.

**Recipient of a Gift.** At times a question may arise as to who is the recipient of a gift: a Member or individual members of his or her staff. As a general matter, this question is to be decided according to the expressed intent of the donor. Thus, for example, when an individual delivers several tickets to a sporting event to an office and indicates that the tickets are for use by the staff, the tickets are treated as a gift to each individual staff person who uses them, rather than as a single gift to the Member. If, however, the donor indicates that the tickets are for the Member's use, all of the tickets will be treated as a gift to the Member.

Another example concerns the **delivery of perishable food**, such as pizza, to a House office for consumption by staff. In such an instance, the gift of food sent to a House office is deemed to be a gift to the individual recipients, and not to the employing Member. Thus, when a private source sends perishable food to a House office for staff, each staff member may accept food having a value of up to \$49.99, subject to the following restrictions and limitations –

- If the source of the gift of food is a registered lobbyist, agent of a foreign principal, or private entity that retains or employs such individuals, the food may **not** be accepted. Because it is often a lobbyist or client of a lobbyist that is the source of the food being sent to a House office, Members and staff should exercise caution before accepting the food. Even if the food is from a permissible source, the following **limitations** must be observed.
- Each staff member must comply with the annual gift limitation of less than \$100 from any source in a calendar year. Any gift having a value of less than \$10 does not count against the annual limitation. In order to comply in good faith with the dollar limitation on gifts, a staff member who is offered such a gift of food must learn both the identity of the donor and the dollar value of the food provided.<sup>25</sup>
- While, as noted above, the gift rule provides that a gift valued at less than \$10 is generally acceptable, the Committee has long advised that to accept such a gift from one source on a repetitive basis is contrary to the spirit of the gift rule, and hence is not permissible under the House Code of Official Conduct.<sup>26</sup> Accordingly, it would be impermissible for a staff member to accept gifts of perishable food, even if valued at less than \$10 each, from any one source on a repetitive basis.
- The Committee has also long advised that a gift of food sent to a House office for staff, even if within the dollar limits of the gift rule, must be refused if the person offering it has a direct interest in the particular legislation or other official business on which staff is working at the time. In addition to possibly violating the gift rule restriction on accepting lobbyist gifts, as discussed above, the gift of food may also be considered an improper gratuity or inducement to take a particular action.
- While the gift rule sets out the categories of gifts that a Member of staff person may accept if offered, Members and staff are generally prohibited

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<sup>25</sup> It is important to bear in mind that a gift from an individual who is employed by or similarly affiliated with any organization is deemed to be a gift from both that individual and the affiliated organization, as discussed in the text above.

<sup>26</sup> House Rule 23, cl. 2.

from soliciting gifts. Accordingly, a Member or a staff person may never request or suggest that anyone send a gift of food to a House office.

Members and staff should also note that this gift rule provision (House Rule 25, clause 5(a)(1)(B)) does **not** affect the prohibition against accepting food or beverages from any private organization or individual for any **event** sponsored by a House office, such as a meeting, a conference, or a briefing. A separate rule (House Rule 24, clause 1 to 3) generally prohibits Members and staff from accepting private subsidy for official House business, including events sponsored by a Member, committee or leadership office, a caucus, or any other House office.

On the other hand, when a House office fields a **sports team** in, for example, a local softball league or joins with others in fielding a team, and an outsider offers to sponsor the team by providing caps, T-shirts, or other benefits to team members, a different application of the gift rule applies. In such a case, the benefits provided to the staff members are treated as one gift to the employing Member, valued at their total fair market retail value. Any such gift is acceptable only if its total value is less than \$50 (and the gift is not from a lobbyist or entity that employs a lobbyist), and the Member may not accept gifts from that source having a value of \$100 or more in a calendar year. In addition, with regard to sponsorship of a House office team, an offer of an outsider to pay any league entry fee may **not** be accepted.

**Adhering to the Spirit of the Rule.** Under the House Code of Official Conduct, Members and staff must adhere to the spirit as well as the letter of the Rules of the House (House Rule 23, clause 2). To repeatedly accept gifts valued at under \$10 from a source would violate the spirit of the gift rule and hence be impermissible.

### ***Relationship of the General Provision on Acceptable Gifts to the Specific Provisions***

When a gift satisfies each of the requirements of any of the specific provisions of the gift rule on acceptable gifts – for example, a book under the –informational materials provision (House Rule 25, clause 5(a)(3)(I)) – the gift may be accepted even if its value is \$50 or more. Furthermore, in that circumstance, the value of the gift does **not** count against the donor’s annual gift limitation of less than \$100.

In addition, the gift rule does not restrict Members and staff from accepting, even when the donor is a registered lobbyist, agent of a foreign principal, or private entity that retains or employs such individuals, gifts that fall within one of the specific gift rule provisions (often referred to as the –exceptions to the rule) or general waivers the Standards Committee has issued. Those specific provisions are discussed below.



## Other Acceptable Gifts

The various specific categories of gifts that Members, officers, and employees may accept under the gift rule are set forth in clause 5(a)(3) of House Rule 25. These categories may be summarized as follows.

### *Gifts Given on the Basis of Personal Friendship*

A Member, officer, or employee may accept any gift that is given by an individual on the basis of personal friendship, unless the official has reason to believe that, under the circumstances, the gift was provided because of his or her official position with the House, and not because of the personal friendship (House Rule 25, clause 5(a)(3)(D)). However, a gift exceeding \$250 in value – including, for example, a trip – may **not** be accepted on the basis of personal friendship unless the Standards Committee issues a written determination that the personal friendship provision applies (House Rule 25, clause 5(a)(5)).

This provision of the gift rule further states that in determining whether a gift is provided on the basis of personal friendship, a Member or staff person must consider the circumstances under which the gift was offered, such as (1) the history of the official's relationship with the donor, including any previous exchange of gifts, (2) whether, to the official's knowledge, the donor personally paid for the gift, or whether the donor sought a tax deduction or business reimbursement for it, and (3) whether, to the official's knowledge, the donor at the same time gave the same or similar gifts to other Members or staff.

The word –friendship may be used in different ways, and at times this provision of the gift rule has been mischaracterized as requiring Members and staff to decide who is, and who is not, a –friendship. Instead, when a Member or staff person wishes to rely on this provision of the rule, the individual must consider **each gift individually** – whether the gift is a meal, tickets to a game, or anything else – and the individual must determine whether **that particular gift** was offered –on the basis of personal friendship. That determination is to be made using the criteria set forth in the rule.

When the offeror is **a lobbyist or someone else who has interests before Congress**, Members, officers, and employees have the most reason to be concerned about whether a gift is offered for a reason other than personal friendship. In that circumstance, the criteria set forth in the rule are especially helpful. For example, if the gift was paid for by a business or will be charged to a firm or corporate credit card – as opposed to being paid for out of the offeror's own pocket – it is likely that the gift is based on business concerns, rather than personal friendship.<sup>27</sup> Likewise,

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<sup>27</sup> See H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 13 (1995).

if, in a relationship, all of the gifts have gone to the Member or staff person, and there has not been reciprocal gift giving, it is likely that the gifts have a business purpose. Thus, when a Member or staff person is offered a gift by a lobbyist or someone else who has interests before Congress and either of these circumstances is present (*i.e.*, the gift is not paid for personally, or there has not been reciprocal gift-giving), the official should **not** accept the gift on the basis of the personal friendship provision. Unless the gift is acceptable under another provision of the gift rule, the Member or staff person should either decline the gift or pay for it personally.

**Example 12.** A Member's former college roommate, who is also a lobbyist, offers to take the Member to a baseball game. The college roommate had paid for the Member's ticket personally, and the Member's family and the roommate's family often exchange presents during the holidays. The roommate does not contact the Member on official matters. The Member may accept the ticket.

**Example 13.** Through her House work over the years, a committee staff person has come to know a lobbyist. The staff person often sees the lobbyist at officially-related events, but they do not see each other socially or exchange gifts. The lobbyist offers to take the staff person to dinner at the lobbyist's expense. The staffer may not accept the dinner. However, the staff person may accompany the lobbyist to the restaurant and pay for her own meal and drinks.

As noted above, when a Member, officer, or employee wishes to accept a gift on the basis of the personal friendship provision, and the value of the gift exceeds \$250, the official must first obtain the written approval of the Standards Committee. This requirement may apply when, for example, one wishes to accept a friend's invitation to go on a vacation trip.<sup>28</sup>

The Standards Committee will grant written approval for a personal friendship gift exceeding \$250 in value only in response to a written request. The request should identify the donor and briefly describe the donor's line of work and any interests before Congress, the history of the relationship, and the nature of the gift. The request should also state whether the donor will be paying for the gift personally. Under Committee Rule 3(i), the Committee keeps confidential any such request and the Committee's response. (Indeed, this confidentiality requirement applies to any advisory opinion request made by a Member, officer, or employee and the response thereto.) However, as noted below in the section on —Gift Disclosure, Members and officers, as well as employees who are required to file a Financial

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<sup>28</sup> However, gifts from one's fiancé or fiancée are acceptable under the rule's provision on gifts from relatives, and so the requirements of the personal friendship provision need not be observed regarding those gifts.

Disclosure Statement, will have to disclose any gift exceeding \$335 in value on their statement, unless the Committee grants a waiver of the reporting requirement.

### ***Attendance at Events (Including Meals)***

Under provisions of the gift rule and related general waivers granted by the Standards Committee, Members, officers, and employees may accept invitations to the following kinds of events, provided that certain requirements are satisfied:

- A —widely attended— event, when the individual’s attendance is in connection with the performance of his or her official duties;
- A charity fundraising event;
- A fundraising or campaign event sponsored by a political organization;
- An educational event sponsored by a university, foundation, or similar nonprofit, nonadvocacy organization; or
- A regularly scheduled event sponsored by a constituent organization.

Members and staff can accept a meal at these kinds of events, provided that the applicable requirements are satisfied. The circumstances in which an invitation to these events may be accepted are detailed below. One common limitation in these gift rule provisions and waivers is that invitations can be accepted **only** from the organization that is actually **sponsoring** the event. An invitation may **not** be accepted from an individual or organization that merely bought a block of tickets to or a table at the event.

—**Widely Attended— Events.** The gift rule provision on widely attended events can apply to a broad range of events: a convention, conference, symposium, forum, panel discussion, dinner, viewing, reception,<sup>29</sup> and similar events (House Rule 25, clause 5(a)(4)(A)). An unsolicited offer of free attendance<sup>30</sup> at such an event can be accepted when three requirements are satisfied: (1) The event is —widely attended— as defined below, (2) the invitation came from the sponsor of the event, and (3) the attendance of the Member or staff person is related to his or her official duties.

As to the **first** of these requirements, the Standards Committee has determined that an event is —widely attended— if (a) there is a reasonable

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<sup>29</sup> However, when an event, such as a reception, will involve only —[f]ood or refreshments of a nominal value offered other than as a part of a meal,— Members and staff may participate in it under a separate provision of the gift rule, described below, even if the reception does not satisfy the requirements for a widely attended event.

<sup>30</sup> The items encompassed in the term —free attendancell— as used in the gift rule are described below.

expectation that **at least 25 persons**, other than Members, officers, or employees of Congress, will attend the event, **and** (b) attendance at the event is open to individuals from throughout a given industry or profession, or those in attendance represent a range of persons interested in a given matter.<sup>31</sup> Individuals who are officials of other branches or levels of government count toward the required minimum of twenty-five, but spouses and others who accompany the congressional members and staff do **not** count toward the required minimum.

The types of events that typically satisfy this first requirement are Chamber of Commerce and Rotary Club lunches and dinners, and meetings of the membership of trade or professional associations.

***Example 14.*** One of the departments of a large corporation has a weekly staff meeting and luncheon that is attended by at least 30 employees. These meetings do **not** constitute a widely attended event as that term is used in the gift rule, however, because attendance at the event is not open to individuals from throughout a given industry or profession, and those present do not represent a range of persons interested in a given matter.

As to the **second** requirement, the term —sponsor|| refers to the person, entity, or entities that are primarily responsible for organizing the event. An individual or entity that merely contributes money to an event is **not** considered to be a sponsor of the event for purposes of the gift rule. Elaboration on this requirement appears below, in the section entitled —Source of Invitations for Widely Attended and Charity Events.||

The **third** requirement is satisfied when (a) the Member, officer, or employee will be participating in the event by speaking or performing a ceremonial role, or (b) he or she determines that attendance at the event is appropriate to the performance of his or her official duties or representative function. The responsibility for making this determination rests with the invited Member or officer, or the invited employee and the employing Member, but the determination must be made in a reasonable manner. Some relevant factors might include the opportunity to meet with constituents at the event, the desirability of representing one's constituency at an event where other elected or appointed officials will be present, or the opportunity to present or receive information that is pertinent to one's district or to a legislative proposal. With regard to a staff member, the nature of the individual's duties in the office will be a relevant factor. For example, attendance at a dinner sponsored by an environmental organization may well be appropriate for a staff member who

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<sup>31</sup> See H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12 (1995).

handles environmental issues, but not for a staff member who handles banking issues only.

In deciding whether attending an event would be appropriate to the individual's official duties, one must also bear in mind the legislative history of the gift rule, which states that an event **may not be merely for the personal pleasure or entertainment of the Member or staff person**.<sup>32</sup> Accordingly, an invitation that would involve nothing more than viewing a sporting event, a movie, or a show will rarely be acceptable under the widely attended event provision.

***Example 15.*** Knowing that a district office staff person is a fan of his team, the owner of a local sports team offers the staff person free tickets to an upcoming game. Even though the source of the tickets would be the event sponsor, and there will be far more than 25 individuals in attendance at the game, the staff person may not accept the tickets under the widely attended event provision, in that his attendance would bear no relationship to the performance of his official duties.

***Example 16.*** A new concert hall is opening in Member A's district. The symphony invites a number of officials, including Member A, to attend the inaugural concert, sit in a place of honor, and be recognized for their help in making the new hall a reality. In view of the circumstances, Member A may reasonably determine that it is appropriate to his official duties or representative function to attend, and that hence the invitation is acceptable under the widely attended event provision.

***Example 17.*** Member B has announced that this will be her last term in office. In honor of her career, a group of corporations and associations is hosting a dinner for her, to which hundreds of people from the private and public sectors, including many House Members and staff, will be invited. Those who deem their attendance at the dinner to be appropriate to their official duties or representative function may accept an invitation to the dinner from the host committee.

When the requirements of the widely attended event provision are satisfied, a Member or staff person may also accept a sponsor's unsolicited offer of free attendance at the event for **an accompanying individual** (House Rule 25, clause 5(a)(4)(B)). While the accompanying individual need not be the spouse or child of

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<sup>32</sup> H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12 (1995).

the invitee – it may be, for example, a friend or a colleague – the rule provides for only **one** accompanying individual. Thus, for example, an invitee may not accept an offer of free attendance for both a spouse and child under this provision.

**Charity Fundraising Events.** Subject to the restrictions noted below, a Member, officer, or employee may accept an unsolicited offer of free attendance<sup>33</sup> at a charity event (House Rule 25, clause 5(a)(4)(C)). This provision extends to charity events such as lunches, dinners, golf or tennis tournaments, races, and cook-offs. The purpose of the charity event provision of the gift rule is to enable Members and staff –to lend their names to legitimate charitable enterprises and otherwise promote charitable goals.<sup>34</sup> The requirements that apply to attendance at such events are as follows.

**First**, in order to be a –charity event<sup>34</sup> as that term is used in the rule, the **primary purpose** of the event must be to raise funds for an organization that is qualified under § 170(c) of the Internal Revenue Code to receive tax deductible contributions. Thus, the mere fact that a donation to a charity will result from an event does **not** necessarily mean that a Member or staff person may accept from the sponsor an offer of free attendance at, or travel expenses to, the event. An event will likely be deemed a –charity event<sup>34</sup> for purpose of the rule when the participants or attendees pay an admission fee, and more than half of the fee paid is tax deductible as a charitable donation. When an event has any other format, a Member or staff person considering attending the event should first consult with the Standards Committee to ensure that it constitutes a –charity event<sup>34</sup> for purposes of the gift rule.

**Example 18.** Each year a business pays for a golf outing for several of its employees and their guests, and if there are any funds left after payment of expenses, it donates the excess to charity. This outing would not qualify as a charity event for purposes of the rule because its primary purpose is not to raise funds for charity.

**Example 19.** A lobbying firm wishes to hold a dinner for Members and staff, at which it will announce that the firm has made a substantial donation to charity. The dinner would not qualify as a charity event for purposes of the rule because its primary purpose is not to raise funds for charity.

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<sup>33</sup> The items encompassed in the term –free attendancell as used in the gift rule are described below.

<sup>34</sup> H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 12 (1995).

**Example 20.** For the same reason, the regular performances of a theater that is organized under § 501(c)(3) of the Tax Code are not deemed to be charity events. However, such an entity may have a special fundraising performance that would qualify as a charity event.

**Second**, as noted above, Members and staff may accept an invitation to a charity event only from the sponsor of the event. As with widely attended events, the sponsor of a charity event is the person or persons primarily responsible for organizing the event, and a person who simply contributes money or buys tickets to an event is **not** considered a sponsor of that event. This matter is elaborated on below, in the section entitled —Source of Invitations for Widely Attended and Charity Events.¶

**Third**, Members and staff invited to attend a charity event may accept **local** transportation from the event sponsor. In addition, when certain requirements are satisfied, they may also accept reimbursement for travel and lodging in connection with a charity event. Those requirements are discussed in Chapter 3 on travel. Before accepting travel to a charity event, a Member or staff person should make inquiry to the charitable organization to ensure that it understands the applicable rules and is acting consistently with them.

—**Free Attendance¶ for Purposes of Widely Attended and Charity Events.** The gift rule provides that when the requirements set forth above are satisfied, Members, officers, and employees may accept —free attendance¶ at the event. As used in the rule, free attendance includes —waiver of all or part of a conference or other fee, the provision of local transportation, or the provision of food, refreshments, entertainment, and instructional materials furnished to all attendees as an integral part of the event.¶ (House Rule 25, clause 5(a)(4)(D)). However, this term does **not** include either —entertainment collateral to the event,¶ or —food or refreshments taken other than in a group setting with all or substantially all other attendees¶ (*id.*), which therefore may not be accepted under the gift rule.

**Example 21.** In connection with its annual meeting in Washington, an association will hold a banquet and has arranged for the attendees to see a show at a downtown theater. Upon invitation from the association, a Member may attend the banquet if the requirements for a —widely attended¶ event are satisfied. However, he may not attend the show under this provision, in that it is not part of the banquet, but is instead entertainment that is collateral to that event.

**Example 22.** A charity will be holding a fundraising reception, and immediately after the reception the charity will hold a dinner to which only certain VIP's will be invited. A Member may accept an invitation

from the charity to attend the reception under the charity event provision, but he could not attend the dinner under that provision.

At times at charity fundraising events in particular, the sponsor may offer attendees a souvenir, gift, or prize. A Member or staff person may accept a baseball cap or T-shirt from the event sponsor under the —item of nominal value provision of the gift rule, which is summarized below. In addition, under the general provision on acceptable gifts, as explained above, the official may also accept an item that has a value of less than \$50 (provided that the sponsor is not a lobbyist, foreign agent, or employer of such an individual, and the official has not accepted other gifts from the sponsor that would cause the annual gift limit of less than \$100 per source to be exceeded). When a Member or staff person is accompanied at a charity event by a spouse or dependent, the official should bear in mind that any such gifts given to the accompanying individual are deemed to be gifts to the official and count against the gift rule dollar limits applicable to that official.

**Source of Invitations for Widely Attended and Charity Events.** The gift rule is clear that Members, officers, and employees may accept an invitation to a widely attended or charity event **only** from the sponsor of the event. The report of the House Rules Committee on the gift rule defines the term —sponsor as follows:

The term —sponsor of the event refers to the person, entity, or entities that are primarily responsible for organizing the event. An individual who simply contributes money to an event is not considered to be a sponsor of the event.<sup>35</sup>

Accordingly, under the gift rule, the term —sponsor has a definition that is narrower than the manner in which it is commonly used. Often the large financial supporters of an event are termed as —sponsors of the event. However, such entities are **not** sponsors of an event for purposes of the gift rule unless they also have a substantial role in organizing the event.<sup>36</sup>

**Example 23.** Foundation A, a § 501(c)(3) organization under the Tax Code, organizes a \$1,000-per-plate fundraising dinner to support its charitable activities. Member B may accept complimentary tickets to the dinner from Foundation A, for himself and his spouse, under the charity event provision.

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<sup>35</sup> *Id.*

<sup>36</sup> Sound guidance on the possibility of multiple sponsors for an event was provided in a Senate committee report on an earlier version of the gift rule. —[T]here may be more than one sponsor of an event if more than one entity plays a significant, active role in organizing the event in a manner that is roughly comparable to another sponsor or sponsors. S. Rep. 255, 103d Cong., 2d Sess. 14 (1994).



**Example 24.** Corporation C buys a table at the fundraising dinner of Foundation A. Member B may **not** accept tickets to the dinner from Corporation C under the charity event provision. In accordance with the previous example, Member B may accept tickets from Foundation A, and if it chooses to do so, Foundation A may seat B at the corporation's table.

Contributors to a widely attended or charity event may request that the sponsor invite particular Members or staff to sit with them at the event. However, the invitation will **not** be acceptable under these provisions unless the sponsor retains ultimate control of the guest list and the seating arrangements, and the invitation neither references any contributor nor is extended by anyone other than the sponsor. Put another way, all communications with Members or staff regarding the event should be made by the event sponsor, because a communication from an event contributor may be deemed an impermissible invitation from the contributor.

The Standards Committee has made an exception to the above rules on the proper source of invitations for the large media-related events that take place in Washington, such as the White House Correspondents' Dinner sponsored by the Correspondents' Association. Traditionally invitations to those events are extended not by the sponsoring organization, but instead by journalists or news organizations that are members of the sponsoring organization. Accordingly, the Committee has granted a general gift rule waiver to enable a House Member or staff person to accept an offer of free attendance at one of these media-related events from a journalist or a news organization that is a member of the media organization sponsoring the event.

**Fundraising or Campaign Events Sponsored by Political Organizations.** Members, officers, and employees may accept food, refreshments, and other benefits provided by a political organization in connection with a fundraising or campaign event sponsored by that organization (House Rule 25, clause 5(a)(3)(G)(iii)). Under this provision, Members, officers, and employees may also accept transportation and lodging from the sponsoring political organization in connection with such an event, provided that the travel rules are observed. In addition, they may participate in a golf tournament or attend a show or sporting event sponsored by the political organization, provided that the event is a **bona fide** fundraiser. The term —political organization‖ is defined in this provision by reference to § 527(e) of the Internal Revenue Code.<sup>37</sup>

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<sup>37</sup> Briefly stated, under that statute, a political organization is an entity organized and operated primarily for the purpose of accepting contributions or making expenditures for the purpose of influencing the election of any individual to a public or political office.

Under this provision of the gift rule, like the provisions concerning widely attended and charity fundraising events, Members and staff may accept an invitation only from the event sponsor. They may not accept a ticket from a person that has simply donated money or purchased tickets to the event.

In addition, a meal with a lobbyist or other individual during which the individual gives a Member a campaign contribution is not a fundraising or campaign event under this provision of the gift rule, unless the meal is sponsored and paid for by a political organization, and the expenditures are reported as required by Federal Election Commission regulations or applicable state or local laws.

**Example 25.** Members and staff may accept complimentary tickets to a Republican National Committee fundraising dinner from the RNC.

**Example 26.** A political action committee buys a table at a DCCC fundraising dinner. A House staff member may **not** accept a ticket to the dinner from the PAC under this provision of the gift rule.

**Educational Events.** Soon after the gift rule took effect, the Standards Committee recognized that there are certain events that are worthwhile for Members or staff to attend, but that do not meet the numeric requirement for widely attended events (*i.e.*, at least 25 non-congressional attendees). Among such events are those designed for a small group in order to facilitate discussion. Accordingly, the Committee granted a general gift rule waiver allowing Members and staff to accept invitations to events (including meals offered as part of these events) that, while they do not meet the numeric requirement for widely attended events, are:

- Educational (for example, lectures, seminars and discussions); and
- Sponsored by universities, foundations, —think tanks,|| or similar nonprofit, nonadvocacy organizations.

As under the gift rule provisions summarized above regarding events, Members and staff may accept such an invitation from the event sponsor only.

In keeping with the gift rule's intent, this waiver does not extend to meals in connection with presentations sponsored by lobbyists, lobbying firms, or advocacy groups. Moreover, this waiver does not extend to meals in connection with legislative briefings or strategy sessions, even if the sponsoring entity has educational status under the Tax Code.

**Example 27.** A nonpartisan, nonprofit —think tank|| hosts a luncheon series featuring distinguished speakers from academia discussing

foreign policy topics. The organization invites about 15 individuals to each luncheon, including some House staff members. The staff members may attend and accept the lunch under this waiver.

**Example 28.** A trade association establishes a nonprofit educational foundation. The foundation sponsors a monthly forum at which experts from the field explain aspects of their industry and the ramifications of various legislative proposals for that industry. A dozen House staff members are invited to these presentations, which occur over lunch. The staff members may attend, but they may not accept the lunch under the terms of this waiver. This is so because these events are legislative briefings, and as noted above, this waiver does not extend to such events.

**Events With Constituent Organizations.** The Standards Committee has also recognized that the gift rule was not intended to interfere with Members carrying out their conventional representational duties, and that meetings or events with constituent organizations may sometimes be attended by only a few constituents, particularly when the organization is from a state with a small or diffuse population. Such events may not satisfy the numeric requirement for widely attended events.

Accordingly, the Committee has also granted a general waiver for Members and staff to accept free attendance (including meals) at meetings or events sponsored by constituent organizations, regardless of the number of constituents in attendance or the location of the event, provided that the meeting or event is:

- Regularly scheduled (such as an annual visit to Washington, D.C.);
- Related to the official duties or representative function of the Member or employee attending the event; and
- Open to members of the constituent organization (as opposed to only officers or board members).

Examples of constituent organizations covered by this waiver include, but are not limited to, civic associations, senior citizens organizations, veterans groups, and business, trade or professional associations (e.g., associations of lawyers, nurses, bankers, teachers, or farmers).

**Example 29.** A civic association in a small town in Member A's district invites him to one of its periodic luncheon meetings of its membership. If the Member determines that his attendance would be related to his official duties or representative function, he may attend and accept the lunch under this waiver.

**Example 30.** A veterans group in Member B's district invites her to a Veterans Day dinner with its members at the local VFW hall. If B determines that her attendance would be related to her official duties or representative function, she may attend and accept the dinner.

**Example 31.** The real estate agents association of a state holds its annual Washington —fly-in. All members of the association are invited, and usually about 20 agents come. One of the events on the agenda is a dinner for the congressional delegation. Each delegation member who determines that attendance would be related to his or her official duties or representative function may attend and accept the dinner.

**Example 32.** A real estate agent comes to Washington for the association —fly-in described in the previous example. He is the only agent from Member C's district who makes the trip, and he would like to have lunch with his representative. Since the lunch is not an association event, the Member cannot accept the lunch under this waiver.

### ***Food or Refreshments of a Nominal Value (Attendance at Receptions)***

Members and staff frequently receive invitations to attend events that are less elaborate or formal than the ones for which a sponsor's offer of free attendance may be accepted under one of the gift rule exceptions or general waivers the Committee has issued for events which include a *meal* (i.e., widely attended events, charity fundraising events, fundraising or campaign events sponsored by a political organization, educational events, and regularly scheduled events sponsored by a constituent group). These events may take different forms but often are in the setting of a business meeting, reception (including a holiday or other social event), or similar gathering that includes *nonmeal* food items and drinks. In these circumstances, Members and staff should consider whether the invitation may be accepted under the gift rule exception for —[f]ood or refreshments of a nominal value offered other than as a part of a meal (House Rule 25, clause 5(a)(3)(U)). However, several limitations of this provision should be noted.

Questions will arise as to whether it is permissible to accept nominal value food or refreshments offered *other* than in a business meeting, reception, or similar setting. In its report prior to the original enactment of this provision in 1995, the House Rules Committee indicated that the exception covers —reception food. <sup>38</sup> Soon

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<sup>38</sup> See H. Rep. 104-337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 11 (1995) (—Food and refreshments of nominal value not offered as part of a meal (reception food) ).

after the new gift rule was adopted, the Committee indicated that the types of food that could be accepted under the provision include —coffee and donuts, hors d’oeuvres at a reception.<sup>39</sup> In 2000, the Standards Committee issued further written guidance that specifically described the kinds of food and refreshments that may be accepted under the provision, including coffee, juice, pastry, or bagels usually offered at a breakfast reception or meeting, and hors d’oeuvres, appetizers, and beverages usually offered at an evening reception.<sup>40</sup>

Also in this regard, the intent of the gift rule enacted at the beginning of the 110<sup>th</sup> Congress to ban most gifts from lobbyists and organizations that employ them should be taken into account. Accordingly, food and refreshments of the nature described above may be accepted under this provision **only** when offered at a business meeting, reception, or similar gathering. It is now impermissible, for example, for a Member or staff person to accept food or refreshments under this provision in a one-on-one setting with a registered lobbyist.<sup>41</sup>

Even if offered in an appropriate setting, food or refreshments that exceed —a nominal value<sup>||</sup> may **not** be accepted under this provision. The rule does not define —nominal value,<sup>||</sup> and Members and staff are accordingly cautioned to exercise reasonable judgment in accepting food or refreshments having a value greater than the examples given above.

Furthermore, the provision does **not** allow the acceptance of a meal, or of food or refreshments offered as part of a meal. Thus even a low-cost meal (for example, sandwiches or hot dogs) may not be accepted under this provision.

**Example 33.** A trade association invites House staff to attend a holiday reception in its offices featuring hors d’oeuvres and drinks. Provided that the food and refreshments are of —nominal value<sup>||</sup> and offered —other than as part of a meal,<sup>||</sup> House staff may attend the reception and accept these items.

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<sup>39</sup> House Comm. on Standards of Official Conduct, *New Gift Rule*, at 3 (Dec. 7, 1995).

<sup>40</sup> House Comm. on Standards of Official Conduct, *Gifts and Travel* booklet, at 32 (April 2000).

<sup>41</sup> Under the gift rule in effect prior to the 110<sup>th</sup> Congress, it was permissible for Member and staff to accept gifts, including food and refreshments, from virtually any individual or organization under the less than \$50 provision of the gift rule (subject to the cumulative limit of less than \$100 from a single source in a calendar year), even if the source was a registered lobbyist, agent of a foreign principal, or a private entity that retains or employs such individuals. As a result, it was not necessary for the Committee to determine the context in which this provision applied. With the gift rule amendments in the 110<sup>th</sup> Congress, the Committee has concluded that the provision allows acceptance of such food and drink only at business meetings, receptions, or similar events. The Committee intends that this determination be applied prospectively only, given the absence of previous definitive guidance on this point.

**Example 34.** A lobbyist invites a staff person out for a cup of coffee to discuss the status of a pending bill. The staff person is free to meet with the lobbyist, but because the occasion is not a reception the staff person may not accept a cup of coffee from the lobbyist even though the item is of low cost and offered other than as a part of a meal.

***Meal or Local Transportation Incident to a Visit to a Business Site***

The Standards Committee has recognized that at times in the course of performing one's official duties at House expense, a Member or staff person will be offered a *de minimis* amount of food or transportation as a courtesy. For example, one might be offered a meal in the company cafeteria while touring a facility in one's district, or a ride from the airport to a site being visited as part of a committee-sponsored trip. In the Committee's view, the acceptance of such occasional, incidental courtesies does not violate the spirit of the gift rule. Accordingly, the Committee has granted a general waiver of the gift rule to enable a Member, officer, or employee to accept the following items incidental to legitimate official activity:

- Food or refreshments, including a meal, offered by the management of a site being visited, (1) on that business's premises, and (2) in a group setting with employees of the organization; and
- Local transportation, outside of the District of Columbia, provided by the management of a site being visited in the course of official duties, between the airport or other terminus and the site, or at the site being visited (*e.g.*, in connection with a tour of a large manufacturing facility).

However, this waiver does **not** extend to car service made available from the same source on a regular basis, transportation in the District of Columbia, or meals at the Washington, D.C.-area offices of lobbying or law firms.

In addition, acceptance of a meal or transportation incident to a business site visit will not be deemed to violate the prohibition against private subsidy of official activities (House Rule 24, clauses 1 to 3). In this regard, it should be stressed that this waiver applies when a Member or staff person is traveling in the Member's own district, or is traveling elsewhere at House expense. As is detailed in the Committee guidance on the travel rules, when a Member or staff person is taking an officially related trip at the expense of a **private source** consistent with the provisions of the gift rule, it is generally permissible to may generally accept meals and transportation from that source **without** regard to the limitations noted above. However, when officially related travel is appropriately paid for by a private source, all of the expenses paid by the private source must be publicly disclosed.

### *An Item of Nominal Value*

Members, officers, and employees may accept —[a]n item of nominal value such as a greeting card, baseball cap, or a T-shirt<sup>42</sup> (House Rule 25, clause 5(a)(3)(W)). Through the 105<sup>th</sup> Congress, the Committee permitted Members and staff to accept a variety of low value, tangible items under this provision. With the adoption of the general gift rule provision at the start of the 106<sup>th</sup> Congress, however, the Committee determined that such a reading of the nominal value provision was no longer appropriate. Accordingly, as a general matter, Members and staff should **not** rely on the nominal value provision in accepting any item having a value of \$10 or more, except for the items that are explicitly referred to in that provision (*i.e.*, a baseball cap or a T-shirt).

**Example 35.** A baseball team in a Member’s district sends the office eight of its baseball caps along with a letter suggesting that one be given to the Member and to each staff person who wants one. The Member and the staff persons may each accept one of the caps under the nominal value provision.

### *Commemorative Items*

—A plaque, trophy, or other item that is substantially commemorative in nature and that is intended for presentation<sup>42</sup> may be accepted (House Rule 25, clause 5(a)(3)(S)). There are several points to note regarding this provision.

First, in contrast to other provisions of the gift rule, this one refers to —presentation,<sup>42</sup> and thus the concept of the provision is that there will be an **in-person presentation** of the item to the Member or staff person.

Second, in order to be acceptable under this provision, an item must be —substantially commemorative in nature.<sup>42</sup> Usually there is little question as to the commemorative nature of a plaque or trophy.<sup>42</sup> As to other items that may be presented to a Member or staff person at an event — for example, an expensive pen or a crystal bowl — such items are **not** commemorative in nature merely because they were presented at an event. Instead, in order to fall within this provision, an item must have some commemorative characteristic or feature. It would be impossible to enumerate all of the features that would cause an item to be deemed commemorative, but an item that is inscribed or engraved with the Member’s name, the name of the presenting organization, and the date of the presentation will likely be deemed commemorative in nature.

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<sup>42</sup>A separate provision of the gift rule, described below, applies to bona fide public service awards presented to Members or staff.

Finally, as a general matter, the items acceptable under this provision may not have significant utilitarian or artistic value. Thus, for example, a television would not be acceptable under this provision, no matter how elaborate an inscription appears on the television. The types of items that can be accepted under this provision, if commemorative in nature by reason of an inscription or otherwise, include a framed photo or print, a figurine, or a clock.

When a Member or staff person is presented with an item of unusually high value, or receives information that a group intends to present an item of such value, the official should contact the Standards Committee for guidance. A commemorative item that exceeds \$335 in value will have to be disclosed on Schedule VI of one's annual Financial Disclosure Statement (see the section on —Gift Disclosure below).

**Example 36.** After a Member speaks at an event, the sponsoring organization presents him with an expensive pen that is inscribed with his name only. Because the inscription is limited to the Member's name, the pen is not commemorative in nature and thus may not be accepted.

**Example 37.** A Member visits an Indian tribe, and during her visit, the tribal leaders present her with a blanket that was handmade by members of the tribe. Because the blanket has a traditional tribal design, the Member may accept it as a commemorative item.

**Example 38.** An aircraft manufacturer in a Member's district sends the Member, through the mail, a high-quality model of one of the airplanes it builds. While the Member probably could have accepted the model as a commemorative item had it been presented to him in person, he may not accept it under this provision since it was merely mailed to him.

### ***Books, Periodicals, and Other Informational Materials***

A Member, officer, or employee may accept —[i]nformational materials that are sent to [his or her] office . . . in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication (House Rule 25, clause 5(a)(3)(I)). The purpose of this provision is to ensure that Members have access to information sources or reference tools useful in the conduct of official duties. Several points should be noted regarding informational materials.

First, under long-standing Committee guidance, a subscription to a periodical may be accepted only from the publisher or distributor of the periodical. In other words, Members and staff may **not** accept a gift subscription that was paid for by a third party.



Second, the provision specifies that informational materials —sent to the official— may be accepted. The intent of this language is that a Member or staff person may not accept, under this provision, an additional courtesy copy of a publication that is sent to his or her home.<sup>43</sup> The intent of that language is **not** to preclude acceptance of a book or other appropriate informational material at, for example, a reception or other event.

Third, while the provision allows acceptance of a set of materials (such as, for example, a PBS documentary on alternative energy sources), it does not permit acceptance of specialized reporting services or other collections that are periodically updated, such as the U.S. Code annotated or an encyclopedia.

Fourth, at times a Member is offered multiple copies of a book or similar item for the purpose of distributing the copies to his or her colleagues or others. As a general matter, a Member may accept multiple copies of an item in these circumstances, provided that the copies are intended for distribution to a particular audience and are not for the Member's unrestricted use, and provided further that the item was not created especially for the Member.

Finally, at times a Member, officer, or employee may be offered computer software. Neither application software (*e.g.*, Microsoft Word or WordPerfect), developmental software (*i.e.*, software that enables one to generate or edit code), nor entertainment software is acceptable under this provision of the gift rule, as such materials do not constitute informational materials within the meaning of this provision. Informational software may be acceptable, but only if the database is entirely self-contained, such as on a compact disc. Software that provides access to a database that otherwise is available only on a subscription basis (*e.g.*, LEXIS-NEXIS or Westlaw) is not acceptable under this provision. However, demonstration or evaluation copies of software that a business generally makes available to prospective customers may be acceptable under a different gift rule provision (see the section below entitled —Widely Available Opportunities and Benefits—).

### ***Things Paid for by the Federal Government, or by a State or Local Government***

—Anything that is paid for by the Federal Government, by a State or local government, or secured by the Government under a Government contract<sup>44</sup> is acceptable (House Rule 25, clause 5(a)(3)(O)). This is a broad provision, which extends to tangible items of all kinds, as well as meals, services, and travel — provided, however, that the gift is paid for by a government agency or entity. Insofar as this provision concerns in-kind services provided by a federal, state, or local government agency, this provision mirrors the Standards Committee's

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<sup>43</sup> H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 11 (1995).

interpretation of the ban on unofficial office accounts (House Rule 24, clauses 1 to 3) under which Members and staff may accept in-kind services and functions from government agencies for official House activities.

**Example 39.** A state university in a Member's district offers the Member tickets to an upcoming home game of one of its teams. The Member may accept the tickets under this provision. (However, as a general matter, sporting event tickets may be accepted from a private university only under the general provision on acceptable gifts, *i.e.*, if their value is less than \$50, and the private university does not retain or employ lobbyists.)

The —paid for byll language of this provision is especially important. Thus, under this provision, Members and staff may not accept a gift from a government agency when the gift was donated to the agency by a third party, and the agency is merely acting as a conduit. In addition, Members and staff may **not** accept, under this provision, a meal or other gift that is paid for by an outside consultant or lobbyist for a government agency – even though the cost of the gift will ultimately be reimbursed by the government.<sup>44</sup>

Questions may arise as to whether a particular entity, such as an airport authority, port authority, or public utility, is a government agency for purposes of this provision. An entity is a government agency for purposes of this provision only if, under the law, it is treated as a government agency for other purposes. For example, an interstate compact entered into by the State of Maryland, the Commonwealth of Virginia, and the District of Columbia, which was also approved by Congress, established the Washington Metropolitan Area Transit Authority (or WMATA) as a governmental agency, with funding derived from the federal government and state governments, as well as from rider fares. In addition, the Committee has determined that the Tennessee Valley Authority is a governmental agency.<sup>45</sup> Conversely, federal law provides that Amtrak is not a department, agency, or instrumentality of the United States government (49 U.S.C. § 24301(a)(3)), and thus Amtrak is not a government agency for purposes of this gift rule provision. Similarly, the Committee has concluded that the regional Federal Home Loan Banks are private entities under the House gift rule. The Committee's staff should be consulted for guidance on the status of a particular entity.

The commonwealths and territories of the United States are deemed to be part of the federal government and hence are treated as government entities.

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<sup>44</sup> *Id.*

<sup>45</sup> The Committee has also determined that certain quasi-municipal corporations, *e.g.*, the Metropolitan Water District of Southern California, are governmental agencies under state law.

However, Indian tribes are not treated as a state or local government for purposes of the gift rule. The Standards Committee considered this matter carefully and found nothing in the legislative history of the current gift rule or its predecessors indicating an intent to treat Indian tribes as state or local government entities for these purposes.

The language of this provision regarding things secured by the government under a government contract applies, by its terms, only to things secured under a contract of the **federal** government. This language was derived from a comparable provision of the gift regulations that govern the Executive Branch (5 C.F.R. § 2635.203(b)(7)). The stated intent of that provision was to cover only items that—the Government procures for use by its employees under a Government contract or knowingly obligates itself to pay for (57 Fed. Reg. 35,014 (1992))—for example, a health club membership that the owner of a building in which the federal government leases space makes available to building tenants.

### ***Gifts From Foreign Governments and International Organizations***

Members, officers, and employees may accept—[a]n item, the receipt of which is authorized by the Foreign Gifts and Decorations Act, the Mutual Educational and Cultural Exchange Act, or any other statute (House Rule 25, clause 5(a)(3)(N)).

Special rules apply to gifts from foreign governments. The Constitution prohibits federal government officials, including Members and employees of Congress, from receiving—any present . . . of any kind whatever from a foreign state or a representative of a foreign government without the consent of the Congress.<sup>46</sup> Congress has consented, through the vehicles of the Foreign Gifts and Decorations Act (—FGDA<sup>47</sup>) and the Mutual Educational and Cultural Exchange Act (—MECEA<sup>48</sup>), to the acceptance of certain gifts from foreign governments. The FGDA defines—foreign government to include not only foreign governments *per se*, but also international or multinational organizations whose membership is composed of units of foreign governments, and any agent or representative of such a government or organization while acting as such.<sup>49</sup> That Act also covers gifts from—quasi-governmental organizations closely affiliated with, or funded by, a foreign government.

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<sup>46</sup> Art. I, § 9, cl. 8.

<sup>47</sup> 5 U.S.C. § 7342.

<sup>48</sup> 22 U.S.C. § 2458(a).

<sup>49</sup> 5 U.S.C. § 7342(a)(2)(B).

MECEA and the FGDA provisions concerning the acceptance of travel and travel expenses are addressed in the Committee's guidance on the travel provisions of the gift rule.

In addition to its travel provisions, however, the FGDA authorizes House Members, officers, and employees to accept—a gift of minimal value tendered and received as a souvenir or mark of courtesy.<sup>50</sup> Under implementing regulations issued by this Committee,<sup>51</sup> the term—minimal value<sup>52</sup> as used in the Act is currently defined, by reference to a statutory formula, as \$335.<sup>52</sup>

This provision on minimal value gifts clearly applies to gifts of tangible items. In addition, the Standards Committee has interpreted this provision to permit Members and staff to accept, from a foreign government, meals, entertainment, and local travel in the United States when related to official duties. However, since providing lodging in the United States is not normally viewed as within the realm of diplomatic courtesy, it may not be accepted. Similarly, the Committee's interpretation does not allow the acceptance of such meals, entertainment, or local travel offered by a lobbyist or agent of a foreign government, because such gifts are not properly deemed as having been—tendered as a souvenir or mark of courtesy<sup>53</sup> as required by the FGDA.

**Example 40.** An embassy in Washington has invited a Member to attend a dinner at the embassy. The Member may accept the invitation under the minimal value provision of the FGDA.

**Example 41.** An embassy official in Washington has invited a staff member to lunch at a local restaurant to discuss pending legislation concerning his country. The staff member may accept the invitation under the minimal value provision of the FGDA.

**Example 42.** An attorney who is a registered foreign agent has invited a staff member to lunch to discuss pending legislation concerning his client. The staff member may not accept the lunch.

The FGDA further allows a Member or staff person to accept (but **not** to retain) a gift of more than minimal value, as defined above, when refusal of the gift—would likely cause offense or embarrassment or otherwise adversely affect the

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<sup>50</sup> 5 U.S.C. § 7342(c)(1)(A).

<sup>51</sup> The Committee's implementing regulations are issued pursuant to 5 U.S.C. § 7342(a)(6)(A), (g)(1) and apply to House Members and staff. The regulations were first published on Jan. 23, 1978 (124 *Cong. Rec.* 452-53) and are reprinted in their current form in the appendix.

<sup>52</sup> 5 U.S.C. § 7342(a)(5)(A); 73 Fed. Reg. 7475 (Feb 8, 2008).

foreign relations of the United States.<sup>53</sup> Such gifts, however, are deemed to be accepted on behalf of the United States and become the property of the United States. Within 60 days of accepting such a gift, a Member or staff person must turn the gift over to the Clerk of the House for disposal or, with the consent of this Committee, the recipient may retain the gift for display in his or her office or other official use.<sup>54</sup>

At the time such a gift is deposited for disposal or official use, the recipient must also complete and sign a foreign gifts disclosure form, and file it with the Standards Committee.<sup>55</sup> Copies of the form are available from the Committee office or its website, [www.house.gov/ethics](http://www.house.gov/ethics). If a Member or employee is uncertain whether the value of a gift exceeds —minimal value<sup>56</sup> as defined above, the Clerk's office can arrange for an appraisal.<sup>56</sup> Under the Committee's foreign gifts regulations, the disclosure statements filed by Members and employees are publicly available at the Committee's office, and their contents are published annually in the *Federal Register*.<sup>57</sup>

Additionally, the FGDA allows a Member or employee to accept a gift of an educational scholarship or medical treatment from a foreign government.<sup>58</sup>

Furthermore, the FGDA applies not only to Members and employees but also to the spouse or dependant of a Member or employee.<sup>59</sup>

### ***Benefits Resulting from Outside Business and Other Activities***

Subject to two restrictions that are described below, Members, officers, and employees may accept benefits (including food and refreshments) that result from any of the following activities:

- Outside business or employment activities of the Member or staff person;
- Other outside activities of the Member or staff person that are not connected to the duties of the individual as an officeholder; or
- Outside business or employment activities of the spouse of the Member or staff person.

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<sup>53</sup> *Id.* § 7342(c)(1)(B).

<sup>54</sup> *Id.* § 7342(c)(2), (a)(6)(A).

<sup>55</sup> *Id.* § 7342(c)(3).

<sup>56</sup> *Id.* § 7342(g)(2)(B), (a)(6)(A).

<sup>57</sup> *Id.* § 7342(f).

<sup>58</sup> *Id.* § 7342(c)(1)(B).

<sup>59</sup> *Id.* § 7342(a)(1)(G).

The restrictions on the acceptance of such benefits are that (1) the benefits may not have been offered or enhanced because of the official position of the Member or staff person, and (2) they must be benefits that are —customarily provided to others in similar circumstances|| (House Rule 25, clause 5(a)(3)(G)(i)). (This provision also allows the acceptance of transportation and lodging under the same terms.)

This is a common-sense provision that allows Members and staff to accept things of value that essentially have nothing to do with their position with the House, but instead are the result of outside business or other activities. However, before accepting anything under this provision, a Member or staff person must be satisfied that the benefit was neither **offered** nor **enhanced** because of his or her official position. The provision also requires that the benefit be one that is —customarily provided to others in similar circumstances.||

**Example 43.** A Member serves, on an uncompensated basis, as a member of the board of directors of a nonprofit organization. The board holds monthly dinner meetings, and the organization also provides each director with a free subscription to its monthly publication. The Member may attend the dinner meetings and accept the subscription.

**Example 44.** The spouse of a staff member is a partner in a law firm that leases a skybox in a pro football stadium. Each partner may attend games with his or her spouse or a guest. The staff member may attend games with his spouse.

**Example 45.** A Member who was a star tennis player as a youth is invited to a banquet honoring retired greats. The Member may accept.

**Example 46.** A pro sports team has established an —honorary board of advisers,|| which is to be composed largely of government officials from the area, and it has asked the local Member to join. Each member of the honorary board will be given season tickets for the team's home games. While the Member may join the honorary board if he chooses, he may not accept the season tickets under this provision, because in effect the tickets are being offered because of the Member's official position.

As a related matter, Members and staff are also allowed to accept benefits (including food, refreshments, and travel) —customarily provided by a prospective employer in connection with bona fide employment discussions|| (House Rule 25, clause 5(a)(3)(G)(ii)).

**Example 47.** During the course of employment discussions with a lobbying firm, a staff member is offered use of the firm's beach condo for a weekend. Unless the firm has a history of making the same offer to comparable prospects in the private sector, the offer is not acceptable under this provision.

Questions in this area can also arise in connection with a **severance package** that a Member, officer, or employee may receive from a former employer that is separate from or in addition to continuing participation in a pension or other employee welfare or benefit plan (*see* House Rule 25, clause 5(a)(3)(H)). Such packages may take any number of forms, and they may include the award of a performance bonus or the retention of benefits accrued through an incentive program, but generally they are awarded based on services rendered to an outside employer **prior** to the individual's congressional service. A severance package may be accepted if it meets the following criteria: (a) The former employer regularly gives its employees a severance package as part of the individual's compensation for services performed; (b) the package constitutes compensation for services the individual performed prior to employment with the House; (c) the package is no greater than that given to similar employees who do not work for the House; and (d) the monetary value of the package has in no way been enhanced because of the individual's employment with the House. Any severance package that is not offered along these lines would raise concerns that the benefits being conferred involve an improper gift.<sup>60</sup>

### ***Personal Hospitality of an Individual***

A Member, officer, or employee may accept a gift of personal hospitality of an individual, **except from a registered lobbyist or an agent of a foreign principal** (House Rule 25, clause 5(a)(3)(P)).<sup>61</sup> This provision incorporates the definition of the term —personal hospitality‖ that is provided in § 109(14) of the Ethics in Government Act:

[H]ospitality extended for a non-business purpose by an individual, not a corporation or organization, at the personal residence of that

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<sup>60</sup> Furthermore, a severance package or other post-employment benefit (such as participation in a partnership's retirement plan) may implicate provisions of the federal criminal code. For example, 18 U.S.C. § 203, prohibits federal employees (including House Members, officers, and staff) from accepting, —directly or indirectly,‖ compensation for representational services before federal agencies. Members and employees should consult the Committee staff for guidance concerning the application of this provision to their particular circumstances.

<sup>61</sup> The definitions of the terms —registered lobbyist‖ and —agent of a foreign principal‖ as used in the gift rule are provided above in the section —Definitions of Registered Lobbyist and Agent of a Foreign Principal.‖

individual or his family or on property or facilities owned by that individual or his family.

When the requirements of this provision are satisfied, a Member or staff person may accept, for example, a meal at an individual's residence, and may also accept lodging. It is not required that the host be present; thus, use of a personally owned vacation home is permissible even if the owner is not present. However, this provision does **not** allow the acceptance of either meals or entertainment outside the home, or travel expenses. In addition, in order for this provision to apply, the property or facilities must be **personally owned**. Property or facilities owned by a corporation or a firm may not be used under this provision, even if the corporation or firm is wholly owned by an individual. Likewise, as a general rule, a residence or other property that the individual owner rents out to others or otherwise uses for business purposes may not be used under this provision.

The aspect of the rule requiring that the personal hospitality be for a —non-business purpose<sup>62</sup> should also be noted. Thus, when an individual invites a Member or staff person to a dinner at the individual's home for the purpose of discussing pending legislation, the invitation may not be accepted under this provision. Similarly, the provision does not apply when the expenses that an individual incurs in providing personal hospitality are either to be reimbursed by a business, or deducted as business expenses.<sup>62</sup>

**Example 48.** Mr. and Mrs. Z (neither of whom is a registered lobbyist or foreign agent) invite Member A and spouse to spend the weekend with them at their home. Provided that there is no business purpose for the visit, the Member may accept under this provision.

**Example 49.** A Member receives an invitation from an individual (who is neither a registered lobbyist nor a foreign agent) to spend a week at a vacation home. The Member may accept if (1) the home belongs to the host personally (as opposed to a corporate employer), (2) the costs of the visit will **not** be reimbursed by an employer or deducted from taxes as a business expense, and (3) there is no business purpose for the visit.

**Example 50.** An individual (who is neither a registered lobbyist nor a foreign agent) invites a Member to spend the weekend with him at his condominium in Aspen. The individual offers to fly the Member out on his private plane and to pay for his ski rentals and lift tickets. While

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<sup>62</sup> *Bipartisan Task Force Report, supra* note 5, 135 *Cong. Rec.* 30743.



the Member may accept the weekend lodging, the travel and ski expenses are not acceptable under this provision.

As noted above, Members and staff may **not** accept personal hospitality from a registered lobbyist or foreign agent under this provision. However, it is possible for the benefits encompassed in the personal hospitality provision – for example, a meal or lodging at a private home – to be accepted from a lobbyist or foreign agent under the **personal friendship provision** of the gift rule.<sup>63</sup> The restrictions on the acceptance of things of value under the personal friendship provision are described above, and as is noted there, Members and staff must be especially cautious in relying on the personal friendship provision where the offeror is a registered lobbyist or foreign agent.

Briefly stated, a Member or staff person may accept such hospitality from a lobbyist or foreign agent under the personal friendship provision of the gift rule when the following circumstances are present: (1) All of the requirements of the personal hospitality provision are satisfied, including that the property is individually owned, and that there is no business purpose underlying the offer, (2) in addition, there is a history of reciprocal gift exchange between the offeror and the Member or staff person, and (3) if the value of the hospitality exceeds \$250, the advance, written approval of the Standards Committee is obtained. The acceptance of hospitality from a registered lobbyist or foreign agent exceeding \$335 in value must be reported on Schedule VI of one's annual Financial Disclosure Statement.

### ***Contributions to a Legal Expense Fund, and Pro Bono Legal Services***

A Member, officer, or employee may accept—a contribution or other payment to a legal expense fund established for the benefit of [the official] that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Standards of Official Conduct<sup>ll</sup> (House Rule 25, clause 5(a)(3)(E)). However, such a contribution or other payment may **not** be accepted from a registered lobbyist or an agent of a foreign principal (House Rule 25, clause 5(e)(3)).<sup>64</sup>

The Committee issued Legal Expense Fund Regulations in an advisory memorandum dated June 10, 1996, which is reprinted in revised form in the appendix. **Those regulations generally prohibit Members and staff from soliciting or receiving donations to pay legal expenses without the prior written permission of**

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<sup>63</sup> See H. Rep. 337, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 11 (1995).

<sup>64</sup> The definitions of the terms—registered lobbyist<sup>ll</sup> and—agent of a foreign principal<sup>lll</sup> as used in the gift rule are provided at the beginning of this chapter.

**the Committee.**<sup>65</sup> It should be noted that this prohibition generally applies to **in-kind donations** – including pro bono legal services – as well as **cash donations**. However, as detailed below, Members and staff may accept pro bono legal assistance for certain purposes without Committee permission.

Merely because a Member or staff person is incurring or will incur legal expenses does not necessarily mean that the individual may establish a fund to defray those expenses. Under the Committee's regulations, a fund may be established only when the legal expenses arise in connection with one of the following matters:

- The individual's candidacy for or election to federal office;
- The individual's official duties or position in Congress (including a matter before the Standards Committee);
- A criminal prosecution; or
- A civil matter bearing on the individual's reputation or fitness for office.

The Committee will **not** grant permission to establish a fund when legal expenses arise in connection with a matter that is primarily personal in nature, such as a matrimonial action.

The rules governing the operation of a Legal Expense Fund include the following. A fund must be established as a trust, administered by a trustee who is entirely independent of the Member or staff person who is the trust's beneficiary. No contribution may be solicited for or accepted by a fund prior to the Committee's written approval of the completed trust document and the trustee. Trust funds can be used only to pay legal expenses, or the expenses incurred in soliciting for or administering the trust. Excess funds must be returned to the contributors. A fund may not accept more than \$5,000 in a calendar year from any individual or organization, but in accordance with the gift rule, no contribution may be accepted from a registered lobbyist or foreign agent. A fund may not pay for legal services for anyone other than the named beneficiary except with the Committee's written permission. Written Committee permission is also required for any amendment of the trust document and any change in the trustee.

The regulations also require extensive public disclosure regarding each Legal Expense Fund. After the Committee has approved a trust document, the beneficiary must file a copy of it with the Legislative Resource Center (Room B-106,

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<sup>65</sup> The only donations that may be solicited or received without prior permission are donations from relatives, and donations of up to \$250 that are given on the basis of personal friendship (as discussed above).

Cannon House Office Building) for public disclosure. In addition, reports on contributions to and expenditures from a fund must be filed with both the Committee and with the Legislative Resource Center on a quarterly basis. Contributions exceeding \$335 in a calendar year from any source (other than a relative of the beneficiary) must also be reported on Schedule VI of the beneficiary's annual Financial Disclosure Statement (see the section on —Gift Disclosure below).

As to pro bono legal assistance, a Member, officer, or employee may accept such assistance without limit for the following purposes:

- To file an amicus brief in his or her capacity as a Member of Congress;
- To participate in a civil action challenging the validity of any federal law or regulation; or
- To participate in a civil action challenging the lawfulness of an action of a federal agency, or an action of a federal official taken in an official capacity, provided that the action concerns a matter of public interest, rather than a matter that is personal in nature.

Acceptance of pro bono legal assistance for any other purpose is permissible only with Committee authorization pursuant to an advisory opinion, or as a contribution to a Committee-approved legal expense fund.

In certain circumstances, campaign funds may also be used to pay legal expenses. The Federal Election Commission has issued a number of advisory opinions on this matter pursuant to its rules barring personal use of campaign funds (11 C.F.R. Part 113). Both the Standards Committee and the FEC should be consulted before campaign funds are used to pay any legal expenses.

#### *—Home State Products*

A Member may accept —[d]onations of products from the district or State that the Member . . . represents that are intended primarily for promotional purposes, such as display or free distribution, and are of minimal value to any single recipient. (House Rule 25, clause 5(a)(3)(V)). Several points to bear in mind regarding this provision are as follows:

- This provision applies to tangible items only. Thus, for example, tickets to a museum or a show in a Member's district may not be accepted under this provision.
- To be acceptable under this provision, an item must be produced or grown in the Member's home state.

- If the item is to be distributed for free, it must be of —minimal value— candy bars, apples, and peanuts that are produced or grown in a Member’s state are common examples.
- The provision applies not only to small items that can be given away, but also to home-state items that can be displayed in the office — for example, a Christmas tree grown in the Member’s home state.
- The provision allows acceptance of items —that are intended primarily for promotional purposes— Accordingly, any give-away items must be available to office visitors, and not merely to Members and staff. Likewise, any display item must be placed in the reception area of the office.

### ***Honorary Degrees and Nonmonetary Public Service Awards***

Honorary degrees are acceptable, as are travel, food, refreshments, and entertainment that are provided in connection with the award of an honorary degree (House Rule 25, clause 5(a)(3)(K)). In addition, under the same provision of the gift rule, —bona fide, nonmonetary awards presented in recognition of public service— are acceptable, along with food, refreshments, and entertainment provided in connection with the presentation of such awards.

This provision allows only the acceptance of a —bona fide— award — a condition that is particularly significant when the award is an item having significant monetary value, such as a crystal sculpture. In determining whether an award is indeed —bona fide,— among the important considerations are the nature of the awarding organization, whether the award is made as part of an established program and has been made on a regular basis, whether in the past non-congressional individuals have been recipients of the award, and whether there are specific, written criteria for the selection of the awardees. If the award is an item that exceeds \$335 in value, and the recipient is a Member or officer, or an employee who files a Financial Disclosure Statement, the award must be disclosed on Schedule VI of the individual’s filing for the year in which the award was received (see the section on —Gift Disclosure— that follows).

A public service award that consists of an amount of money is not acceptable under this provision. Similarly, where an award includes both an item and an amount of money, the monetary aspect of the award is not acceptable under this provision. A Member, officer, or employee who is offered a public service award that consists of or includes an amount of money may submit a written request for a gift rule waiver to the Committee. In considering any such request, the Committee will closely examine the factors noted above that bear on whether the award is a —bona fide— one.

### ***Training in the Interest of the House***

Training is acceptable, —if such training is in the interest of the House.¶ (House Rule 25, clause 5(a)(3)(L)). Also acceptable under this provision are —food and refreshments furnished to all attendees as an integral part of the training.¶

This provision may apply to, for example, vendor promotional training, *i.e.*, training provided by a company for the purpose of promoting its products or services. However, the acceptance of training may implicate the prohibition against private subsidy of official activity (House Rule 24, clauses 1 to 3), and thus Members and staff should consult with the Committee before accepting training under this provision. This provision does **not** extend to meals in connection with presentations made by lobbyists or advocacy groups, or to meals in connection with briefings or discussions relating to issues before the Congress.

### ***Widely Available Opportunities and Benefits***

Members, officers, and employees may accept certain opportunities and benefits that are similarly available to individuals outside the House (House Rule 25, clause 5(a)(3)(R)). Specifically, Members and staff may accept opportunities and benefits that are –

- (1) —[A]vailable to the public or to a class consisting of all Federal employees, whether or not restricted on the basis of geographic consideration;¶
- (2) —[O]ffered to members of a group or class in which membership is unrelated to congressional employment;¶
- (3) —[O]ffered to members of an organization, such as an employees' association or congressional credit union, in which membership is related to congressional employment and similar opportunities are available to large segments of the public through organizations of similar size;¶
- (4) —[O]ffered to a group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of branch of Government or type of responsibility, or on a basis that favors those of higher rank or rate of pay;¶ or
- (5) —[I]n the form of reduced membership or other fees for participation in organization activities offered to all Government employees by professional organizations if the only restrictions on membership relate to professional qualifications.¶

***Example 51.*** A hotel chain offers a discounted rate to all federal employees, regardless of whether they are on official travel. House

employees may take advantage of the reduced rate under category No. 1 above.

**Example 52.** A staff person accumulates sufficient —frequent flyer— miles on personal travel to receive complimentary airfare to Europe. He may accept the award under category No. 2 above because the —frequent flyer— program is available to all travelers.

**Example 53.** An alumni association offers reduced-price travel and other benefits to its members. A staff member who is a member of the association may, under category No. 2 above, accept from the association any benefits that it makes available to all of its members.

**Example 54.** A local health club offers reduced membership fees to congressional staff members. Because the offer is not made to federal employees generally, and because of the limitations set forth in category Nos. 1 and 4 above, House staff may not accept the offer under this provision. A House staff member could accept such an offer under category No. 1 above if it were made to all federal employees in the Washington, D.C. area.

**Example 55.** An association of tax attorneys holds monthly lunch meetings, and the admission fee charged to federal tax attorneys is lower than that charged to private sector tax attorneys. A House staff member who is a tax attorney may attend the lunch meetings at the reduced fee under category No. 5 above, provided that the only restrictions on membership in the association relate to professional qualifications.

### **Loans**

Members, officers, and employees may accept opportunities and benefits that are —in the form of loans from banks and other financial institutions on terms generally available to the public— (House Rule 25, clause 5(a)(3)(R)(v)). In addition, as reflected in a Committee advisory memorandum of May 23, 1997, a copy of which is reprinted in the appendix, the Committee has determined that Members and staff may accept a loan from a person other than a financial institution, provided that the loan is on commercially reasonable terms, including requirements for repayment and a reasonable rate of interest. That determination was based on a separate provision of the gift rule, clause 5(a)(3)(A), which allows the acceptance of —[a]nything for which the Member, . . . officer, or employee pays the market value.—

Whether a loan from a person other than a financial institution is on terms that are —commercially reasonable,— and hence acceptable under the Committee’s

determination, will depend on a number of facts and circumstances. Thus, *before* entering into a loan arrangement with a person other than a financial institution, Members and staff should contact the Committee for a review of the proposed terms, and a determination by the Committee on whether the loan is acceptable under the gift rule.

### *Awards and Prizes*

Members, officers, and employees may accept —[a]wards or prizes that are given to competitors in contests or events open to the public, including random drawings<sup>ll</sup> (House Rule 25, clause 5(a)(3)(J)). Thus, for example, a Member or employee who purchases a lottery ticket and wins a cash prize may accept the prize.

The Committee has also determined that a Member, officer, or employee may accept a prize won in a drawing, raffle or other contest that is not necessarily open to the public — for example, a drawing held at a charity fundraising event — but **only** if **most** of the entries in the contest were from individuals other than Members, officers, or employees of Congress (and their accompanying spouses or other individuals).

Any prize that exceeds \$335 in value will have to be disclosed on Schedule VI of the official's annual Financial Disclosure Statement (see the section on —Gift Disclosure<sup>ll</sup> below).

### *Gifts From Relatives*

A gift from a relative is acceptable (House Rule 25, clause 5(a)(3)(C)). This provision incorporates the definition of the term relative that is provided in the Ethics in Government Act (5 U.S.C. app. 4 § 109(16)):

—relativ<sup>ll</sup> means an individual who is related to the [official] as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or grandmother of the spouse of the [official], and shall be deemed to include the fiancé or fiancée of the [official].

Fiancés and fiancées are included in this definition, and thus engagement rings and other gifts exchanged by engaged couples are acceptable under this provision. However, a gift may not be accepted under this provision when a relative of a Member, officer, or employee is merely passing along a gift from some other person.

### ***Gifts From Other Members, Officers, or Employees***

Members, officers, and employees may accept —[a] gift from another Member, . . . officer, or employee of the House or Senate.¶ (House Rule 25, clause 5(a)(3)(F)). However, federal law generally bars government employees from giving gifts to their official superiors.<sup>66</sup> While the Committee has recognized common-sense exceptions for voluntary gifts on special occasions,<sup>67</sup> as a general rule, Members may not accept things of value from their staff members, and higher level staff members may not accept things of value from those who work for them. In addition, a gift may not be accepted under this provision where a Member, officer, or employee is merely passing along a gift from some other person.

### ***Things for Which a Gift Rule Waiver Is Granted***

A Member, officer, or employee may accept —[a]nything for which, in an unusual case, a waiver is granted by the Committee on Standards of Official Conduct.¶ (House Rule 25, clause 5(a)(3)(T)).

**General Waivers for Wedding and Baby Gifts.** Upon receipt of an advance, written request, the Committee will grant a Member, officer, or employee a general waiver for gifts received in connection with his or her wedding, or in connection with the birth of a baby. Such general waivers are issued primarily for the convenience of the requester, and notwithstanding the issuance of the waiver, recipients should exercise caution in accepting any gift that likely would not have been offered but for the individual's official position. As to any such gift, the individual should consider its source, nature and value, and any possible conflict with official duties.

A Member, officer, or employee who receives wedding or baby gifts that otherwise are not acceptable under the gift rule, but did not submit an advance request for a general waiver, may submit a waiver request for those gifts. However, such post-event requests should include, at a minimum, a description of each gift for which a waiver is requested, including its market value, and the identity of the donor.

The grant of a gift rule waiver by the Committee does **not** waive the requirement for reporting certain gifts on Schedule VI of one's annual Financial Disclosure Statement. The requirement for disclosure of certain gifts, and the Committee's authority to waive disclosure in certain instances, are noted below in the section on —Gift Disclosure.¶ Generally the Committee will waive the

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<sup>66</sup> 5 U.S.C. § 7351.

<sup>67</sup> For example, a birthday, holiday, marriage, the birth of a child, anniversary, retirement, and like occasions when gifts are traditionally given.



requirement for disclosure of wedding and baby gifts, but a separate letter requesting the disclosure waiver must be submitted to the Committee. In contrast to requests for gift rule waivers, which are kept confidential by the Committee, a request for waiver of the disclosure requirement is required by law to be made publicly available.

**Other Waivers.** In addition to gifts received in connection with a wedding or the birth of a baby, the Committee will also grant gift rule waivers in other —unusual case[s],<sup>68</sup> provided that —there is no potential conflict of interest or appearance of impropriety.<sup>68</sup> For example, when a Member or a family member becomes seriously ill, the Committee will generally grant a gift rule waiver for any flowers or floral arrangements that are received.

Any Member, officer, or employee who is offered a gift that is not otherwise acceptable under the rule, but who believes that acceptance of the gift should be allowed, should submit a written request to the Committee for a waiver. Any request should include, at a minimum, a description of the gift, including its market value, the identity of the donor, and a statement of the reasons believed to justify its acceptance.

### ***Other Acceptable Gifts***

Under the gift rule, Members, officers, and employees may also accept the following gifts:

- —A contribution, as defined in section 301(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) that is lawfully made under that Act.<sup>68</sup> (House Rule 25, clause 5(a)(3)(B));
- —[A] lawful contribution for election to a State or local government office.<sup>68</sup> (*Id.*, clause 5(a)(3)(B));
- —Bequests, inheritances, and other transfers at death.<sup>68</sup> (*Id.*, clause 5(a)(3)(M)).

### **Other Expressly Prohibited Lobbyist Gifts**

As noted above (in the section —Overview of the Gift Rule<sup>68</sup>), a Member, officer, or employee may not accept **any** gift, except as the rule specifically provides. Thus, unless a gift falls into one of the categories of acceptable gifts described above, it may not be accepted. In addition to the prohibition on lobbyists and foreign agent gifts under the general gift rule provision, the rule also expressly prohibits the

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<sup>68</sup> *Bipartisan Task Force Report, supra* note 5, 135 *Cong. Rec.* 30743.

acceptance of certain other gifts from registered lobbyists and foreign agents. The other gifts that are expressly prohibited are as follows:

- —Anything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member, . . . officer, or employee of the House.¶ (House Rule 25, clause 5(e)(1));
- —A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member, . . . officer, or employee of the House (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution [made in lieu of an honorarium].¶ (*Id.*, clause 5(e)(2));
- —A contribution or other payment by a registered lobbyist or an agent of a foreign principal to a legal expense fund established for the benefit of a Member, . . . officer, or employee of the House.¶ (*Id.*, clause 5(e)(3)); and
- —A financial contribution or expenditure made by a registered lobbyist or an agent of a foreign principal relating to a conference, retreat, or similar event, sponsored by or affiliated with an official congressional organization, for or on behalf of Members, . . . officers, or employees of the House.¶ (*Id.*, clause 5(e)(4)).

The prohibition against accepting a contribution or other payment to a legal expense fund from a registered lobbyist or foreign agent was noted above (in the section —Contributions to a Legal Expense Fund, and Pro Bono Legal Services¶ ). Registered lobbyists and foreign agents are also singled out in the gift rule provisions on personal hospitality of an individual (discussed above) and officially related travel (discussed in the travel section). The rationale for these special restrictions on gifts from lobbyists is noted above.

The definitions of the terms —registered lobbyist¶ and —agent of a foreign principal are provided at the beginning of this chapter. The Committee does not interpret the provisions described in this section to apply to the clients of lobbyists and lobbying firms (unless the client is also a lobbyist or is a lobbying firm).

As a related matter, clause 8 of House Rule 25 prohibits a Member from participating in certain events held in honor of the Member during a political convention if those events are paid for by a lobbyist. This provision is discussed below in the section on —Events in Honor of a Member, Officer, or Employee.¶

## Handling Unacceptable Gifts

When a Member, officer, or employee receives a gift that is not acceptable under the gift rule, and for which a gift rule waiver is not available, there are generally two options: pay the donor the —market value<sup>69</sup> of the gift, or return the gift to the donor. However, when the unacceptable gift is a perishable item, such as flowers or a fruit basket, the rule also provides the options of donating the item to charity or destroying it. In addition, other options may be available for a gift that is unusual in nature, such as a work of art from one’s home state. These options are detailed below.

At times when a Member, officer, or employee is unexpectedly presented with a gift at an event, he or she may be uncertain whether it can be accepted under the gift rule. In that circumstance, the individual may receive the gift and wait until after the event to review the provisions of the gift rule and make a decision on the gift’s acceptability. Members and staff should always feel free to contact the Committee’s Office of Advice and Education on such matters.

### *Pay Market Value for the Gift*

**In General.** The gift rule provides that a Member, officer, or employee may accept —[a]nything for which the [official] pays the market value. (House Rule 25, clause 5(a)(3)(A)). Generally, for the purpose of the gift rule, items are valued at their retail, rather than wholesale prices. Often an item may be priced differently at different stores. A gift may be valued at the lowest price at which the item is available to the general public. Committee guidance on the value of certain specific kinds of gifts is as follows.

**Tickets to Sporting Events and Shows.** The gift rule provides that a ticket to a sporting or entertainment event is —valued at the face value of the ticket or, in the case of a ticket without a face value, at the highest cost of a ticket with a face value for the event. (House Rule 25, clause 5(a)(1)(B)(ii)). To address the issue of artificially low face values, the gift rule also provides that the —price printed on the ticket shall be deemed its face value only if it also is the price at which the issuer offers that ticket for sale to the public. (*Id.*). Thus, for a ticket to a skybox or other private luxury box with no face value or an artificially low face value, the value of the ticket is the price of the highest individually-priced ticket for the event. Other methods of valuation, such as calculating a pro-rata, pro-event cost for a season ticket, are not permitted under the gift rule. The Committee should be contacted for advice on the value of tickets for an event for which individually priced tickets are not made available for sale to the public.<sup>69</sup>

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<sup>69</sup> The guidance set forth above applies to the valuation of tickets for purposes of the House gift rule. Members and staff should contact the Federal Election Commission for guidance regarding the valuation of tickets for campaign events.

For many sporting or entertainment events, especially those taking place in the Washington, D.C. or other major metropolitan areas, the value of a ticket may exceed \$50. When the value equals or exceeds \$50, the invitee must either decline the ticket or pay for the ticket according to the method set forth in the rule. In addition to paying the cost of any ticket(s), Members and staff must pay the market value of any other benefits that are accepted in connection with the event, including food, beverages, or parking that exceed the gift rule limits. Of course, as explained above, if the ticket is from a lobbyist or private entity that retains or employs lobbyists, a Member or staff person may not accept free attendance, even if the ticket is valued under \$50.

**Tickets to Charity or Political Fundraisers.** Under a policy established by the House Select Committee on Ethics, a ticket to a charity or political fundraising dinner is valued at the cost of the dinner, rather than the cost of the ticket to the purchaser.<sup>70</sup>

**Honorary Memberships.** Membership in a club or other organization typically involves an initiation fee, periodic dues, and usage charges. An —honorary membership usually involves a waiver or reduction in the normal fee or dues levied on members. For purposes of the gift rule, an honorary membership is valued at the total market price of the organization’s normal initiation fee, periodic dues, and usage charges. The value of an honorary membership to a Member or staff person is not diminished merely because the individual does not use the membership, or because the honorary membership does not carry voting rights or an equity interest.

**Example 56.** A Member is offered a complimentary membership in a health club. Normally, new members are assessed an initiation fee of \$45 and annual dues of \$500. The Member may not accept the membership.

### ***Prompt Return to the Donor***

The restrictions of the gift rule do not apply to anything that a Member, officer, or employee —does not use and promptly returns to the donor (House Rule 25, clause 5(a)(3)(A)). As noted above, the rule provides additional options only with regard to perishable items: —When it is not practicable to return a tangible item because it is perishable, the item may, at the discretion of the recipient, be given to an appropriate charity or destroyed (id., clause 5(a)(6)). Thus, a perishable item may be donated to a local hospital, homeless shelter, religious organization, or other charity.

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<sup>70</sup>*Final Report of the Select Comm. on Ethics*, H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess. 9.

However, when a Member, officer, or employee receives a nonperishable gift that cannot be accepted under the gift rule, he or she has no choice but to return the item to the donor promptly. One wishing to return a gift by mail should consult with the Commission on Congressional Mailing Standards (the Franking Commission) to determine if the item is frankable. If the item is not frankable, it will be necessary to purchase postage stamps using the Members' Representational Allowance in order to return it by mail.

### *Artwork and Other Gifts of an Unusual Nature*

At times a Member has been offered, for display in his or her office, a work of art having significant value. Members have also been offered gifts of an unusual nature, the value of which is not readily ascertainable. Gifts in this category have ranged from works of art and antiques to items emblematic of the donor's cultural group. The gift may represent the personal efforts of an individual, or may symbolize the esteem of a constituent group, and thus a Member may feel awkward about declining such a gift.

A Member may accept a loan of a painting or other work of art from his or her home state for the purpose of displaying the item in the Member's House office. It should be clearly established in correspondence between the Member and the item's owner that the Member is holding the item on a loan basis only, and that the item will be returned to the owner upon the soonest of the item being removed from display, the Member leaving office, or the owner requesting its return. In addition, a written statement of the value of the item should be obtained from the owner, and if possible, it is advisable to place a sticker or other marking on the item that states that the item is on loan and identifies the owner. Finally, the Member should enter into a written agreement with the owner that provides for liability in the event of damage or loss, since official allowances may not be used to repair or replace personal property. On the latter point, staff of the Committee on House Administration should be contacted.

In addition, in certain circumstances, the Standards Committee may consent to a Member receiving a gift of a work of art or similar item for the sole purpose of facilitating its donation to, for example, a museum in the home district or the House Fine Arts Board.<sup>71</sup> Provided that the recipient agrees, such an item may be loaned back to the Member, on a temporary basis, for display in the Member's office. Any Member having a question about the proper manner to handle a gift of this nature should contact the Standards Committee for advice.

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<sup>71</sup> The Board has statutory authority to accept, on behalf of the House, gifts of works of fine art, historical objects, and similar property.

### ***Gifts From a Foreign Government***

Instances may arise when a Member, officer, or employee is presented with a gift of more than minimal value when refusal would be deemed likely to cause offense or embarrassment or otherwise adversely affect United States foreign relations. In such an instance, the gift may be accepted on behalf of the United States and becomes the property of the United States. Within 60 days of accepting such a gift, a Member or staff person must turn the gift over to the Clerk of the House for disposal or, with the consent of this Committee, the recipient may retain the gift for display in his or her office or other official use. The regulations on gifts from foreign governments are reprinted in the appendix.

### **Events in Honor of a Member, Officer, or Employee**

At times an outside organization wishes to hold a reception or other event in honor of a Member, officer, or employee. As long as the identity of the sponsor (that is, the person that is organizing and paying for the event) is made clear to all participants (*e.g.*, on the invitations), an event nominally—in honor of a Member or group of Members is **not** generally considered a gift in itself to the honoree(s). However, the Members being recognized should not identify themselves as hosts or receive any particular benefit from the event. If they do, the entire cost of the event may be viewed as a gift to the honoree(s).

Thus, for example, a Member with a strong record on environmental issues might be honored at a reception hosted by a nonprofit organization interested in those issues without raising concerns under the gift rule. If the same Member were an amateur photographer, however, and the event was set up to provide the Member with a forum for selling his or her photographs of wildlife, the Committee could find that the entire cost of the reception was a gift from the organization to the Member. The Committee could also make such a finding if the honoree assumes any role in organizing the event, such as hosting the event in the honoree's home. Put another way, the event must genuinely be the event of the outside sponsor, and it is the sponsor who must determine the nature of the event and the guest list.

Of course, whether a Member, officer, or employee may attend such an event will depend on whether attendance would be permitted under the gift rule. As discussed previously, it is permissible for a Member, officer, or employee to accept a gift (*e.g.*, a meal) that has a value of less than \$50, and gifts having a cumulative value of less than \$100 from a single source in a calendar year. However, if the host of the event is a private entity that retains or employs registered lobbyists, reliance on the less than \$50 provision of the gift rule would be impermissible. On the other hand, depending on the circumstances, such an event may qualify as a—widely attended event, permitting an invitee to accept food and refreshments furnished to

all attendees as an integral part of the event.<sup>72</sup> In addition, it is permissible for a Member, officer, or employee to accept at a reception —[f]ood or refreshments of a nominal value offered other than as a part of a meal (House Rule 25, clause 5(a)(3)(U)).

Furthermore, it would **not** be permissible for a Member, officer, or employee to solicit another individual or group to hold a reception or event in his or her honor. Similarly, it would **not** be permissible for a Member, officer, or employee who is being honored at a reception or event to solicit support for the event.

### *Political Conventions*

In the 110<sup>th</sup> Congress, a new provision was added to House Rule 25 prohibiting Member participation in certain events held during a national political convention.<sup>73</sup> The provision (House Rule 25, clause 8) provides as follows:

During the dates on which the national political party to which a Member (including a Delegate or Resident Commissioner) belongs holds its convention to nominate a candidate for the office of President or Vice President, the Member may not participate in an event honoring that Member, other than in his or her capacity as a candidate for such office, if such event is directly paid for by a registered lobbyist under the Lobbying Disclosure Act of 1995 or a private entity that retains or employs such a registered lobbyist.

Under this provision, a Member may not —participate<sup>[74]</sup> in an event honoring that Member if the event takes place during a national political convention, other than to participate in the Member's capacity as a candidate for President or Vice President, and when certain other criteria are met. Member participation prohibited under the provision is for an event when the Member is named, including through the use of any personal title, as an honoree (including as a —special guest ) in any invitations, promotional materials, or publicity for the event. Member participation also would be prohibited if the Member were to receive, through the Member's participation in the event, some special benefit or opportunity that would

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<sup>72</sup> For guidance on —widely attended events, see discussion on —Attendance at Events (Including Meals).

<sup>73</sup> See The Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, § 305, 121 Stat. 735, 753 (Sept. 14, 2007).

<sup>74</sup> The term —participate is not defined in the underlying Act or the House rule. In the Committee's view, the prohibition on participation in the events that are the subject of the provision concerns Member attendance at the event. Members should contact the Committee with any questions regarding whether activities other than attendance may constitute participation in such events.

not be available to some or all of the other participants, such as if the sponsor were to offer the Member an exclusive speaking role or a very prominent ceremonial role.

According to the legislative history of this provision, the restriction set forth above is intended to have the —effect of preventing lobbyists or an entity employing such lobbyists from directly paying for a party to honor a *specific* Member.<sup>75</sup> Thus, an event that is organized to honor a delegation or caucus, without naming any specific Member of the delegation or caucus, or providing any special benefit or opportunity to a particular Member, would be an event that Members may participate in under clause 8 of House Rule 25 – provided that, as discussed below, attendance at the event otherwise would be in compliance with clause 5 of House Rule 25 (the gift rule). There is no numerical requirement on the size of the delegation or caucus participating in the event. Furthermore, a Member would not be prohibited from participating in an event taking place during a national convention if the Member’s name appears, for example, in a listing of the names of the honorary host committee members for the event if that listing includes the names of non-congressional host committee members.

The provision is very specific in prohibiting Member participation in an event that is —directly paid for<sup>76</sup> by a lobbyist or private entity that retains or employs lobbyists. The fact that a private organization received some of its funding for an event taking place during a national convention from a lobbyist or private entity that retains or employs lobbyists, by itself, would not disqualify a Member from participating in the organization’s event.

The provision also states that Member participation is prohibited only at certain events taking place —[d]uring the dates<sup>77</sup> on which a national convention is held. Accordingly, the rule does not prohibit Member participation in an event that takes place on a date other than the dates on which the national convention is held.

It is important to note that the provision does not establish a new type of event for which free attendance may be accepted under the gift rule. In other words, a Member may accept an offer of free attendance at an event taking place during a national political convention only in accordance with the gift rule – that is, the event is a reception or it satisfies all of the criteria of a widely attended event, a charity event, or a fundraising or campaign event sponsored by a political organization.

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<sup>75</sup> 153 *Cong. Rec.* E1759 (daily ed. Aug. 4, 2007) (statement of Rep. John Conyers, Jr.) (emphasis added).



## Bribery and Illegal Gratuities

The solicitation or acceptance of a gift that is tied to an official act may implicate the U.S. criminal code. The federal bribery statute makes it a crime for a public official, including a Member, officer, or employee of the House, to ask for or receive gifts, money, or other things of value in connection with the performance of official duties. Bribery occurs when a federal official —directly, or indirectly, corruptly<sup>76</sup> receives or asks for —anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act.<sup>76</sup> An illegal gratuity results when an official directly or indirectly seeks or receives personally anything of value other than —as provided by law . . . for or because of any official act performed or to be performed.<sup>77</sup> In a leading decision, the U.S. Supreme Court discussed the distinguishing features of the two sections:

[F]or bribery there must be a *quid pro quo* — a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.<sup>78</sup>

In that decision, the Supreme Court held that in order to establish a violation of the illegal gratuity statute, —the Government must prove a link between a thing of value and a specific ‘official act’ for or because of which it was given.<sup>79</sup> According to the court, the illegal gratuity statute is not violated in the absence of such a link, such as when one gives a federal official a gift —because of his official position — perhaps, for example, to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future.<sup>80</sup>

Thus, both the bribery statute and the illegal gratuity statute require as an element of the offense that the thing of value be related in some manner to an official act, that is, the thing of value must be offered or requested either —in return for being influenced in<sup>81</sup> or —for or because of<sup>81</sup> an official act. This element distinguishes a bribe or illegal gratuity from a mere gift. A gift, as generally defined, is a —voluntary transfer<sup>81</sup> of property, made —without consideration.<sup>81</sup> A bribe induces an official act; an illegal gratuity rewards an official act; a gift has no connection to any official act.

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<sup>76</sup> 18 U.S.C. § 201(b)(2)(A).

<sup>77</sup> *Id.* § 201(c)(1)(B).

<sup>78</sup> *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404 (1999).

<sup>79</sup> *Id.* 414.

<sup>80</sup> *Id.* 405.

<sup>81</sup> *Black’s Law Dictionary* 709 (8<sup>th</sup> ed. 1999).

While responsibility for enforcing this statute rests with the Justice Department, in the view of this Committee, these provisions do not extend to token gifts of appreciation or goodwill, intended as courtesy, and consisting of either:

- Perishable items (*e.g.*, candy or flowers) that the Member or employee shares with staff and constituents or donates to charity; or
- Decorative items that are displayed in the office or donated to charity.

This view as to perishable items is similar to that in regulations of the Executive Branch's Office of Government Ethics.<sup>82</sup>

**Example 57.** A lobbyist offers a Member a substantial campaign contribution if the Member will introduce certain legislation. The lobbyist has violated the bribery law, as will the Member if he accepts.

**Example 58.** A Member introduces H.R. 1776 and manages the bill through passage solely because she believes the legislation will be good for the country. A lawyer also favors the legislation because it will benefit his clients. The lawyer sends the Member a clock radio valued at less than \$50, with a note saying, —In appreciation for your good work on H.R. 1776.‖ The Member must send the clock radio back because it is an illegal gratuity.

**Example 59.** In mid-December, a trade association sends a small basket of fruit to Member A's office, with a note saying, —Season's Greetings to Member A and staff.‖ Acceptance of the basket is not prohibited by the bribery and illegal gratuity statutes.

**Example 60.** A caseworker helps B, a constituent with a VA claim. The following week, the caseworker receives a \$25 gift certificate for a local restaurant with a note from B saying, —I'll never be able to repay you for what you've done for me.‖ The caseworker must return the gift certificate; it is an illegal gratuity.

**Example 61.** A caseworker helps a constituent with her Social Security claim. In gratitude, the constituent brings a box of home-baked cookies to the office for the caseworker and the rest of the staff. The caseworker may accept the cookies.

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<sup>82</sup> 5 C.F.R. § 2635.205(a)(2) (Example 1).

**Example 62.** Member C's office helps a constituent with a Medicare claim. In gratitude, the constituent embroiders C's name on a small piece of fabric, for C to display in the office. C may accept the embroidery as a token decorative item.

**Example 63.** A citizens group sends a Member a framed reprint of the Constitution with a note saying, —Thank you for being a responsible voice for good government.‖ Because the gift is not tied to any specific official act, its acceptance is not prohibited by the bribery and illegal gratuity statutes.

A person found guilty of bribery may be fined up to three times the value of the bribe, imprisoned for up to 15 years, and disqualified from holding any federal office.<sup>83</sup> A person found guilty of seeking or receiving an illegal gratuity may be fined, imprisoned for up to two years, or both.<sup>84</sup> Violation of these laws may also lead to disciplinary action by the House.

Several recent examples concerning the bribery statute are worth noting. During the 109<sup>th</sup> Congress, a Member resigned from the House after pleading guilty in federal court to engaging in tax evasion and criminal conspiracy to violate, among other things, the bribery statute through his acceptance of a wide variety of extravagant items and millions of dollars worth of payments, travel, and other benefits.<sup>85</sup> Following his resignation, there were continuing reports concerning possible violations of House rules and standards, including that the Member had been provided with hotel rooms, limousines, and other services in exchange for performing official acts.<sup>86</sup>

Although he was not prosecuted under the bribery statute, during the 109<sup>th</sup> Congress another Member resigned from the House after pleading guilty in federal court to conspiracy to commit honest services fraud and other offenses (making false statements and aiding and abetting in the violation of his former chief of staff's one-year lobbying ban), and with making false statements to the House. As a part of his plea agreement, the Member admitted that he corruptly solicited and accepted trips, meals, concert and sporting tickets, thousands of dollars in gambling chips, tens of thousands of dollars of campaign contributions and in-kind donations with the intent to be influenced and induced to take official actions.<sup>87</sup>

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<sup>83</sup> 18 U.S.C. § 201(b).

<sup>84</sup> *Id.* § 201(c).

<sup>85</sup> *United States v. Randall -Dukel Cunningham*, Doc. No. 05-CR-2137 (S.D. Cal. 2005).

<sup>86</sup> House Comm. on Standards of Official Conduct, *Summary of Activities, 109<sup>th</sup> Congress*, H. Rep. 109-744, 109<sup>th</sup> Cong., 2d Sess. 20 (2007).

<sup>87</sup> *United States v. Robert W. Ney*, Doc. No. 06-CR-272 (D.D.C. 2006).

During the 107<sup>th</sup> Congress, a Member was convicted of, among other things, conspiracy to violate the federal bribery statute by agreeing to and performing official acts for various individuals in exchange for free labor, materials, supplies, and equipment for use at the Member's farm.<sup>88</sup> In a subsequent Committee investigation, the investigative subcommittee stated in a letter transmitting the Statement of Alleged Violations that such acts included, for example, intervening in matters pending before federal and state authorities.<sup>89</sup> The Committee found that the conduct by the Member violated clauses 1-3 of the Code of Official Conduct. On the basis of this violation, as well as other conduct found to be in violation of the Code of Official Conduct which taken together were —of the most serious character meriting the strongest possible Congressional response,<sup>90</sup> the Committee recommended that the House of Representatives adopt a resolution that the Member be, and he later was, expelled.<sup>91</sup>

In the 1980s, the Committee on Standards conducted a number of investigations into allegations that Members of Congress accepted bribes or illegal gratuities. In one case, the Member was alleged to have received not cash, but free vacation trips from a creditor of a government contractor on whose behalf the Member had intervened with local authorities.<sup>92</sup> In the 96<sup>th</sup> and 97<sup>th</sup> Congresses, the Committee investigated three Members on charges — arising out of the Department of Justice's —ABSCAM probe — that they had accepted money in exchange for promising to aid purportedly wealthy foreigners seeking to immigrate to the United States.<sup>93</sup> Also in the 96<sup>th</sup> Congress, the Committee investigated a Member for allegedly receiving payments, either directly or through an assistant, from a series of individuals over a five-year period, in exchange for agreements to

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<sup>88</sup> *United States v. James A. Traficant, Jr.*, Crim. No. 4:01-CR-207 (N.D. Ohio 2002).

<sup>89</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant, Jr.*, H. Rep. 107-594, 107<sup>th</sup> Cong., 2d Sess. 119-20 (2002).

<sup>90</sup> *Id.* at 2.

<sup>91</sup> See H. Res. 495, 107<sup>th</sup> Cong., 2d Sess. (148 *Cong. Rec.* H5375-01 (July 24, 2002)).

<sup>92</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Mario Biaggi*, H. Rep. 100-506, 100<sup>th</sup> Cong., 2d Sess. (1988). The Committee recommended expulsion, but the Member resigned before the House could act.

<sup>93</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Michael J. Myers*, H. Rep. 96-1387, 96<sup>th</sup> Cong., 2d Sess. 5 (1980); House Comm. on Standards of Official Conduct, *In the Matter of Representative John W. Jenrette, Jr.*, H. Rep. 96-1537, 96<sup>th</sup> Cong., 2d Sess. 10 (1980); House Comm. on Standards of Official Conduct, *In the Matter of Representative Raymond F. Lederer*, H. Rep. 97-110, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess. 16 (1981).

attempt to influence various government agencies.<sup>94</sup> These cases resulted in one expulsion<sup>95</sup> and four resignations from Congress.

In addition to the bribery and illegal gratuities statute, several other provisions of the federal criminal code restrain Members, officers, and employees from accepting private compensation in matters of federal concern. Section 203 of Title 18 prohibits House Members and employees from accepting compensation for representing anyone before a federal department, agency, officer, or court in any particular matter in which the United States is a party or has a direct and substantial interest. Even if Members and employees are acting properly and within their official capacities, they may not receive compensation, other than their congressional salaries, for acts before a unit of federal government.<sup>96</sup> Nor may an individual solicit or receive anything of value (including campaign contributions) in return for supporting someone for, or using influence to obtain for someone, a federal job.<sup>97</sup> A Member, officer, or employee should therefore be wary of accepting any gifts, favors, contributions, or entertainment from persons whom the individual has assisted with job applications or other dealings with the agencies of the federal government.

## Fundraisers and Testimonials

A provision of the House Code of Official Conduct (House Rule 23, clause 7) requires that Members treat the proceeds of any testimonial dinners or other fundraising events as campaign contributions, subject to all the restrictions on campaign funds.<sup>98</sup> Such funds must be disclosed as required by Federal Election Commission regulations<sup>99</sup> and used by the Member **only** for bona fide campaign or political purposes.<sup>100</sup> The money may not be treated as unrestricted personal gifts.

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<sup>94</sup>House Comm. on Standards of Official Conduct, *In the Matter of Rep. Daniel J. Flood*, H. Rep. 96-856, 96<sup>th</sup> Cong., 2d Sess. 125 (1980).

<sup>95</sup>126 *Cong. Rec.* 28953-78 (Oct. 2, 1980).

<sup>96</sup>*May v. United States*, 175 F.2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949). Indeed, if an employee is acting outside his or her official duties, the employee may not act as anyone's agent or attorney before any federal agency or officer in a matter in which the United States has an interest, *whether or not* compensation is received. 18 U.S.C. § 205(a).

<sup>97</sup>18 U.S.C. § 211.

<sup>98</sup>This provision was a recommendation of the House Commission on Administrative Review. See House Comm'n on Admin. Review, *Financial Ethics*, H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 14 (1977).

<sup>99</sup>Title 11, C.F.R.

<sup>100</sup>House Rule 23, cl. 6.

House rules prohibit the conversion of campaign funds to personal use or official congressional purposes.<sup>101</sup>

The House Select Committee on Ethics determined that a direct mail solicitation by a Member or a Member's spouse constituted a —fund-raising event— for the purposes of Rule 23, clause 7. Proceeds from such a solicitation **must** be treated as campaign contributions that may **not** be converted to personal use by the Member. In reaching this decision, the Select Committee noted that a major purpose of revisions to the Code of Official Conduct was to prevent Members from —cashing in— on their official position in the Congress.<sup>102</sup> The Select Committee also found that a Member may not accept for unrestricted personal use the proceeds of a fundraiser conducted by a group independent of the Member.<sup>103</sup>

### Gift Disclosure

Under the Ethics in Government Act of 1978, Members, officers, and certain employees must disclose information in annual financial statements. Schedule VI of the statements concerns gifts received by the reporting individual, and in general, the donor, description and value of all gifts aggregating more than \$335 from a single source during the year must be disclosed on that schedule.<sup>104</sup> Information on certain gifts received by the spouse or dependent of the Member or employee may need to be disclosed as well.<sup>105</sup> However, the statute also provides that in an —unusual case—, a gift need not be aggregated —if a publicly available request for a waiver is granted.—<sup>106</sup> A House Member or staff person wishing a waiver of the reporting requirement must submit a written waiver request to the Standards Committee. Additional information on the reporting of gifts on one's annual Financial Disclosure Statement, and the criteria for granting a waiver of the reporting requirement, are provided in the Financial Disclosure Instructions booklet issued by the Standards Committee.

In addition, as noted above (in the section —Gifts From Foreign Governments and International Organizations—), tangible gifts of over minimal value that may be

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<sup>101</sup> House Rule 23, cl. 6; House Rule 24, cl. 1-3.

<sup>102</sup> House Select Comm. on Ethics, *Advisory Opinion No. 4* (Apr. 6, 1977), reprinted in H. Rep. 95-1837, *supra* note 64.

<sup>103</sup> House Select Comm. on Ethics, *Advisory Opinion No. 11* (May 11, 1977), reprinted in H. Rep. 95-1837, *supra* note 64.

<sup>104</sup> 5 U.S.C. app. 4 § 102(a)(2).

<sup>105</sup> *Id.* § 102(e)(1)(C).

<sup>106</sup> *Id.* § 102(a)(2)(C).

received from foreign governments must be disclosed at the time such gifts are required to be turned over to the United States, that is, within 60 days of receipt.

## Summary of Travel Rules

**Type of Trip**

	<b>Permissible Sponsor</b>	<b>Lobbyist Involvement in Planning, Organizing, Requesting, or Arranging</b>	<b>Lobbyist and Foreign Agent Accompaniment</b>	<b>Certification, Committee Approval, and Post-travel Disclosure Required?</b>	<i>Notes</i>
<b>One-day Event Trip</b>	Any sponsor <i>OTHER</i> than a lobbyist or foreign agent	<i>De minimis</i>	Not permitted	Yes	Travel may be extended to a two-night stay when determined by the Committee to be practically required for traveler to participate in the one-day event
<b>Trip Sponsored by an Institution of Higher Education</b>	Private universities and colleges	Permitted	Permitted	Yes	
<b>Multiple-day Event Trip</b>	Any sponsor <i>OTHER</i> than a lobbyist, foreign agent, or private entity that retains or employs such an individual	Not permitted	Not permitted	Yes	
<b>Government-sponsored Travel</b>	Federal, state, and local governments, including a public university or college	Permitted	Permitted	No	
<b>Foreign Government-sponsored Travel</b>	Foreign government with a MECEA-approved trip, or in-country foreign travel permitted under the FGDA	Permitted	Permitted	No	Special disclosure requirements for FGDA travel



# TRAVEL

## Overview

At times Members, officers, and employees are offered the opportunity to travel at the expense of an outside organization or of another individual.<sup>1</sup> Except as the House gift rule (House Rule 25, clause 5) otherwise provides, such travel expenses are a gift to the Member, officer, or employee. Like any other gift, travel expenses are subject to the basic gift prohibitions noted in the Committee's guidance on gifts – including the prohibition against soliciting a gift – and they may be accepted only in accordance with the provisions of the gift rule. Indeed, travel may be among the most attractive and expensive gifts, and thus before accepting travel, a Member, officer, or employee should exercise special care to ensure compliance with the gift rule and other applicable laws, rules, and regulations.

Under the gift rule, there are essentially five types of travel that a Member, officer, or employee may accept, subject to certain restrictions and conditions provided in the rule. These types of acceptable travel are defined primarily by reference to the **source** of the travel expenses, and the **purpose** of the trip:

- Travel in connection with the individual's official duties that is paid for by a private source;
- Travel entirely unrelated to official duties that is paid for by a private source, including travel paid for by a personal friend;
- Travel paid for by the federal government, or by a state or local government;
- Travel paid for by a foreign government or an international organization; and
- Travel for a campaign purpose that is paid for by a political organization.

Each type of travel is addressed separately below. Officially-connected travel that is paid for by a private source is one of the types of travel frequently offered to Members and staff. While the gift rule imposes a number of requirements and restrictions regarding this type of travel, which are detailed below, the most important requirements are for approval by the Committee on Standards of Official Conduct for each trip and each House participant following pre-travel certification by the private sponsor to a variety of travel-related facts.

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<sup>1</sup>In this chapter, the terms —travell and —travel expenses are used interchangeably, because the rules are the same whether one accepts —travell (*i.e.*, transportation, food, lodging or other items provided on an in-kind basis), or —travel expenses (*i.e.*, cash reimbursement for expenses paid directly by the traveling individual).

Under the previous version of the gift rule, the Standards Committee did not have authority to approve trips paid for by a private source. The previous rule placed on individual Members and officers, for themselves and their staff, the responsibility of making the determination that a particular trip was in connection with official duties and would not create the appearance of using public office for private gain. Pursuant to the rules adopted at the beginning of the 110<sup>th</sup> Congress, **no** such travel may be accepted without first receiving written approval by the Standards Committee. Therefore, for every officially-connected trip paid for by a private source, each invited House Member, officer, and employee is required to obtain Committee approval **before** participating in such travel. Acceptance of travel from a private source for an unapproved trip is a violation of House rules. Following the trip, House rules require public disclosure of all advance authorizations, certifications, and disclosures within **15 days**. Such post-travel disclosures must provide, among other things, a description of the meetings and events attended.

The House rules adopted at the beginning of the 110<sup>th</sup> Congress also required the Standards Committee to develop guidelines concerning the reasonableness of travel expenses and the types of information that must be submitted in order to obtain prior approval by the Committee of officially-connected travel (House Rule 25, clause 5(i)).

On February 20, 2007, the Committee issued guidelines and regulations concerning the travel restrictions and requirements. The guidelines and regulations, which are reprinted in the appendices, took effect on March 1, 2007. In many significant areas, the guidelines and regulations include new restrictions and requirements that **supersede** the Committee's policies under the travel provisions of the gift rule that existed in previous Congresses.

Among the other matters addressed in this chapter are –

- –Official travel<sup>ll</sup> by a Member, officer, or employee – that is, travel that is paid for or authorized by the House of Representatives;
- Trips that have more than one purpose, *i.e.*, –mixed purposell trips;
- The restrictions on travel to charity events; and
- The rules and restrictions on use of a non-commercial aircraft for travel.

## **Officially-Connected Travel Paid for by a Private Source**

### *Summary of the Rule*

During the 110<sup>th</sup> Congress, the travel provisions of the gift rule (House Rule 25, clauses 5(b), (c), and (d)) were substantially revised to impose new restrictions

and requirements on officially-connected travel paid for by a private source.<sup>2</sup> These restrictions and requirements are the most significant changes made in the travel provisions since the modern gift rule took effect on January 1, 1996. Specifically, the revised provisions –

- Prohibit certain sources of travel expenses;
- For most types of trips, prohibit lobbyist accompaniment on any segment of the trip;
- Ban lobbyist involvement in planning, organizing, requesting, or arranging most trips;
- Require approval of **all** privately funded travel by the Standards Committee following pre-travel certification by the private sponsor, and impose new post-travel reporting requirements; and
- Limit the acceptance of travel expenses to those that are reasonable under guidelines and regulations issued by the Standards Committee.

Included at the beginning of this chapter is a chart that summarizes the travel rules. As summarized there, and as further detailed below, travel expenses may never be accepted from a registered lobbyist or registered agent of a foreign principal, regardless of the trip's duration.<sup>3</sup> In the case of travel paid for by a private sponsor that retains or employs registered lobbyists or agents of a foreign principal, Members and staff may only accept necessary travel expenses to attend a **one-day** event, with a single night's lodging and related meal expenses. The Committee, however, may permit a second night's stay for such a trip when it determines, on a case-by-case basis, that the additional expenses are practically required for the individual to participate in the one-day event. Also permitted under the rule is the acceptance of necessary travel expenses to attend a **multiple-day** meeting, speaking engagement, fact-finding trip, or similar event in connection with official duties from a private source **other** than a registered lobbyist, agent of a foreign principal, or private entity that retains or employs such individuals. A multiple-day trip sponsored by an institution of higher learning also is permissible, even if the institution retains or employs lobbyists or foreign agents.

Lobbyist involvement in planning, organizing, requesting, or arranging a one-day event trip must be —*de minimis*,<sup>4</sup> as that term is defined in the travel guidelines and regulations issued by the Standards Committee. In addition, Members and staff are prohibited from accepting travel from a private source if the official will be accompanied by a lobbyist or foreign agent on any segment of a one-day or multiple-

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<sup>2</sup> The history of House Rule 25 is discussed in Chapter 2 on gifts.

<sup>3</sup> See note 4, *infra*.

day trip. Lobbyist involvement in planning, organizing, requesting, or arranging multiple-day trips is also prohibited. However, for a trip sponsored by an institution of higher education, a Member or staff person may be accompanied by a lobbyist, and a lobbyist may be involved in planning, organizing, requesting, or arranging the trip.

A private sponsor offering officially-connected travel must complete a Private Sponsor Form, and provide a copy of that form (with the pertinent attachments) to each House invitee (not directly to the Standards Committee). A Member, officer, or employee seeking approval to accept travel must submit to the Committee a completed Traveler Form that attaches or includes the Private Sponsor Form. For staff, the Traveler Form must be signed by the supervising Member authorizing the travel.

Travel expenses that are permissible under the rule are limited to those that are reasonable and necessary under the travel provisions of the gift rule and the guidelines and regulations issued by the Standards Committee. Necessary expenses include reasonable expenses for transportation, food, and lodging, but do not include expenditures for entertainment or recreational activities. A Member, officer, or employee may also accept expenses to enable one of the individual's family members to accompany the individual on the trip.

For each trip taken by a Member, officer, or employee, a travel disclosure form must be completed, signed, and filed with the Clerk of the House within **15 days** of return. All of the pre-travel documentation described above must be attached to the form. Members and officers, as well as employees who file a Financial Disclosure Statement, must also report on their annual statements all travel expenses from any source having a total value of more than \$335 in a calendar year.

Travel taken in accordance with these provisions of the gift rule is **not** deemed a gift that is prohibited by the rule, but instead is deemed —a reimbursement to the House of Representatives (House Rule 25, clause 5(b)(1)(A)). Elaboration on the requirements and restrictions of this provision of the gift rule, including the restrictions on private subsidy of official activity, follows.

### ***Requirement That the Travel Be in Connection With Official Responsibilities***

The fundamental requirement of the travel provisions of the gift rule is that **the subject matter of the trip must be related to the official duties of the participating Member, officer, or employee**. Among the travel purposes that may be proper under this provision are attendance at a meeting or a speaking engagement, or participation in a fact-finding trip (House Rule 25, clause 5(b)(1)(A)).

When a Member, officer, or employee requests approval to accept travel, the rule specifically requires that a determination be made that the travel is in connection with the individual's official duties. As phrased in the rule (House Rule 25, clause 5(b)(3)(G)), travel must be –

in connection with the [individual's] duties as an officeholder and would not create the appearance that the [individual] is using public office for private gain.

Members and staff requesting approval from the Standards Committee to accept travel paid for by a private source must demonstrate compliance with this requirement. Pursuant to the travel guidelines and regulations the Committee has issued, the Committee considers a number of factors in determining whether to approve a travel request, including –

- The official's responsibilities;
- Whether the trip relates to matters within the legislative or policy interests of Congress; and
- The amount of officially-connected activities scheduled to take place during the trip.

Concerning the last factor, the gift rule states that —events, the activities of which are substantially recreational in nature, are not considered to be in connection with the duties of [the individual] as an officeholder.¶ (House Rule 25, clause 5(b)(1)(B).)

Member and staff participation on a trip is evaluated on a case-by-case basis, and travelers are required to explain to the Committee – through the completion of a Traveler Form – how attendance on a given trip relates to the individual's official and representational duties. For staff travel, the rule provides that it is the responsibility of the individual's employing Member or officer to provide a signed, written statement that the Member or officer deems the travel to comply with this requirement. That explanation, together with the rest of the information on the form, is among the information made publicly available after the trip.

While expenses for **officially-connected** travel may be accepted, Members and staff may **not** accept expenses from a private source for travel the **primary purpose** of which is to conduct **official business**. Clauses 1-3 of House Rule 24 prohibit the acceptance of private support – both monetary and in-kind – for official House activities. Thus, when the primary purpose of a trip is to conduct official business, such as general oversight activities within a committee's jurisdiction, the expenses must be paid with official House funds.

*Travel Sponsored by Private Entities That Retain or Employ Lobbyists or Foreign Agents*

The travel provisions of the gift rule **severely limit** the ability of Members and staff to accept travel from an entity that employs or retains a registered lobbyist or a registered agent of a foreign principal (House Rule 25, clause 5(b)(1)).<sup>4</sup> Included in this limitation are any companies, firms, nonprofit organizations (including charities), and other private entities that retain or employ a lobbyist or agent of a foreign principal. However, a trip sponsored by an institution of higher education that retains or employs a lobbyist (or foreign agent) is subject to different rules, which are discussed below.

**One-Day Event Trips.** The sole exception to the general prohibition on accepting officially-connected travel from a private source that retains or employs lobbyists or agents of a foreign principal is for trips involving attendance at or participation in a —one-day event (exclusive of travel time and an overnight stay)ll (House Rule 25, clause 5(b)(1)(C)).

Under the rule, it is permissible for a Member or staff person to accept a **single night’s lodging** and meals related to the trip, if offered by the trip sponsor. Members and staff must limit their involvement in connection with the event to a **single calendar day**, exclusive of travel time and an overnight stay. A Member or staff person may therefore attend only a single day of a multiple-day conference, forum, or other event that is being hosted primarily for individuals other than congressional invitees.

Under the Committee’s travel regulations and guidelines implementing the travel provisions of the gift rule,<sup>5</sup> the Committee may permit a **second night’s stay** when determined —on a case-by-case basis to be practically required to participate in the one-day eventll (House Rule 25, clause 5(b)(1)(C)). Some circumstances in which the Committee may permit a second night’s stay are for certain long-distance trips, when a Member or staff person is participating in a full day’s worth of officially-

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<sup>4</sup> As discussed in the summary, travel may **never** be accepted from a registered lobbyist or agent of a foreign principal. The gift rule provides that the term —registered lobbyistll means —a lobbyist registered under the Federal Regulation of Lobbying Act or any successor statute,ll and the term —agent of a foreign principalll means —an agent registered under the Foreign Agents Registration Act.ll (House Rule 25, clause 5(g).)

Because travel may not be accepted from an individual who is a registered lobbyist, travel likewise may not be accepted from a lobbying firm. As a general matter, the Committee does not consider a corporation, trade association, labor union, or other entity that retains or employs lobbyists to represent **only** the interests of the organization or its members to be a —lobbyistll for purposes of the prohibition.

<sup>5</sup> The travel regulations and guidelines are reprinted in the appendices.

connected activities such that a second night's stay is necessary to accomplish the purpose of the trip, or other *exceptional* circumstances that are described in detail by the traveler.<sup>6</sup> The traveler will be personally responsible for any expenses incurred beyond those allowed by the Committee in connection with the second night's stay. For guidance concerning extending a trip at one's personal expense, see the discussion under the heading —Extending a Trip at Personal Expense,|| below.

### *Travel Sponsored by Other Private Entities*

Members and staff may participate in a multiple-day trip *only* if the trip is one that is sponsored by a private source that does **not** retain a registered lobbyist or agent of a foreign principal, or if the trip is being paid for directly by —an institution of higher education.||<sup>7</sup> The time limits concerning such trips are as follows.

**Travel *Within* the Continental United States.** For travel within the continental United States, a Member, officer, or employee may be permitted to accept travel expenses for up to, but for no more than, **four days** inclusive of travel time. The Committee has interpreted the four-day time limit to consist of four 24-hour periods. Thus, a Member, officer, or employee must commence his or her return trip to Washington or the congressional district no later than 96 hours after beginning the trip.

**Travel *Outside* the Continental United States.** For travel outside the continental United States — including travel to a foreign country, or to Alaska, Hawaii, Puerto Rico, or any other U.S. territory or commonwealth — a Member, officer, or employee may be permitted to accept travel expenses for up to, but no more than, **seven days** exclusive of travel time. The Committee interprets this provision to mean that any days spent in whole or in part in traveling to or from the United States do not count toward the seven-day limit. However, time spent traveling between foreign countries does count toward the limit.

**Extending the Time Limits.** Although the rule (House Rule 25, clause 5(b)(4)(A)) authorizes the Committee to approve requests to extend the four- and seven-day time limits (but not the time limit for one-day event trips<sup>8</sup>), the

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<sup>6</sup> In addition, the second night's stay must have been offered by the private source (*i.e.*, it may not be solicited by the Member or staff person), and the traveler must request the Committee's approval for the second night's stay before the trip.

<sup>7</sup> As used in the rule, —an institution of higher education|| is one within the meaning of section 101 of the Higher Education Act of 1965, that is, an accredited, degree-granting postsecondary institution.

<sup>8</sup> The matter of requesting a second night's stay in connection with a one-day event trip is discussed above in the section on —One-Day Event Trips.||

Committee grants such requests only in truly extraordinary circumstances. The fact that a particular conference, or a fact-finding trip organized by an outside entity, is scheduled to last longer than the time periods set forth in the rule ordinarily will **not** suffice as grounds for a waiver. An example of a situation that would warrant a waiver is when the destination is so remote that it receives air service only once every ten days. In this regard, it should be noted that these limitations on trip length were imposed out of concern for —the public perception that such trips often may amount to paid vacations for the Member and his family at the expense of special interest groups.¶<sup>9</sup>

**Further Restrictions on the Length of Multiple-Day Trips.** The four- and seven-day limits described above reflect the **maximum** period for which a Member, officer, or employee may accept expenses from a private source for officially-connected travel. A further restriction on trip length results from the requirement that only —**necessary** transportation, lodging, and related expenses for travel¶ may be accepted (House Rule 25, clause 5(b)(1)(A) (emphasis added)). That is, a Member, officer, or employee will be permitted by the Standards Committee to accept only such expenses as are reasonably necessary to accomplish the purpose of the trip, and thus it may not always be permissible to accept expenses being offered for a full multiple-day period. This is particularly so when the sole purpose of an individual's travel to an event is to give a speech. Therefore, as a general matter, the Committee will grant approval for a Member, officer, or employee to accept travel, lodging, and meal expenses for the full time periods only if, after reviewing the trip itinerary, the Committee determines that those expenses are reasonably necessary for the officially-connected purpose of the trip to be accomplished. In making this determination, the Committee takes into account whether there is any free time on the trip, as well as the amount of free time, being offered to the traveler.

**Extending a Trip at Personal Expense.** Provided that the officially-connected purpose of the trip remains the **primary purpose** of the trip, travelers may be permitted to extend trips (in connection with either one-day or multiple-day travel) at their own expense and on their own time and still accept return transportation.<sup>10</sup> Subject to the same condition, a traveler may depart early for the initial location of a trip and take personal days there, at the individual's own expense, before the start of the officially-connected part of the trip, and still accept outbound transportation from the trip sponsor.<sup>11</sup> However, a traveler will not be permitted to

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<sup>9</sup> House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 6 (Comm. Print, Comm. on Rules 1989), reprinted in 135 *Cong. Rec.* 30740, 30742 (1989).

<sup>10</sup> See also the discussion below concerning —Mixed Purpose Trips.¶

<sup>11</sup> In this regard, the rule provides that one may be permitted to accept necessary transportation, —whether or not such transportation occurs within¶ the four- and seven-day periods established in the rule (House Rule 25, clause 5(b)(4)(B)).



accept additional reimbursements to cover the costs of personal travel. Moreover, as a general rule, when the number of days for personal travel exceeds the number of days of the privately-sponsored trip, the gift rule does not permit acceptance of round-trip transportation from the private source. Especially with regard to extending a one-day event trip at one's own personal expense, Members and staff should consult the Committee's Office of Advice and Education for guidance before arranging the travel.

**Example 1.** A private university invites a staff person to participate in a five-day conference in London. After the conference ends, she wishes to take four vacation days in Europe. The staff person will be permitted to accept reimbursement from the university for her expenses in London and for the cost of round-trip airfare to and from London. She may then continue her travels at her own expense. If the extension of the trip results in higher airfare for the flights between the U.S. and London than would have been charged had the trip not been extended, the staff person must personally pay the difference.

—**Stacking Trips.** A Member, officer, or employee may be permitted to travel beyond applicable time limits if the individual is participating in consecutive but distinct trips, sponsored by different organizations. To qualify for —stacking, the trips and their purposes, sponsors, **and** participants must be truly distinct. When these circumstances are present, a new time limit commences with the onset of travel to, or participation in, a separate, subsequent event.

**Example 2.** A staff person receives an invitation from a corporation to participate in a fact-finding tour of Yellowstone National Park that will depart from Washington on February 1 and return on February 4. The staff person also receives a separate invitation from a nonprofit organization to attend a conference in Phoenix from February 4 through 7. Neither entity retains or employs lobbyists. The staffer may be permitted to —stack these trips because they are separate and distinct.

### ***Ban on Lobbyist Accompaniment and Other Involvement***

In addition to prohibiting Members and staff from accepting officially-connected travel from a private source that retains or employs lobbyists or agents of a foreign principal, for most trips the travel provisions of the gift rule **prohibit** Members and staff from accepting travel from a private source if the official will be accompanied by a lobbyist or agent of a foreign principal on —any segment of the trip (House Rule 25, clause 5(c)(1)(A)). The term —segment means any part(s) of the travel to and from the destination, rather than the event itself or location being visited that is the purpose of the trip. Whether a lobbyist may be involved in

planning, organizing, requesting, or arranging a trip also depends on the source of the travel expenses.

**One-Day Event Trips.** Accompaniment by a lobbyist or agent of a foreign principal on —any segmentll of a one-day event trip is **prohibited**. In addition, under the travel guidelines and regulations issued by the Standards Committee no more than —de minimisll involvement of a lobbyist or agent of a foreign principal is permitted in terms of planning, organizing, requesting, or arranging a one-day event trip (House Rule 25, clause 5(c)(2)). To be permissible, the involvement of a lobbyist or agent of a foreign principal in connection with the trip must be —only negligible or otherwise inconsequential in terms of time and expense to the overall planning purpose of the trip.ll <sup>12</sup>

Accordingly, it would be permissible for a lobbyist to respond to a private sponsor’s request that the lobbyist identify Members and staff with a possible interest in a particular issue relevant to a planned trip, **provided that the request was not initiated by the lobbyist or agent of a foreign principal, and that the lobbyist or agent of a foreign principal does not determine which Members or staff are actually invited on the trip.** A lobbyist or agent of foreign principal may **not** initiate contact with trip sponsors or planners for purposes of suggesting possible House invitees, **nor** may a lobbyist or agent of a foreign principal have any other role in planning, organizing, requesting, or arranging the trip, other than possibly providing the names of possible invitees as described above. Thus, in order for a Member or staff person to receive Committee approval for a trip, a lobbyist or agent of a foreign principal should **not** be involved in —

- Selecting the destination of the trip;
- Drafting the trip agenda; or
- Accompanying Members and staff on the trip, except as otherwise permitted under the rules.

**Multiple-Day Trips.** Accompaniment by a lobbyist or foreign agent is **prohibited** on any travel segment of a multiple-day trip. Members and staff are **prohibited** from participating in any multiple-day trip that was planned, organized, requested, or arranged by a lobbyist or agent of a foreign principal.

**Trips Sponsored by an Institution of Higher Education.** Unlike the types of trips described above, accompaniment by a lobbyist or foreign agent is permitted on trips sponsored by an institution of higher education. Lobbyist involvement in

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<sup>12</sup> Comm. on Standards of Official Conduct, *Travel Guidelines and Regulations*, at 4 (Feb. 20, 2007) (reprinted in the appendices).

planning, organizing, requesting, or arranging a trip paid for by an institution of higher education is also permitted.

### ***Proper Sources of Expenses for Officially-Connected Travel***

Among the factors the Committee considers in evaluating a Member or staff person's request for approval to accept officially-connected travel paid for by a private source is the relationship of that source to the event or location being visited that is the purpose of the trip. Pursuant to the Committee's travel guidelines and regulations –

Expenses may only be accepted from an entity or entities that have a significant role in organizing and conducting a trip, and that also have a clear and defined organizational interest in the purpose of the trip or location being visited. Expenses may not be accepted from a source that has merely donated monetary or in-kind support to the trip but does not have a significant role in organizing and conducting the trip.<sup>13</sup>

Even prior to the issuance of the travel guidelines and regulations, the Committee had long taken the position that a Member, officer, or employee may accept expenses for officially-connected travel only from a private source that has a direct and immediate relationship with the event or location being visited.<sup>14</sup> Thus, the Committee found a violation of the gift rule when a Member accepted travel expenses from an organization that was *not* the sponsor of his speaking engagements.<sup>15</sup>

***Example 3.*** A nonprofit organization that is active on defense-related issues is holding a conference in New York City. A defense contractor in a Member's district learns of the conference and believes the Member's legislative assistant would benefit by attending. The Committee will not approve the staff member's acceptance of the contractor's offer of travel expenses to the event, because the contractor does not have a direct and immediate relationship with the conference.

The rule and implementing regulations are concerned with the organization(s) or individual(s) that actually pay for travel. Thus, for example,

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<sup>13</sup> *Id.* at 3.

<sup>14</sup> See, e.g., House Comm. on Standards of Official Conduct, *Investigation of Financial Transactions participated in and Gifts of Transportation Accepted by Representative Fernand J. St Germain*, H. Rep. 100-46, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 5-6(1987).

<sup>15</sup> See *id.*

when a nonprofit organization pays for travel with donations that were earmarked, either formally or informally, for the trip, each such donor is deemed a —private source for the trip and (1) must be publicly disclosed as a trip sponsor on the applicable travel forms and (2) must itself be required to satisfy the above standards on proper sources of travel expenses.<sup>16</sup> The rule requires that a private entity (or entities) that pays for officially-connected travel will organize and conduct the trip, rather than merely pay for a trip that is in fact organized and conducted by another entity. Thus, in order for a Member or staff person to receive Committee approval to accept officially-connected travel from a private source, the source must certify to the Committee that it has not accepted from any other source funds earmarked directly or indirectly to finance any aspect of the trip. The sponsor must also certify that the trip was not financed (in whole or in part) by a federal lobbyist or agent of a foreign principal.

***Relationship Between the Event (Including Its Location) and the Officially-Connected Purpose of the Trip***

The Committee’s travel guidelines distinguish between —

- Travel to events or locations arranged or organized **without regard** to congressional participation (*e.g.*, annual conferences of business or trade associations, seminars, symposiums, meetings of professional societies, *etc.*); and
- Travel organized **specifically for** congressional participation, such as fact-finding trips, site visits, educational conferences, and other trips designed for congressional attendance.

For travel falling within the former category, the Committee recognizes that flexibility is needed in authorizing travel to events that are organized principally for the benefit of non-congressional attendees. Accordingly, the guidelines treat the location of such events as presumptively valid. While travel to an event or location may be deemed to be presumptively valid, Members and staff must still demonstrate either that the purpose of the trip is related to the individual’s official and representational duties, or that the purpose of the trip relates to matters within the legislative or policy interests of Congress. In addition, there must be sufficient officially-connected activities for the House participants during *each* day of the trip.

For trips designed specifically for Members and staff, the guidelines require that the location being visited **must be necessary to the purpose of the trip**, or if more than one possible location may be relevant to the purpose of the trip, the

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<sup>16</sup> The result would be the same when, for example, a major donor to a nonprofit organization has a significant role in organizing or conducting a trip to which the nonprofit issues invitations.

location selected **must be reasonable in relation to the alternatives**. Factors to be used to evaluate the reasonableness of a location include the nature of the event and its participants. For example, a fact-finding trip regarding a particular industry may be appropriate at one or more locations that have a connection to the industry, but the trip would likely not be appropriate if the destination is a resort location with no connection to the industry. In other words, the selected location should not create the appearance that the Member, officer, or employee attending the event is using his or her public office for personal gain.

**Prohibition Against Accepting Local Travel Expenses.** The travel provisions of the gift rule do **not** allow Members or staff to accept what are essentially **local** meals, **local** lodging, or **local** transportation. Thus in order to be within the rule, a trip must have a destination beyond the metropolitan Washington area, or beyond the Member's district, as the case may be. The Committee has taken the position that as a general matter, the site to be visited at private expense must be at least 35 miles from the U.S. Capitol or, for travel in or near one's congressional district, at least 35 miles from the district office.

In addition, because official allowances are provided to cover travel expenses of both Members and staff between Washington, D.C., and the congressional district, House Rule 24 (clauses 1-3), which generally prohibits private subsidy of official activity, is also relevant to local travel. Under House Rule 24, a Member or staff person generally is **not** permitted to accept expenses from a private source for a fact-finding trip to or within one's own district. For the same reason, district office staff are not permitted to accept travel expenses from a private source for the purpose of fact-finding in the Washington, D.C. area. However, an exception exists when a Member or employee is traveling as part of a group that includes Members or staff representing at least two other congressional districts. In that circumstance, the Committee does not interpret House Rule 24 to require the official to separate from the group to avoid going into his or her own district.

The Committee does not deem the occasional acceptance of travel expenses to give a speech in one's own district or in the Washington, D.C. area, or otherwise to participate substantially in an event, to violate House Rule 24.

As a related matter, the Committee will generally approve the acceptance of expenses only to or from Washington, D.C., or another duty station. The traveler generally may not accept additional expenses for stopovers that are unrelated to the purpose of the trip.

### ***Acceptable Travel Expenses***

Under the travel provisions of the gift rule, Members and staff may accept reasonable expenses for transportation, lodging, and meals from the private sponsor of an officially-connected trip, but they may **not** accept recreational activities or

entertainment. Specifically, these provisions state that a Member, officer, or employee may accept —necessary transportation, lodging and related expenses— (House Rule 25, clause 5(b)(1)(A)). They further state that the quoted phrase —is limited to **reasonable** expenditures for transportation, lodging, conference fees and materials, and food and refreshments— (*id.*, clause 5(b)(4)(B) (emphasis added)).

The travel provisions also state that one may **not** accept —expenditures for recreational activities, or —entertainment other than that provided to all attendees as an integral part of the event, except for activities or entertainment otherwise permissible under this clause— (*id.*, clause 5(b)(4)(C)). A gift of entertainment or recreational activities may be acceptable under other provisions of the gift rule, but *only* if valued at less than \$50 and provided by a non-prohibited source.<sup>17</sup> (See Chapter 2 on gifts for further information). Members and staff therefore may not accept any entertainment or recreation during a trip if the sponsor of the trip retains or employs registered lobbyists or agents of a foreign principal. In general, any gift given to the relative of a Member or staff person is deemed to be a gift to the official and, thus, will be acceptable only as permitted under the gift rule, and an otherwise permissible gift will count against the per-gift and annual limits of the Member or staff person.

The Standards Committee has issued guidelines for judging the reasonableness of travel expenses that Members, officers, and employees are permitted to accept from a private source for officially-connected travel. The guidelines, along with the regulations concerning one-day event trips, are reprinted in the appendices. The provisions addressing the reasonableness of travel expenses distinguish between transportation expenses on the one hand, and lodging and food expenses on the other. A brief description of the guidelines follows.

**Transportation Expenses.** Members and staff may accept **coach and business-class air or train fare** from a private source. However, first-class air or train fare, travel aboard chartered flights and trains, and private aircraft flights are permitted only under *limited* conditions, such as when the cost of such fare does not exceed business-class transportation (including when the traveler’s frequent flyer or similar benefits are used to upgrade to first class), first-class travel is necessary due to a disability of the traveler, there are genuine security concerns such that first-class fare is required, or the flight is in excess of 14 hours. The Committee may also approve first-class air or train fare, chartered travel, or private aircraft when *exceptional* circumstances are demonstrated in writing by the private source.

**Lodging and Food Expenses.** As noted previously, the Committee’s travel guidelines distinguish between travel for —

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<sup>17</sup> Receipt of the gift of entertainment or recreation must also be consistent with the annual gift limit of less than \$100 from any source, assuming acceptance of the gift is otherwise permissible.

- Events organized **without regard** to congressional participation; and
- Those organized **specifically for** congressional participation.

For events falling within the former category, the Committee recognizes that flexibility is needed in authorizing lodging and food expenses in order for Members and staff to participate in or appear at events that are organized principally for the benefit of non-congressional attendees. The guidelines therefore permit Members and staff to accept lodging and food that is commensurate with what is customarily provided to or purchased by the non-congressional attendees in similar circumstances.

With regard to events designed specifically for congressional participation, the guidelines specify that—reasonable lodging and food expenses may be accepted. In judging the reasonableness of food expenses, the Committee considers the maximum *per diem* rates for meals and incidental expenses for official government travel published by the General Services Administration or, for international travel, the maximum rate for meals and incidental expenses published by the State Department. The pertinent *per diem* rate schedules are available on each agency's website.

### *Accompanying Relative*

It is permissible for a Member, officer, or employee participating in officially-connected travel paid for by a private source to be accompanied by a relative on the trip (House Rule 25, clause 5(b)(4)(D)).<sup>18</sup> This provision does not allow the acceptance of travel expenses for any accompanying individual other than a relative. Further, this provision allows the acceptance of expenses for only **one** relative. For example, a Member, officer, or employee, if offered by the sponsor, may accept expenses for a spouse **or** one child only, **not** a spouse **and** a child.<sup>19</sup> The travel expenses paid for a relative must be specified by the private source and traveler on the pre-travel forms and reported on travel disclosure forms in the same manner as those paid for the Member, officer, or employee.

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<sup>18</sup> The accompaniment provision of the gift rule was amended on January 4, 2005 (*see* H. Res. 5, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (151 *Cong. Rec.* H13 (daily ed. Jan. 4, 2005)). Previously, the gift rule permitted a Member, officer, or employee to be accompanied by a—spouse or child—but not by any other relative.

<sup>19</sup> A Member, officer, or employee who wishes to be accompanied on a trip by more than one such individual, or by an individual other than a relative, may personally pay the travel expenses of that individual, or may apply to the Committee for a gift rule waiver. However, the Committee will grant such a waiver only in exceptional circumstances.

**Example 4.** A Member is invited by organization Y to give a speech in Dallas on Saturday. Organization Z issues an unrelated invitation to the Member to address its members in Dallas on Sunday. Each group offers to pay expenses for the Member and one family member. The Member may bring only one family member to Dallas at the sponsors' expense. She may *not* bring her husband at the expense of organization Y and her child at the expense of organization Z because such an arrangement would violate the one-relative restriction of the gift rule.

**Example 5.** A Member is invited to give a speech. The sponsoring organization offers the Member and his wife business-class airfare. The Member would like to bring his child as well. He may *not* trade in the two business-class tickets for three economy-class tickets. Even if the sponsor would pay less for the three economy-class tickets than for the two business-class tickets, to allow the Member to accept expenses for his wife *and* child would violate the spirit of the one-relative restriction of the gift rule.

It is possible for a staff person to participate in a trip along with the individual's employing Member, provided that the entity sponsoring the travel provided an **unsolicited** invitation to the staff person to participate in the trip, the Member reasonably determines that the staff person's participation would be in connection with the individual's official duties, and both the Member and staff person seek and obtain the Committee's approval to accept travel expenses before the trip.

At times a private organization has invited only the spouses of Members to participate in a trip. Participation in such a trip, in the capacity as the spouse of a Member, would be deemed a gift to the Member. However, the gift rule does **not** include a provision that permits the acceptance of such —spouse only travel under these circumstances. Instead, as detailed above, the rule allows the acceptance of expenses for spouse travel only when the spouse is accompanying the Member.

Nevertheless, depending on the circumstances involved – including the purpose and itinerary of the trip, and the expenses proposed to be covered – the Standards Committee may consider granting a gift rule waiver to enable a spouse to participate on such a spouse-only trip. For further information on the provision of the gift rule that authorizes the Committee to grant waivers in certain circumstances, see Chapter 2 on gifts. When the Committee has granted a waiver for such spouse travel in the past, it has required that the trip be publicly reported in the same manner that Member travel is reported, (*i.e.*, on a Member Travel Disclosure form filed with the Clerk's office, and on Schedule VII of the Member's annual Financial Disclosure Statement). It would also be necessary for the spouse



to submit the necessary Private Sponsor Form and Traveler Form in order to receive Committee approval before the trip.

### ***Travel of Members and Staff Leaving Office***

Because, as detailed above, officially-connected travel must be related to official duties, it is questionable whether, after the *sine die* adjournment of the House, a Member leaving office or an employee leaving House employment will be permitted to accept an invitation for a trip that is fact-finding in nature. As of that time, the official responsibilities that may justify the acceptance of travel expenses for such a purpose will practically have come to an end. However, this consideration generally will not limit the Committee's authority to approve travel of such a departing Member or employee for the individual to participate substantially in an officially-related event (for example, to give a speech).

### ***Requirements for Pre-Travel Certification, Standards Committee Approval, and Post-Travel Disclosure***

In implementing the requirements of the rules regarding privately-sponsored travel, the Standards Committee has issued three forms: (1) a Private Sponsor Form; (2) a Traveler Form (which includes a signed statement for Member advance authorization of employee travel); and (3) Member/Officer and Employee Post-Travel Disclosure Forms. The forms are available on the Standards Committee's website. A brief discussion of pre-travel certification, Committee approval, and post-travel disclosure requirements follows.

**Pre-Travel Certification by Sources of Private Travel.** Under the travel provisions of the gift rule, both certification by the private source of a variety of travel-related facts and approval of the travel by the Committee are required before Members and staff may accept travel from a private source for **all** officially-connected trips (*i.e.*, regardless of whether the private source retains or employs a lobbyist). To receive Committee approval, Members and staff must provide the Committee with written certification from the private source as to the following:

- The trip will not be financed in any part by a lobbyist;
- That (1) the source does not retain or employ a lobbyist, (2) the source is an institution of higher education, or (3) the trip meets the requirements for travel to a one-day event and the source describes the de minimis involvement of a lobbyist in planning, organizing, requesting, or arranging the trip;
- No funds from another source were earmarked for any aspect of the trip;
- The traveler will not be accompanied by a lobbyist, except for a trip sponsored by an institution of higher education; and

- The trip, except as otherwise permitted in the rules for one-day event trips and trips sponsored by an institution of higher education, will not be planned, organized, requested, or arranged by a lobbyist (House Rule 25, clause 5(d)(1)).

A private sponsor offering officially-connected travel to a Member or staff person must complete and sign a Private Sponsor Form, and provide a copy of that form to each House invitee – **not** directly to the Committee. The Committee has issued detailed instructions (also available on the Committee’s website) to assist sponsors in completing the necessary form.

**Committee Approval.** Every Member, officer, or employee wishing to participate in an officially-connected trip must receive approval from the Committee **before** accepting travel funded by a private source. **Acceptance of travel from a private source for an unapproved trip is a violation of House rules.** A Member or staff person seeking approval for a trip must submit to the Committee a completed and signed Traveler Form along with the Private Sponsor Form. For staff travel, the Traveler Form must include a signed statement by the supervising Member of advance authorization of employee travel. Members and staff are advised to maintain copies of all completed forms for their own records. As discussed below, certain forms are required to be included with the public filing with the Clerk of the House following return from the travel.

As indicated on the forms, any request for approval of private sponsored travel should be submitted to the Standards Committee **at least 30 days** before the commencement of the trip. That 30-day time period is necessary to allow the Committee ample time to review the submission and give final approval, while still permitting sufficient time for the traveler to make the necessary travel arrangements.

**Post-Travel Disclosure.** Members and staff are required to file with the Clerk of the House—all advance authorizations, certifications, and disclosures,<sup>11</sup> and the Clerk is required to make all of that information available for public inspection as soon as possible after receipt (House Rule 25, clause 5(b)(5)). Post-travel disclosure forms must be completed, signed, and filed with the Legislative Resource Center of the Clerk of the House (Room B-106, Cannon House Office Building) within **15 days** after the travel is completed.<sup>20</sup> **It is a violation of House rules not to file the**

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<sup>20</sup> Under the rules in effect prior to the 110<sup>th</sup> Congress, disclosures were required be filed within 30 days after the traveler returned from the officially-connected trip.

When a Member or employee files a form beyond the 15-day period provided by the rule, the individual should also send a letter to the Standards Committee stating the reasons for the late filing.

**necessary disclosure within that time period.** On their post-travel disclosure forms, Members and staff are required to provide a description of the —meetings and events attended,<sup>ll</sup> in addition to other information required to be disclosed under the rule (House Rule 25, clause 5(b)(3)(F)). The Clerk’s office forwards a copy of each disclosure form as filed to the Standards Committee for review.

Members and officers, as well as employees who file a Financial Disclosure Statement, must also disclose travel and travel-related expenses provided by a private source valued at more than \$335 on Schedule VII of their annual statement.

### **Travel Unrelated to Official Duties Paid for by a Private Source**

Several provisions of the gift rule allow Members and staff to accept travel **unrelated** to official duties from a private source, provided that certain conditions are satisfied. Of these, the two most important are the provision on benefits resulting from outside business, employment or other activities, and the provision on gifts given on the basis of personal friendship. All of these provisions are explored in detail in Chapter 2, and only their applicability to travel is discussed here.

#### ***Travel Resulting From Outside Business, Employment, or Other Activities***

Subject to two restrictions described below, a Member, officer, or employee may accept transportation, lodging, meals, and other benefits that result from any of the following activities:

- Outside business or employment activities of the Member or staff person;
- Other outside activities of the Member or staff person that are not connected to the duties of the individual as an officeholder; or
- Outside business or employment activities of the spouse of the Member or staff person.

The restrictions on the acceptance of such travel are that (1) the benefits may not have been offered or enhanced because of the official position of the Member or staff person, and (2) the benefits must be ones that are —customarily provided to others in similar circumstances<sup>ll</sup> (House Rule 25, clause 5(a)(3)(G)(i)). These are the sole restrictions that apply to travel taking place under this provision of the gift rule. Travel of this type is not subject to the requirement for pre-travel Committee approval, the post-travel disclosure requirement, or the other specific restrictions that apply to officially-connected travel that is paid by a private source, such as the time limits on travel, the limitation that only a spouse or child may accompany the traveler, or the prohibition on recreational activities.

**Example 6.** A staff person's son is a Boy Scout. The Boy Scouts of America offer the staff person an all-expense-paid week-long trip to the Grand Canyon if he will chaperone the scouts. He may accept, provided that the trip was not offered because of the staff person's official position.

**Example 7.** A Member's wife is a lawyer with a private law firm. Every year the firm invites all of its lawyers and their spouses to a weekend retreat at a resort hotel. This retreat would be offered to the Member's wife regardless of the identity of her spouse. Both the Member and his wife may accept the invitation.

**Example 8.** A staff person's spouse works as a flight attendant for an airline that offers free travel to all employees and their immediate families to the extent that seats are available. The staff person may accept the free flights.

**Example 9.** A Member has written a book, and her publisher offers to send her on a book tour around the country. The Member may accept, provided that the tour is comparable in duration and benefits to those that the publisher has provided to similarly situated authors in the private sector.

**Example 10.** A Member is an uncompensated member of the board of directors of a corporation. The corporation provides transportation, lodging, and meals to each of its directors in connection with its monthly board meetings, and in connection with the corporation's annual meeting, all of which occur in San Francisco. The Member may accept this travel from the corporation.

As a related matter, a Member, officer, or employee may also accept transportation, lodging, meals, and other benefits —customarily provided by a prospective employer in connection with bona fide employment discussions<sup>11</sup> (House Rule 25, clause 5(a)(3)(G)(ii)).

As noted above, travel resulting from such outside business, employment, or other activities should **not** be reported on the 15-day Travel Disclosure Forms that are filed with the Clerk. Those forms are for the reporting of officially-connected travel only. However, as with officially-connected travel, travel resulting from outside activities that exceeds \$335 in value in a calendar year **must** be reported on Schedule VII of the annual Financial Disclosure Statements of Members and officers, and of those employees required to file an annual statement.

### ***Gift of Travel Given on the Basis of Personal Friendship***

Like gifts of other kinds, a gift of travel that is given on the basis of personal friendship may be accepted, unless the Member or staff person has reason to believe that, under the circumstances, the gift was provided because of his or her official position with the House, and not because of the personal friendship (House Rule 25, clause 5(a)(3)(D)). The specifics of the gift rule provision on personal friendship gifts are explored in Chapter 2, in the section entitled –Gifts Given on the Basis of Personal Friendship.¶ Before accepting any gift of travel under this provision, a Member or staff person should review that section carefully.

There is an important limitation on the acceptance of gifts of travel under this provision. A gift exceeding \$250 in value – and any significant travel will almost certainly exceed that amount – may not be accepted on the basis of personal friendship unless the Standards Committee issues a written determination that the personal friendship provision applies. Thus, if the travel will exceed \$250 in value, an advance written request for approval must be submitted to the Committee. The Committee keeps any such request, as well as its response, confidential.

Note also, however, that travel accepted on the basis of personal friendship that exceeds \$335 in value must be reported on Schedule VI of the annual Financial Disclosure Statement of a Member, officer, or filing employee, unless the Committee waives the reporting requirement. The Committee will consider written requests for waiver of the reporting requirement, but such waiver requests are made publicly available. Additional information on reporting of gifts and the standards for granting a waiver is provided in the Financial Disclosure Instructions booklet issued by the Standards Committee.

### ***Other Gift Rule Provisions***

Three other gift rule provisions under which travel unrelated to official duties may be accepted are as follows.

First, the rule allows the acceptance of certain opportunities and benefits that are similarly available to individuals outside the House (House Rule 25, clause 5(a)(3)(R)). Under this provision, for example, flights obtained through an airline's frequent flier program, when the miles are accumulated through one's own travel, may be accepted. This provision is more fully explained in the gifts publication, in the section entitled –Widely Available Opportunities and Benefits.¶

Second, the provision allowing the acceptance of honorary degrees also allows the acceptance of travel associated with the presentation of the degree (House Rule 25, clause 5(a)(3)(K)).

Finally, the rule provides that a Member, officer, or employee may accept —[a]nything for which the [official] pays the market value (House Rule 25, clause 5(a)(3)(A)). However, under a new rule adopted in the 110<sup>th</sup> Congress, Members generally may not use personal funds to pay for a flight on a non-commercial aircraft. See the section —Use of Non-Commercial Aircraft is Generally Prohibited, below.

### **Travel Paid for by the Federal Government, or by State or Local Government**

Under the gift rule, Members, officers, and employees may accept travel that is —paid for by the Federal Government, [or] by a State or local government (House Rule 25, clause 5(a)(3)(O)). This provision is fully explained in Chapter 2 on gifts. The gift rule includes no restrictions on the ability of Members and staff to accept travel offered by such a governmental entity, whether in terms of trip duration, accompanying individuals, or otherwise. Such travel is **not** subject to the requirements for pre-travel Committee approval following private sponsor certification, the post-travel disclosure requirement, or the various specific restrictions that apply to officially-connected travel that is paid by a private source.<sup>21</sup> Nor does this type of travel need to be disclosed on one's annual Financial Disclosure Statement. The matter of travel paid for or authorized by the House is further addressed below.

### **Travel Paid for by a Foreign Government**

The basic laws and rules on gifts from foreign governments are explained in Chapter 2 on gifts. As is detailed there, the Constitution prohibits federal government officials from accepting any gift from a foreign government without the consent of Congress, and Congress has consented to the acceptance of certain gifts from foreign governments — including travel in limited circumstances — in two enactments: the Foreign Gifts and Decorations Act (—FGDA)<sup>22</sup> and the Mutual Educational and Cultural Exchange Act (—MECEA).<sup>23</sup> A Member, officer, or employee may accept travel expenses from a unit of foreign government **only** under one of these two statutory grants of authority.

Members and staff may be offered expenses from private organizations, unaffiliated with any government, for foreign travel. As discussed previously, the ability to accept such expenses is subject to the gift rule limitations, including the

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<sup>21</sup> For example, the rule permits the acceptance of travel paid for by a **state** university without the requirements described above. However, travel paid for by a **private** university is subject to Committee pre-approval.

<sup>22</sup> 5 U.S.C. § 7342.

<sup>23</sup> 22 U.S.C. § 2458(a).

requirement for pre-approval. While on such travel, a foreign government may offer to pay for the in-country travel expenses of a Member or staff person. Such travel may be acceptable under the FGDA.<sup>24</sup> However, when FGDA travel is taken in connection with a trip that is otherwise paid for with funds from a private source that does not retain or employ registered lobbyists or agents of a foreign principal (or from an institution of higher education), the trip is subject to the seven-day limit.

In addition, Members and staff may accept travel to a foreign country from a foreign government that participates in a MECEA program. Travel authorized under MECEA is **not** subject to the time limits that apply to officially-connected travel that is paid for by a private source.

### ***Travel Expenses From a Foreign Government under FGDA***

Under the FGDA, any travel paid for by a foreign government must take place **totally outside** of the United States, must be consistent with the interests of the United States, and must be permitted under FGDA regulations issued by the Standards Committee.<sup>25</sup> The intent of this provision, as noted in the Committee's regulations (§ 6(e)), is to allow an individual who is already overseas (as on a CODEL or third-party sponsored fact-finding trip) to take advantage of fact-finding opportunities offered by the host country. Therefore, under the FGDA, the Member or employee may **not** accept expenses for transportation from the United States to the foreign destination or back home. This rule may not be circumvented by having a foreign government pay for transportation to or from a point just outside the United States border.

The regulations issued by the Standards Committee under the FGDA state that any travel paid for by a foreign government must relate —directly to the official duties of the Member, officer or employee.¶<sup>26</sup> The regulations also allow the acceptance of travel expenses by an accompanying spouse or dependent. Travel or expenses —may not be accepted merely for the personal benefit, pleasure, enjoyment or financial enrichment of the individual or individuals involved.¶<sup>27</sup> The FGDA and the Committee's implementing regulations also cover gifts from —quasi-governmental¶ organizations closely affiliated with, or funded by, a foreign

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<sup>24</sup> In-country foreign travel may also be permissible under the FGDA when a Member or staff person is already in the foreign country while on official travel paid for by House or with other appropriated funds.

<sup>25</sup> See *Regulations for the Acceptance of Decorations and Gifts (Including Travel or Expenses for Travel, by Members, Officers, and Employees of the House of Representatives) from Foreign Governments* (hereinafter *-FGDA Regulations!*) (reprinted in the appendices of this Manual).

<sup>26</sup> *FGDA Regulations* § 6(e).

<sup>27</sup> *Id.*

government, as well as any international or multinational organizations with membership composed of foreign governments.

A gift of travel permitted under the FGDA and accepted by a Member or employee must be disclosed within 30 days after leaving the host country.<sup>28</sup> The Committee provides a form for this purpose. Copies of the form are available on the Committee's website. Under the Committee's foreign gifts regulations, the disclosure forms filed by Members and staff are publicly available at the Committee office, and their contents are published in the *Federal Register* on an annual basis.<sup>29</sup> Such travel need not be reported on the annual Financial Disclosure Statement of the traveler.

### ***Travel Expenses From a Foreign Government under MECEA***

MECEA authorizes the Secretary of State to approve cultural exchange programs that finance —visits and interchanges between the United States and other countries of leaders, experts in fields of specialized knowledge or skill, and other influential or distinguished persons . . . .<sup>30</sup> The Committee understands that approval of a MECEA program will be reflected in a letter from the State Department (or the U.S. Information Agency, its statutory predecessor) to a representative of the foreign government, and that the Department maintains a list of the approved programs. The Committee also keeps a list of the approved programs on file.

Members and employees of the House may accept travel expenses from a foreign government in order to participate in an approved MECEA program.<sup>31</sup> Expenses for MECEA trips are not considered gifts, either for the purposes of the House gift rule or the FGDA. Under MECEA, however, the traveling Member or employee may **not** accept travel expenses for a spouse or family member.<sup>32</sup> All travel expenses in a MECEA trip are to be paid by the sponsoring foreign government, and none of the trip expenses may be paid by any private source.

It is the responsibility of a Member or staff person who accepts an invitation to travel to a foreign country to confirm that the expenses for travel to and from the United States are **not** paid for by a foreign government, unless the trip is consistent with an approved MECEA program. Accordingly, when one is invited on a trip that the sponsoring organization describes as permissible under a MECEA program, it is

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<sup>28</sup> *Id.* §§ 6(e), 7(b); 5 U.S.C. § 7342(c)(3).

<sup>29</sup> *FGDA Regulations* § 8.

<sup>30</sup> 22 U.S.C. § 2452(a)(2)(i).

<sup>31</sup> 22 U.S.C. § 2458a(1).

<sup>32</sup> *Id.*



advisable for the invitee to ask that organization for a copy of the letter from the State Department approving the program. In addition, the Committee understands that the Department will, upon request, review specific trips and advise whether a trip is consistent with an established MECEA program. Such advice can be requested by either the sponsoring organization or an invitee, and obtaining such advice from the Department is the best way to ensure compliance with the statute.

A MECEA trip is **not** subject to the time limits applicable to officially-connected travel paid for by a private source, or to the requirements for pre-travel Committee approval following private sponsor certification. Nor should the trip be reported on a Member/Officer or Employee Travel Disclosure Form (those forms are filed for privately funded travel only), or on an FGDA form. However, Members, officers, and employees who are required to file an annual Financial Disclosure Statement must report any MECEA trip in which they participated on Schedule VII of that form. The foreign governmental entity that paid for the travel should be identified as the —sourcell of the travel in Schedule VII, and the filer also should note parenthetically that it was a MECEA trip.

**Example 11.** The Chinese Agricultural Ministry invites the Members of the Agriculture Committee on a ten-day tour of Chinese farm cooperatives. The tour is not part of an approved cultural exchange program. The Members may, consistent with the FGDA, accept expenses for themselves and their spouses while they are in China, but they may not accept airfare to and from China from the Chinese government. They must disclose the receipt of these expenses for themselves and their spouses on an FGDA disclosure form within 30 days of leaving China. They need not report the trip on their annual Financial Disclosure Statements.

**Example 12.** A public university in Germany invites a Member to attend a two-week seminar and discussion series with German leaders at the school. This trip is pursuant to a program that has been approved under MECEA. The Member may accept expenses for travel to and from Germany and related expenses for her two-week stay. If she wishes to bring her husband, she must do so at personal expense. She must disclose the trip on Schedule VII of her annual Financial Disclosure Statement.

### **Travel Paid for by a Political Organization**

Under the gift rule, a Member, officer, or employee may accept transportation, lodging, and other benefits provided by a political organization in connection with a fundraising or campaign event sponsored by that organization

(House Rule 25, clause 5(a)(3)(G)(iii)). The term —political organization<sup>33</sup> is defined in this provision by reference to § 527(e) of the Internal Revenue Code.<sup>33</sup>

In addition, a Member may travel at the expense of his or her campaign committee when the primary purpose of the travel is campaign or political in nature. For further information on the proper use of campaign funds, see Chapter 4 on campaign activity. Arrangements for travel to be paid for by a political organization (for example, the booking of flights or hotel reservations) should **not** be made in a congressional office, and any staff persons traveling on political funds must do so on their own time. In addition, House rules prohibit Members from using campaign funds, among other sources, to pay for a non-commercial flight (*see* discussion below). Members wishing to accept travel, including any flight on a non-commercial aircraft, as an in-kind campaign contribution should contact the Federal Election Commission for guidance on whether the acceptance of the travel would be permissible under the Federal Election Campaign Act and implementing regulations.

Travel paid for by a political organization is **not** subject to the requirements for pre-travel Committee approval, and should **not** be reported on the 15-day Travel Disclosure Forms that are filed with the Clerk, as those forms are for the reporting of officially-connected travel only. Travel paid for by a political organization must be reported on one's annual Financial Disclosure Statement only if that travel is not required to be reported on an expenditure report filed with the Federal Election Commission. Accordingly, travel paid for by, for example, a congressional campaign committee generally will **not** have to be reported on one's Financial Disclosure Statement. However, travel paid for by a state or local political organization **will** have to be reported on Schedule VII of that form.

### Official Travel

The term —official travel<sup>33</sup> refers to travel paid for or authorized by the House. Official travel includes travel paid for out of the Members' Representational Allowance or with committee funds, as well as the travel of Members or staff abroad as part of a CODEL or a STAFFDEL.

The basic rules and regulations governing official travel paid for with funds from the Members' Representational Allowance, or with committee funds, are established by the Committee on House Administration. Those rules are set forth in two publications of that committee – the *Members' Handbook*, and the

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<sup>33</sup> Briefly stated, under that statute, a political organization is an entity organized and operated primarily for the purpose of accepting contributions or making expenditures for the purpose of influencing the election of any individual to a public or political office.

*Committees' Handbook.* Guidance on those rules should be sought from the Committee on House Administration.

Official travel to a foreign country may be authorized by the Speaker under clause 10 of House Rule 1, or by a committee chair. Such travel is subject to the requirements set forth in 22 U.S.C. § 1754, as well as clause 8 of House Rule 10 (on funding of foreign travel), and clause 10 of House Rule 24 (prohibiting such travel by a Member not elected to a succeeding Congress after the general election or *sine die* adjournment).

Travel that is paid for or authorized by the House should not be reported on the 15-day Travel Disclosure Forms that are filed with the Clerk, or on one's annual Financial Disclosure Statement.

### ***Applicability of the Prohibition Against Private Subsidy of Official Activity***

**In General.** As noted above, clauses 1-3 of House Rule 24 prohibit the acceptance of private support – both monetary and in-kind – for official House activities.<sup>34</sup> Accordingly, as a general rule, travel the **primary purpose** of which is to conduct **official business** must be paid for or authorized by the House. Put another way, Members and staff may **not** accept expenses or in-kind support from a private source for such travel.

**Travel Between Washington and One's Own District.** As was noted above, the Standards Committee interprets House Rule 24 generally to preclude the acceptance of expenses from a private source for a fact-finding trip to or within one's own district. However, the Committee does **not** view the occasional acceptance of travel expenses to give a speech in one's own district, or otherwise to participate substantially in an event, to violate House Rule 24. But if, for example, a Member were giving speeches at private expense in the home district every week, concerns would arise under the rule. In that circumstance, private sources would pay for a substantial amount of the Member's travel to and from the district – travel that must, as a general rule, be paid with official House funds. In the 99<sup>th</sup> Congress, the Standards Committee found that a Member violated this rule when he accepted free flights on corporate aircraft for official travel.<sup>35</sup> The Member subsequently reimbursed the corporation.

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<sup>34</sup> Prior to the recodification of the rules that occurred at the beginning of the 106<sup>th</sup> Congress, these provisions of the rules were numbered as House Rule 45.

<sup>35</sup> House Comm. on Standards of Official Conduct, *Investigation of Travel on Corporate Aircraft Taken by Representative Dan Daniel*, H. Rep. 99-470, 99<sup>th</sup> Cong., 2d Sess. (1986).

**General Requirement That All Expenses of an Official Trip Be Paid With Official Funds.** Pursuant to House Rule 24, a private source generally may not pay any portion of the expenses of a trip having an official purpose.

*Example 13.* A committee chairman has decided to fund Member travel to a conference with committee funds. The sponsor of the conference offers to provide lodging and meals for the Members without charge. The sponsor's offer may not be accepted. Because official funds are to be used to pay for the airfare, the trip is deemed an official activity. Thus, acceptance of the sponsor's offer would violate the prohibition against private subsidy of official activities.

*Example 14.* A Member plans to travel to a conference using MRA funds. The sponsor of the conference invites a staff person of that Member to travel to the event at the sponsor's expense. The staff person may not travel to the conference at the expense of the sponsor. Because the Member will be traveling on official funds, the participation of that office in the conference is an official activity, and the staff person could travel to it at official expense only.

However, as a general matter, a Member or staff person would not violate House Rule 24 by accepting, while on official travel, food or refreshments that the individual may otherwise accept under the gift rule, for example:

- A meal provided by a foreign government that is acceptable under the Foreign Gifts and Decorations Act;
- A meal that is part of a privately-sponsored, —widely attended event;
- A meal offered in a private residence as personal hospitality (but not from a registered lobbyist or foreign agent);
- A meal that is provided by an individual on the basis of personal friendship;
- Food or refreshments, including a meal, offered by the management of a site being visited, on that business's premises, and in a group setting with employees of the organization; or
- Food or refreshments of nominal value, not offered as part of a meal, at a privately-sponsored reception.

The various provisions of the gift rule that allow the acceptance of these items of food or refreshments are detailed in Chapter 2 on gifts.

As also detailed in Chapter 2, the Committee has determined that a Member or staff person does not violate House Rule 24 by accepting, while on official travel, certain incidental, privately provided transportation. Specifically, a Member or

staff person may accept local transportation, outside the District of Columbia, provided by the management of a site being visited in the course of official duties, between the airport or other terminus and the site.

However, privately-sponsored travel that is greater than incidental – *e.g.*, travel from one city or one country to another (including meals) – is subject to a different rule. While on official travel, a Member or staff person may be permitted to accept such privately-sponsored travel only if the travel has a purpose that is entirely different from that of the official travel.

***Example 15.*** A CODEL is in Germany examining the state of aircraft technology in Europe. A privately owned aircraft manufacturer in France learns of the CODEL and offers to fly the delegation to view its facilities. The manufacturer's offer will **not** be approved by the Committee.

***Example 16.*** The same CODEL referred to in Example 15 receives an offer from a shipbuilding company in France to view its facilities. Because this side trip would have a purpose entirely distinct from that of the official travel, the Committee would approve the Members' pre-travel approval request following the private sponsor's certification to the usual limits and restrictions on privately funded fact-finding.

### ***Use of the Government Rate***

The Standards Committee understands that under contracts with the airlines, hotels, and car rental companies that establish the —government rate,<sup>ll</sup> that rate is available **only** for official travel. Accordingly, as a general matter, the government rate can be used only when the travel of a Member, officer, or employee is to be paid for with official funds, and is **not** available when the travel is to be paid for with, for example, the funds of a private organization or campaign funds. Furthermore, as a general matter, a House office may **not** use the government rate for the travel of anyone other than a Member, officer, or employee. Thus the rate is not available for the travel of, for example, the spouse or a child of one of those officials. Information on use of the government rate is also available from the staff of the Committee on House Administration.

The Committee has also issued a general gift rule waiver permitting Members to make multiple reservations for official travel if offered by an airline. See February 21, 2008 Committee Memorandum on Multiple Reservations on Commercial Flights.

### ***Use of Frequent Flier Miles Earned Through Official Travel***

The rule on the use of frequent flier miles and similar benefits earned through official travel was established by the Committee on House Administration

and is set forth in the *Members' Handbook* and the *Committees' Handbook*. The rule is as follows:

Free travel, mileage, discounts, upgrades, coupons, etc. awarded at the sole discretion of a company as a promotional award may be used at the discretion of the Member or the Member's employee. The Committee [on House Administration] encourages the official use of these travel promotional awards wherever practicable.

Information on use of frequent flier miles earned through official travel is available from the Committee on House Administration staff.

### **Mixed Purpose Trips**

For the most part, the preceding discussion in this section treats all trips as having a **single** purpose, *i.e.*, an officially-connected purpose, a personal purpose, a political purpose, or an official purpose. However, insofar as the Standards Committee is concerned, it is possible for a trip to have **more than one** such purpose.

As to any such mixed purpose trip, the Member, officer, or employee must determine the **primary purpose** of the trip. The source associated with that primary purpose – for example, a political committee for campaign or political activity, the federal government for official business, or the traveler's own funds for personal business – must pay for the airfare (or other long-distance transportation expense), and all other travel expenses incurred in accomplishing that purpose. Any additional meal, lodging, or other travel expenses that the Member or staff person incurs in serving a secondary purpose must be paid by the source associated with that secondary purpose.

The determination of the primary purpose of a trip must be made in a reasonable manner, and one relevant factor in making that determination is the number of days to be devoted to each purpose. That is, often the primary purpose of a trip is the one to which the greater or greatest number of days is devoted.

However, any mixed purpose trip that would be paid in part with campaign funds or House funds must also comply with, respectively, Federal Election Commission rules or rules of the Committee on House Administration. The Standards Committee understands, for example, that FEC rules severely limit the ability of Members to, for example, attend a campaign fundraiser while in the course of officially-connected travel paid for by a private source. Thus Members and staff should consult the Standards Committee, the Committee on House Administration, and the FEC, as appropriate, when planning a mixed purpose trip.

## Travel to a Charity Event

The —charity event<sup>36</sup> provision of the gift rule allows Members and staff to accept transportation and lodging in connection with a charity event only when three requirements are satisfied:

- All of the net proceeds of the event are for the benefit of an established charity, *i.e.*, —an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of the Code ;
- Reimbursement for the transportation and lodging is paid by the charitable organization; and
- The offer of free attendance is made by the charitable organization.

It is important to emphasize that under the rule, the **only** entity from which a Member or staff person may accept transportation or lodging to attend a charity event is the charitable organization that benefits from the event. Travel expenses to the event may **not** be accepted from any donor to or participant in the event, or from anyone else. Furthermore, a Member or staff person may **not** accept transportation or lodging expenses from the beneficiary charity if those expenses would be paid using donations that were earmarked, either formally or informally, for payment of expenses of congressional participants.<sup>36</sup>

In addition, when acceptance of transportation and lodging is otherwise permissible, the Standards Committee interprets the rule to allow a Member or staff person to accept only such expenses as are reasonably necessary for the individual to attend the event. It appears that with rare exception, only one night of lodging, or at most two, will be necessary to attend any charity event.

When attendance at a charity event is otherwise permissible, a Member or staff person may also accept an invitation to be accompanied at the event, at the expense of the charity, by his or her spouse or a dependent — but only by one or the other, not both, and not by any other individual. Members, as well as staff required to file a Financial Disclosure Statement, must disclose travel to attend a charity event on Schedule VII of that form, if the value of the travel exceeds the reporting threshold.

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<sup>36</sup> Consistent with this interpretation, a Member or staff person traveling to a charity event under this provision may **not** accept a flight on, for example, a corporate aircraft that is being used to fly corporate officials to the event, even if the charity reimburses the corporation for the flight. Aside from concerns on whether a corporation may lawfully accept such a reimbursement under Federal Aviation Administration regulations, under the rule, as discussed in the text, a donor to a charity event should have no role in providing travel to a participating Member or staff person.

The rules on attendance at charity events are discussed more fully in Chapter 2 on gifts.

### **Use of Non-Commercial Aircraft Is Generally Prohibited**

At times Members are offered the use of, or wish to use, non-commercial aircraft for travel. Pursuant to a rules change during the 110<sup>th</sup> Congress, the circumstances under which Members are permitted to accept a flight on a non-commercial aircraft has been significantly narrowed. As discussed previously (under the heading —Acceptable Travel Expenses¶ ), under the gift rule, Members and staff participating in privately-sponsored, officially-connected travel may not accept travel on a non-commercial, private, or chartered flight unless exceptional circumstances are demonstrated in writing by the private sponsor.

In addition, under the House Code of Official Conduct, Members are prohibited from using personal, official, or campaign funds<sup>37</sup> to pay for or reimburse the expenses of a flight on **any** aircraft *unless* one of the exceptions in the rule is satisfied (House Rule 23, clause 15).<sup>38</sup> The major exceptions are for travel on commercially scheduled flights and flights provided by individuals or companies operating a charter service. However, the use of personal, official, or campaign funds to pay for a flight on a non-commercial aircraft is generally prohibited. Each of the exceptions to the prohibition on the use of personal, official, or campaign funds for a flight on an aircraft are discussed below.

Also discussed in this section are three limited circumstances under which a Member (or staff person) may be permitted to accept a flight on a non-commercial aircraft as a gift, that is, without having to reimburse the cost of the flight.

#### ***Exceptions to Prohibition To Use of Personal, Official, or Campaign Funds for Flights on Aircraft***

A Member may use personal, official, or campaign funds to pay for or reimburse the cost of a flight on an aircraft when the flight is provided under one of the following circumstances:

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<sup>37</sup> The term —campaign funds¶ is defined broadly to include —leadership PAC¶ funds. Specifically, the term —campaign funds¶ means —

funds of any political committee under the Federal Election Campaign Act of 1971, without regard to whether the committee is an authorized committee of the Member . . . involved under such Act. [House Rule 23, clause 15(c)(1).]

<sup>38</sup> This provision was added pursuant to H. Res. 363 (May 2, 2007). The Federal Election Campaign Act of 1971 (2 U.S.C. § 431 *et seq.*) has been amended to impose a similar prohibition on candidates for election to the House of Representatives. *See* The Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, § 601, 121 Stat. 735, 774 (Sept. 14, 2007).



- The aircraft is operated by an air carrier or commercial operator, including a charter service;<sup>39</sup>
- The aircraft is owned or leased by the Member or the Member's family member,<sup>40</sup> including fractional ownership or equity in a nonpublic corporation, provided that such use does not exceed the individual's proportionate ownership or equity share;
- The flight is for the personal use of the Member and is otherwise permissible on the basis of personal friendship;<sup>41</sup> or
- The aircraft is operated by the federal government or any state government.

Members wishing to reimburse the cost of a flight permitted under the rule using official funds or campaign funds should consult the House Administration Committee or the Federal Election Commission, respectively, for guidance on the timing and rates of reimbursement for a permissible flight and the applicable reporting requirements. The FEC should also be consulted for guidance on whether travel on non-commercial aircraft may be accepted on behalf of a Member's campaign as a permissible in-kind contribution.<sup>42</sup>

**Acceptance of Travel Provided on the Basis of Personal Friendship.** At times a Member, officer, or employee is offered a flight on an aircraft that is personally owned by an individual whom the official knows. If the requirements of the personal friendship provision of the gift rule are satisfied, the offer of a flight to the Member or staff person may be accepted as a gift. Those requirements are detailed in Chapter 2 on gifts. Several points to bear in mind regarding this type of travel are as follows:

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<sup>39</sup> Specifically, the prohibition does not apply if —the aircraft is operated by an air carrier or commercial operator certified by the Federal Aviation Administration and the flight is required to be conducted under air carrier safety rules (House Rule 23, clause 15(b)(1)). In the case of foreign travel, the prohibition does not apply if the aircraft is operated by —an air carrier or commercial operator certified by an appropriate foreign civil aviation authority and the flight is required to be conducted under air carrier safety rules (id). An aircraft that does not fall within one of these classifications is considered a non-commercial aircraft.

<sup>40</sup> The rule defines the term —family member (House Rule 23, clause 15(c)(2)).

<sup>41</sup> See section on —Gifts of Travel Given on the Basis of Personal Friendship (House Rule 23, clause 15(c)(2)) for additional guidance.

<sup>42</sup> But see note 38, supra.

- As a general matter, the personal friendship provision can apply only if the aircraft is owned by the individual, and cannot apply to a flight on an aircraft owned by a corporation or other entity.
- When the value of a gift proposed to be accepted under the personal friendship provision exceeds \$250, written approval of the Standards Committee is required before the gift can be accepted. Practically any flight on a non-commercial aircraft will exceed \$250 in value and hence will require Committee approval.\*\*
- Gifts received by a Member, officer, or senior employee that exceed \$335 in a calendar year - including flights on non-commercial aircraft - must be reported on the individual's annual Financial Disclosure Statement, unless the Standards Committee grants a waiver of the reporting requirement.
- A flight may not be accepted on the basis of personal friendship when the primary purpose of the trip is either to conduct House business or engage in campaign activity.

Acceptance of Travel Resulting From Outside Business, Employment, or Other Activities. In participating in travel resulting from outside business, employment, or other activities, a Member, officer, or employee may accept a flight on a non-commercial aircraft provided by the business or other entity, if two conditions are satisfied: (1) The non-commercial aircraft was not provided because of the individual's official position, and (2) such travel is customarily provided to others in similar circumstances.

Acceptance of Travel Paid for by a Foreign Government. A flight on a non-commercial aircraft that is paid for by a foreign government may be accepted, provided that the flight complies with the requirements of either the Foreign Gifts and Decorations Act ("FGDA") or the Mutual Educational and Cultural Exchange Act ("IECEA"). The requirements of those statutes, including that travel paid for under the FGDA must take place totally outside the United States, are explained above.

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\*\* The value of a flight on a non-commercial aircraft is to be determined as follows. *When the travel is via a previously or regularly-scheduled flight by the owner or operator of the aircraft, and the cities between which the Member or staff person is flying have regularly-scheduled air service (regardless of whether such service is direct), the value of the use of the aircraft is the cost of a first-class ticket from the point of departure to the destination. If only the coach rates are provided between those points, the value is the coach rate. If more than one first class rate is available, the lowest fare may be used. However, no discount fares may be used for vacation purposes.*

*When the flight is scheduled specifically for Member or staff person use, or when either the point of origin or destination does not have regularly-scheduled air service, the value of the use of the aircraft is the cost of chartering the same or similar aircraft for that flight.*

# CAMPAIGN ACTIVITY

## Overview

- House Members and staff engaging in campaign or political activity are subject to a wide variety of laws, rules, and standards of conduct, including:
- The Federal Election Campaign Act, as amended (2 U.S.C. §§ 431-455) (–FECA), with regard to campaigns for federal office;
- Provisions of the Rules of the House of Representatives, including rules that **require** that campaign funds be used only for campaign or political purposes, and **prohibit** their use for either personal or official House purposes, with limited exceptions;
- Rules of the Committee on House Administration requiring that House funds and official House resources be used for official House purposes, and precluding their use for campaign or political purposes; and

Other provisions of the U.S. Code, including provisions of the criminal code that concern, among other things, the solicitation and receipt of contributions, and abuse of one’s office for political gain.

Members or staff who are seeking state or local office are not subject to FECA in that undertaking, but they likely are subject to a comparable set of state laws and rules.

This chapter addresses the laws, rules, and standards on four major subjects relating to campaign and political activity, as follows:

- The general prohibition against using official House resources for campaign or political purposes;
- Campaign work by House employees, which must be done on their own time and outside the congressional office, and without the use of any House resources;
- The solicitation, receipt, and acceptance of campaign contributions, and the general prohibition against taking actions in one’s official capacity on the basis of political considerations; and
- The proper use of campaign funds.

Four other, more specific subjects are addressed in the last section of this chapter: (1) The rules on campaign letterhead, (2) the provisions of the House gift rule that apply to campaign or political activity, (3) Member involvement with

independent redistricting funds, and (4) provisions of the federal criminal code that apply to campaign or political activity.

While FECA establishes an extensive set of regulations on contributions and expenditures for campaigns for federal offices, this chapter, with one exception, does **not** address the provisions of FECA. FECA is enforced primarily by the Federal Election Commission (—FEC<sup>1</sup>), and House Members and their campaign staff should refer to the explanatory materials and advisory opinions issued by the FEC. One provision of FECA that this chapter does address, albeit briefly, is that on the proper use of campaign funds. As noted above, the House Rules also include a provision on this matter, and thus this chapter addresses the similarities and differences between the House rule and the statute.

With regard to the applicable provisions of the House rules, Members and staff should bear in mind that under House Rule 23, clause 2 they are obligated to adhere to not only the letter, but also the spirit of those rules. This provision has been interpreted to mean that Members and staff may not do indirectly what they are barred from doing directly. Chapter 1 on general ethical standards includes further discussion on this point.

While FECA and other statutes on campaign activity are not rules of the House, Members and employees must also bear in mind that the House Rules require that they conduct themselves —at all times in a manner that shall reflect creditably on the House<sup>1</sup> (House Rule 23, clause 1). In addition, the Code of Ethics for Government Service, which applies to House Members and staff, provides in ¶ 2 that government officials should —[u]phold the Constitution, laws and legal regulations of the United States and of all governments therein and never be a party to their evasion.<sup>1</sup> Accordingly, in violating FECA or another provision of statutory law, a Member or employee may also violate these provisions of the House rules and standards of conduct.<sup>1</sup> In addition, acceptance of an unlawful campaign contribution may also violate the House gift rule (House Rule 25, clause 5).

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<sup>1</sup> In the 105<sup>th</sup> Congress, an investigative subcommittee of the Standards Committee adopted a Statement of Alleged Violation against a Member charging violations of the predecessor of House Rule 23, clause 1, based in part on the allegation that in his campaign for the House, the Member had (1) caused illegal in-kind contributions to be made to his campaign by a corporation he owned, (2) received and accepted an illegal contribution from a foreign national, and (3) received and accepted an illegal contribution from another corporation. The Member had previously pled guilty in federal court to criminal charges that had been brought against him on these matters. The Standards Committee took no further action in this case because as of the time that the investigative subcommittee completed its work, the Member was about to depart the House. See House Comm. on Standards of Official Conduct, *In the Matter of Rep. Jay Kim*, H. Rep. 105-797, 105<sup>th</sup> Cong., 2d Sess. (1998).

Moreover, under these rules, a Member or employee must take reasonable steps to ensure that any outside organization over which he or she exercises control – including the individual’s own authorized campaign committee or, for example, –leadership PAC<sup>11</sup> – operates in compliance with applicable law. Depending on the circumstances, consultation with private counsel may be necessary.

In this regard, in a case handled by the Committee on Standards of Official Conduct in the 104<sup>th</sup> Congress, a Member admitted to a Statement of Alleged Violation that charged a violation of the predecessor of House Rule 23, clause 1 (requiring conduct that reflects creditably on the House). One of the bases of that charge was that the Member had failed to seek and follow legal advice for the purpose of ensuring that certain activities he undertook through tax-exempt organizations complied with provisions of the Internal Revenue Code governing such organizations, including those that generally prohibit such organizations from engaging in political activity. The House subsequently approved a Committee recommendation that the Member be reprimanded and required to reimburse the House the sum of \$300,000.<sup>2</sup>

### **General Prohibition Against Using Official Resources for Campaign or Political Purposes**

As detailed below, official resources of the House must, as a general rule, be used for the performance of official business of the House, and hence those resources may **not** be used for campaign or political purposes. The laws and rules referenced in this section reflect –the basic principle that government funds should not be spent to help incumbents gain reelection.<sup>3</sup>

What are the –official resources<sup>11</sup> to which this basic rule applies? Certainly the funds appropriated for Member, committee, and other House offices are official resources, as are the goods and services purchased with those funds. Accordingly, among the resources that generally may not be used for campaign or political purposes are congressional office equipment (including the computers, telephones, and fax machines), office supplies (including official stationery and envelopes), and congressional staff time.

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<sup>2</sup> House Select Comm. on Ethics, *In the Matter of Rep. Newt Gingrich*, H. Rep. 105-1, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 7-8 (1997). *See also* House Comm. on Standards of Official Conduct, *In the Matter of Rep. George V. Hansen*, H. Rep. 98-891, 98<sup>th</sup> Cong., 2d Sess., 3 (1989) (To establish the defense that a Member justifiably relied on the legal advice of counsel, the Member must show that the advice had been –sought in good faith, all material facts must [have been] given to the attorney and the person seeking advice must then follow the advice given.<sup>11</sup> ).

<sup>3</sup> *Common Cause v. Bolger*, 574 F. Supp. 672, 683 (D.D.C. 1982), *aff’d*, 461 U.S. 911 (1983).

Among the specific activities that clearly may **not** be undertaken in a congressional office or using House resources (including official staff time) are the solicitation of contributions; the drafting of campaign speeches, statements, press releases or literature; the completion of FEC reports; the creation or issuance of a campaign mailing; and the holding of a meeting on campaign business. The same prohibition applies to any activity that is funded to any extent with campaign funds, even if the activity is not overtly political in nature. The latter point is addressed further below under the headings —Use for Bona Fide Campaign or Political Purposes<sup>4</sup> and —Use of Campaign Funds or Resources for Official House Purposes.<sup>4</sup>

The misuse of the funds and other resources that the House of Representatives entrusts to Members for the conduct of official House business is a very serious matter. Depending on the circumstances, such conduct may result in not only disciplinary action by the House, but also criminal prosecution. Moreover, while any House employee who makes improper use of House resources is subject to disciplinary action by the Standards Committee, each Member should be aware that he or she may be held responsible for any improper use of resources that occurs in the Member's office. The Standards Committee has long taken the position that each Member is responsible for assuring that the Member's employees are aware of and adhere to the rules, and for assuring that House resources are used for proper purposes.<sup>4</sup>

Specific laws and rules that prohibit the use of official resources for campaign or political purposes are summarized in the remainder of this section. The effect of these laws and rules is generally to preclude campaign or political activity from taking place in congressional offices. However, the Standards Committee has long recognized that there are certain **limited** activities in a congressional office that, while related to a Member's campaign, are permissible. Those activities are described in this section.

Members and staff should be aware that the general prohibition against campaign or political use of official resources applies not only to any Member campaign for re-election, but rather to **any** campaign or political undertaking. Thus the prohibition applies to, for example, campaigns for the Presidency, the U.S. Senate, or a state or local office, and it applies to such campaigns whether the Member is a candidate or is merely seeking to support or assist (or oppose) a candidate in such a campaign.

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<sup>4</sup> House Comm. on Standards of Official Conduct, *In the Matter of Rep. E.G. —Bud Shuster*, H. Rep. 106-979, 106<sup>th</sup> Cong., 2d Sess. 31 (2000); House Comm. on Standards of Official Conduct, *Statement Regarding Complaints Against Rep. Newt Gingrich*, 101<sup>st</sup> Cong., 2d Sess. 60, 165-66 (1990); House Comm. on Standards of Official Conduct, *In the Matter of Rep. Austin J. Murphy*, H. Rep. 100-485, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4 (1987).

**Example 1.** A Member wishes to issue a press release announcing that he is endorsing a candidate for President. The Member may not issue the release out of his House office or use any House resources (including his official press release letterhead) in making the announcement. Likewise, a Member may not refer to or discuss his endorsement in letters sent on official stationery, including letters sent in response to constituent inquiries.

As noted below, many of the applicable rules here are statutorily based rules that were issued by either the Committee on House Administration or the House Franking Commission (formally known as the House Commission on Congressional Mailing Standards). Definitive explanation of those rules is available from the Committee on House Administration, the Franking Commission, and their staffs.

### ***Laws and Rules on Proper Use of Official Resources***

**Goods and Services Paid for With the Members' Representational Allowance or House Committee Funds.** All expenditures by a Member from his or her Members' Representational Allowance (—MRA<sup>11</sup>) — including expenditures for staff, travel, and communications — must comply with regulations issued by the Committee on House Administration. Those regulations are set forth in the *Members' Handbook* issued by that Committee. The *Handbook* provides that —[o]nly expenses the primary purpose of which [is] official and representation<sup>11</sup> are reimbursable from the MRA, and that the MRA may **not** pay for campaign expenses or political expenses (or any personal expenses).

Similarly, all House committees, in spending their official funds, must comply with the regulations set forth in the *Committees' Handbook* issued by the Committee on House Administration.<sup>5</sup> The *Committees' Handbook* provides that only expenses —the primary purpose of which [is] official<sup>11</sup> are reimbursable from the official funds provided to a committee, and that committee funds may **not** be used to pay any —political or campaign-related expenses<sup>11</sup> (or any personal expenses). The regulations governing committee expenditures as well as those governing Member expenditures derive in large part from both 31 U.S.C. § 1301(a), which provides that official funds are to be used only for the purposes for which appropriated, and the statutory authorizations for the allowances.<sup>6</sup>

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<sup>5</sup> See Comm. on House Admin., U.S. House of Representatives, *Members' Congressional Handbook* (hereinafter —*Members' Handbook*<sup>11</sup>) and *Committees' Congressional Handbook* (hereinafter —*Committee's Handbook*<sup>11</sup>). Both publications are available on the Committee on House Administration website.

<sup>6</sup> See, e.g., 2 U.S.C. § 57b, and *Principles of Federal Appropriations Law* (3d ed.), issued by the U.S. General Accountability Office.

As detailed below, it is permissible for House employees to do campaign work, but **only** outside of congressional space, without the use of any House resources, and on their own time (as opposed to —official— time for which they are compensated by the House). Accordingly, any House employee who does campaign work must ensure that the work — including any telephone conversations or other communications concerning campaign business — is performed strictly in compliance with these limitations.

A provision of the *Members' Handbook* permits the incidental personal use of House equipment and supplies —when such use is negligible in nature, frequency, time consumed, and expense. However, this policy applies only to incidental **personal** use of those resources, and **not** to their use for campaign or political purposes.

The rules on proper use of official House funds and resources were implicated in a case handled by the Standards Committee in the 104<sup>th</sup> Congress. That case, which was initiated by a complaint filed with the Committee, concerned a Member's use of his office fax machine and official letterhead to send out a press release that severely criticized the record of a prospective campaign opponent on Medicare issues. The Committee resolved that case by sending that Member a letter — which the Committee released publicly — stating (1) its finding that the Member had, in issuing that release, violated applicable rules and regulations on the use of official resources, and (2) the Committee's expectation that he would comply with applicable rules in the future.<sup>7</sup>

Moreover, Members must regularly certify that all official funds have been properly spent. A false certification may bring criminal penalties, and the government may recover any amount improperly paid.<sup>8</sup> Misuse of official House

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<sup>7</sup> House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Fourth Congress*, H. Rep. 104-886, 104<sup>th</sup> Cong., 2d Sess. 22 (1997). The matter of use of House staff to perform campaign work for the employing Member was at issue in another disciplinary case before the Standards Committee in the 104<sup>th</sup> Congress. In that case, an investigative subcommittee adopted a Statement of Alleged Violation against a Member, one count of which alleged a misuse of official resources on the basis that congressional employees of the Member regularly performed work for the Member's campaign while on official time. The campaign work, some of which was performed in the congressional office, included collecting and depositing campaign checks and maintaining campaign financial records. No further action was taken in the case, however, because as of the time the investigative subcommittee completed its work, the Member was about to depart the House. *In the Matter of Rep. Barbara-Rose Collins*, H. Rep. 104-876, 104<sup>th</sup> Cong., 2d Sess. (1997).

<sup>8</sup> Federal law (18 U.S.C. § 1001) provides a criminal penalty for submitting a false statement to the government; the False Claims Act, 31 U.S.C. §§ 3729-3731, permits assessment of a penalty of up to three times the amount wrongly claimed. For further information on this matter, see Chapter 9 (on false claims and fraud).



resources for campaign purposes may violate other criminal laws as well. For example, in 1993 a former House employee pleaded guilty to a charge of theft of government property for receiving a House salary and expenses for time when, despite his claim that he was conducting official business, he was in fact doing campaign work.<sup>9</sup> In addition, in 1979 a former Member pleaded guilty to charges of mail fraud and income tax evasion based on claims that persons on his congressional payroll were paid not for the performance of official duties, but instead for staffing and operating various campaign headquarters in his re-election campaign.<sup>10</sup>

**House Buildings, and House Rooms and Offices.** The House buildings, and House rooms and offices – including district offices – are supported with official funds and hence are considered official resources. Accordingly, as a general rule, they may not be used for the conduct of campaign or political activities.

Thus, for example, a Member may not film a campaign commercial or have campaign photos taken in a congressional office. For rules on filming and taking of photos on grounds near the Capitol, the office of the Sergeant at Arms should be contacted.

In addition, House rooms and offices are not to be used for events that are campaign or political in nature, such as a meeting on campaign strategy, or a reception for campaign contributors.<sup>11</sup> However, under long-standing Committee policy, when a Member is sworn in, the Member may hold a —swearing-inll reception in a House office building that is paid for with campaign funds.<sup>12</sup> A criminal statute that prohibits the solicitation of campaign contributions in any House building, room, or office is discussed below in this chapter, in the section on solicitation of contributions.

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<sup>9</sup> *United States v. Bresnahan*, Crim. No. 93-0409 (D.D.C. 1993); see Senate Comm. on Rules and Administration, *Senate Election Law Guidebook* 2006, S. Doc. 109-10, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 266.

<sup>10</sup> *United States v. Clark*, Crim. No. 78-207 (W.D. Pa. 1978); see S. Doc. 109-10, *supra* note 9, at 265-66.

<sup>11</sup> The Speaker's office has issued a set of rules for use of the meeting rooms under the Speaker's jurisdiction, and those rules prohibit use of those rooms for, among other things, political purposes. In addition, as noted in the text, a provision of the criminal code, 18 U.S.C. § 607 generally prohibits the solicitation or receipt of campaign contributions in federal offices, including the House office buildings and district offices, in connection with a federal, state, or local election.

<sup>12</sup> In addition, there are events that, while not campaign or political events, may properly be paid for with campaign funds (*e.g.*, a reception for visiting constituents). An event of this nature may be held in a House building, even though it is paid for with campaign funds. This and other matters are discussed later in this chapter.

**Coverage of House Floor and Committee Proceedings.** Broadcast coverage and recordings of House floor proceedings may not be used for any political purpose under House Rule 5, clause 2(c)(1). In addition, under House Rule 11, clause 4(b), radio and television tapes and film of any coverage of House committee proceedings may not be used, or made available for use, as partisan political campaign material to promote or oppose the candidacy of any person for public office.

**Internal Office Files.** As discussed below, a congressional office may provide campaign personnel with copies of its press releases and other materials that were distributed publicly. However, the internal office files, such as research files on legislation, may not be used for campaign or political purposes.

**Example 2.** A Member's campaign wishes to make commercials featuring testimonials by individuals whom the office has assisted on casework matters. The office casework files may not be reviewed to obtain names of individuals whom the office has assisted. Likewise, the office files may not be reviewed to obtain names of individuals to solicit for campaign contributions.

**Official Mailing Lists.** The *Members' Handbook* issued by the Committee on House Administration provides that official funds may be used to purchase and produce mailing lists, provided that, among other things, —the list does not contain any campaign, campaign related, or political party information.¶ The *Handbook* further provides that a Member may not use official funds to purchase mailing lists from the Member's campaign —unless the lists are available on the same terms to other entities through an arms length marketplace transaction.¶ (Note that subject to the same conditions, a Member also has the option of purchasing a mailing list from his or her campaign with personal funds and then making that list available for use by the congressional office.)

The *Members' Handbook* also provides that, —[o]fficial mailing lists may not be shared with a Member's campaign committee, any other campaign entity, or otherwise be used for campaign purposes.¶

**Letters, News Releases, Other Printed Materials, and E-mails.** Under regulations issued by the Committee on House Administration, neither a letter nor any other kind of document (including a news release) may be printed on official House stationery unless the content of the document complies with the Franking Regulations. House Administration Committee regulations further provide that any advertisement paid for by a congressional office, as well as any printed materials produced by an office, must be frankable in content. E-mails sent by a congressional office must likewise comply with the Franking Regulations.

The Franking Regulations are issued by the House Franking Commission, and they govern use of the frank under 39 U.S.C. § 3210 and related statutes.<sup>13</sup> Statutory law provides that it is Congress' intent that the frank **not** be used for, among other things,

mail matter which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any political office. [39 U.S.C. § 3210(a)(5)(C).]

The Franking Regulations elaborate on this provision by prohibiting, among other things, —specific references to past or future campaigns or elections, including election or re-election announcements and schedules of campaign related events, the use of materials —used in campaign literature as well as specific campaign pledges or promises, and —excessive use of party labels. The Franking Regulations further provide that when a Member submits a sample of a mass mailing to the Franking Commission for an advisory opinion on frankability, the office must also submit a signed Franking Certification Form that represents that the mailing does not and will not —

contain any logo, masthead design, slogan, or photograph which is a facsimile of any matter contained in the Member's campaign literature.

Any questions on the Franking Regulations should be directed to the staff of the Franking Commission.

While the Franking Regulations prohibit congressional offices from sending letters or issuing press releases that are campaign or political in nature, the Standards Committee understands that the Regulations do **not** necessarily preclude congressional offices from issuing statements on **legislative issues** that are raised in the course of a campaign. Provided that such statements are confined to discussion of legislative issues, they may satisfy the Franking Regulations, and hence may be drafted by congressional staff using the internal office files and other official resources. However, before commencing work on any such statement, a congressional office should consult with Franking Commission staff to ensure that the planned statement will comply with the Regulations.

**The 90-Day Ban on Unsolicited Mass Communications.** Under statutory law and Committee on House Administration regulations, a Member is prohibited from

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<sup>13</sup> The regulations themselves are set out in a publication of the Franking Commission, *Regulations on the Use of the Congressional Frank by Members of the House of Representatives*, the current issue of which is dated June 1998. The regulations are also available on the Committee on House Administration's website.

spending official funds to make any unsolicited mass communication within 90 days of any election in which the Member's name is on the ballot.<sup>14</sup> The regulations define —unsolicited mass communication|| as —any unsolicited communication of substantially identical content to 500 or more persons in a session of Congress.||

The official expenditures that are subject to the prohibition include those for mass mailings, advertisements, certain electronic messages and mailings, and the production and distribution of video and audio services. On the other hand, a Member's direct response to an individual communication, such as an incoming letter initiated by a constituent, is not an unsolicited communication in that the constituent is soliciting the Member's response. Such a response is therefore not subject to the prohibition, even if the total number of individual responses is 500 or more.

In addition, according to the *Members' Handbook*, House offices may consider an individual who subscribed to a Member's electronic communication or newsletter to be a —soliciting|| a response by the office. As a result, a communication to that individual would not be subject to the 90-day communications ban that applies to unsolicited communications. Although there is no requirement that a Member seek an advisory opinion from the Franking Commission before transmitting an electronic communication or newsletter, the content of the communication is subject to Franking regulations. Questions relating to electronic messages and mailings communications should be directed to the Committee on House Administration and Franking, as appropriate.

Note that the ban applies to communications paid for with official funds. Thus the ban does not prohibit a Member who is within the 90-day —cut-off|| from, for example, accepting the invitation of a charitable organization to tape a bona fide public service announcement using facilities provided by the organization. In addition, at times a Member is asked to appear at and lend his or her name to an event of an outside organization (*see* Chapter 10 on official and outside organizations). Materials that the organization typically prints or publishes regarding such an event would not be subject to the ban.

Questions on the applicability of the ban to communications proposed to be made using official funds should be directed to the Committee on House Administration. However, occasionally questions have arisen on whether a Member who is in his or her cut-off period can make a mass communication that is official in nature using nonofficial resources (for example, the services of a state or local government entity). Questions of that nature are within the jurisdiction of the Standards Committee, and the Committee has taken the position that such an

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<sup>14</sup> Statutory law (39 U.S.C. § 3210(a)(6)) applies the ban to mass mailings, and the regulations extend the ban to other forms of communication.

undertaking would not be permissible in that it would be inconsistent with the spirit of the ban on unsolicited mass communications.

**Member and Committee Websites.** Under rules issued by the Committee on House Administration set forth in the *Members' Handbook* and the *Committees' Handbook*, Member and Committee websites –

- May **not** include personal, political, or campaign information; and
- May **not** be directly linked or refer to websites created or operated by a campaign or any campaign-related entity, including political parties and campaign committees.

Further information on the rules governing Member and Committee websites is available from the Committee on House Administration.

As to Member **campaign** websites, the Standards Committee has advised that –

- Such a site may **not** include a link to the Member's House website; and
- The Member's House website may not be advertised on his or her campaign website or in materials issued by the campaign.

This matter is also addressed at the end of this chapter.

**Travel.** Member and staff travel, including to one's district, may be paid with official funds only if the **primary purpose** of the trip is the conduct of **official business**. As a general matter, a Member or staff person, while on official travel, may engage in incidental campaign or political activity, provided that no additional travel expenses are incurred as a result. However, when the primary purpose of a trip is in fact the conduct of campaign or political activity, then the travel expenses must be paid with campaign funds and cannot be paid with official funds.<sup>15</sup>

The *Members' Handbook* and the *Committees' Handbook* issued by the Committee on House Administration include provisions on campaign activity in the course of travel paid for with House funds. Thus when a Member or staff person wishes to engage in any such activity in the course of an official trip, he or she

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<sup>15</sup> In the 104<sup>th</sup> Congress an investigative subcommittee of the Standards Committee adopted a Statement of Alleged Violation against a Member, one count of which alleged a misuse of official resources on the basis that official funds had been used to pay travel expenses of a staff member for a trip the primary purpose of which was to attend a campaign fundraising event for the Member. No further action was taken in the case, however, because as of the time the investigative subcommittee completed its work, the Member was about to depart the House. *See* H. Rep. 104-876, *supra* note 7.

should first review the section of the appropriate *Handbook* on travel and consult with the Committee on House Administration staff as necessary.

**Redistricting.** Prior to May 2001, both the Standards Committee and the Committee on House Administration had taken the position that the use of House resources for redistricting purposes was absolutely prohibited. That policy was based on the view that redistricting is an inherently political activity. However, in a joint Dear Colleague letter of May 24, 2001, the two committees advised that House resources **may** be used for redistricting-related activities – such as responding to constituent inquiries, and Member meetings and briefings – that are merely incidental to each day’s official business, and that are minimal in nature, frequency, time consumed, and use of resources. A copy of that joint Dear Colleague letter is reprinted in the appendices to this Manual.

The matter of Member involvement with independent redistricting funds is discussed at the end of this chapter.

### ***Limited Campaign-Related Activities That May Take Place in a Congressional Office***

The purpose and effect of the laws and rules enumerated above are generally to preclude campaign or political activity from taking place in a congressional office. However, the Standards Committee has recognized that there are certain limited activities that, while related to a Member’s campaign, may properly take place in a congressional office. The Committee’s view has been that it would be impractical and unnecessary to attempt to prohibit these specific activities. In this regard, the Committee has long advised that the following activities are permissible:

**Coordination of the Member’s Schedule.** The individual in the congressional office who handles the Member’s schedule may coordinate with those in the campaign office who schedule the Member’s campaign appearances. Obviously, a Member can be in only one place at any one time, and thus it is necessary for schedulers to communicate. The congressional office scheduler may also maintain an integrated schedule that reflects the Member’s political as well as official activities, but that schedule is for the internal use of the Member and staff only.

While coordination between schedulers is permissible, as a general matter, the congressional office scheduler should not make travel arrangements for the Member’s campaign trips either in the congressional office or while on official time. However, a member of the congressional staff who wishes to perform those duties may do so on his or her own time and outside of congressional space, such as at the office of one of the congressional campaign committees. The matter of campaign work by House employees on their own time and outside of congressional office space is discussed in detail below.

**The Press Secretary.** The press secretary in the congressional office may answer occasional questions on political matters, and may also respond to such questions that are merely incidental to an interview focused on the Member's official activities. However, while in the congressional office, the press secretary should not give an interview that is substantially devoted to the campaign, or initiate any call that is campaign-related. A press secretary wishing to do either of those things should do so outside of the congressional office, and on his or her own time (*see below*).

**Example 3.** In the course of a lengthy interview in the congressional office on how the Member plans to vote on a controversial issue coming before the House, a reporter asks the press secretary how the Member perceives that her vote will affect her upcoming re-election. The press secretary may answer the question. However, if the reporter continues to ask questions on the campaign, the press secretary should terminate the interview. If the press secretary wishes to do so, she may resume the interview outside of congressional space (such as at the office of one of the congressional campaign committees) and on her own time.

**Campaign/Congressional Office Referrals.** The congressional office may refer to the campaign office letters and other communications and inquiries that it receives concerning the campaign. Likewise, the campaign office may refer to the congressional office any officially related matters that it receives.

**Example 4.** A congressional office receives a call from a constituent who wishes to do volunteer work for the Member's campaign. The staff person may provide the constituent with the address and telephone number of the campaign headquarters.

All such referrals should be done at the expense of the campaign, including the cost of any long-distance telephone calls. It may be desirable for the congressional office to have a supply of campaign envelopes and stamps for use in referring written materials. Those stamps and envelopes can also be used to send to the campaign any unsolicited campaign contributions that are received in the congressional office (*see discussion below on —No Solicitation in House Offices, Rooms, or Buildings* ).

**Providing Published Materials to the Campaign.** A congressional office may provide a campaign office with a copy of any materials that the congressional office has issued publicly, such as press releases, speeches, and newsletters. In stating that such activity is permissible, the Standards Committee assumes that only a minimal amount of congressional staff time will be consumed in responding to campaign requests for materials of this nature. However, in no event should the

congressional office provide the campaign with a quantity of any such item for distribution by the campaign.

**Example 5.** In the past year the Member has been very active on the gun issue. The campaign wishes to issue a brochure on the issue, and a campaign worker asks the congressional office for a copy of all the statements and releases the Member issued on guns. The congressional office may provide one copy of the requested material to the campaign.

Other materials in the congressional office files – including, for example, back-up memoranda on issues – are **not** to be shared with the campaign or otherwise used for campaign purposes. Those materials are to be used for official purposes only. Congressional staff members should not do research on behalf of the campaign or write campaign speeches or other materials while on official time or using official resources.

A separate question that arises at times is whether a Member's campaign, having received a copy of an item that the congressional office issued publicly – such as a press release or *Congressional Record* statement – may then reproduce and distribute that item at campaign expense. The Standards Committee addressed this matter in its *Advisory Opinion No. 6*, which was issued on September 14, 1982, and is reprinted in updated form in the appendices. A Member's campaign is free to reproduce and distribute, for campaign purposes, materials that were originally prepared by the congressional office, provided that the following requirements are satisfied:

- The materials were prepared by the congressional office for a bona fide official purpose, and the official use of the materials has been exhausted;
- All the expenses associated with reproducing and distributing the materials are paid from campaign funds; and
- The materials themselves or the context in which they are presented clearly establishes their campaign or political purposes and hence their nonofficial use, so that there is no appearance that private funds are supplementing official allowances.

In reproducing such materials, the campaign must remove all official indicia, such as the official letterhead from a press release that the congressional office had issued, and any references to the address or telephone number of the congressional office. The name of any congressional staff contact that appeared in the material as issued originally must also be deleted. Subject to the same requirements, such materials may also be posted on the Member's campaign website.

A question may arise as to when the official use of an item has been —exhausted— as that term is used here. As a general matter, the official use of the normal press release is exhausted once it has been disseminated and the media



have had an opportunity to utilize its contents. Thus usually a campaign will be able to reproduce the contents of congressional office press releases a few days after their original issuance, provided that the other requirements set forth above are satisfied. On the other hand, when a congressional office posts a statement setting out the Member's views on the major issues on its official website, the Member's campaign is not free to reproduce that statement so long as it remains on the official website. So long as a statement of that nature remains posted on the official site, its official use is not exhausted.

**Responding to Questionnaires on Legislative Issues.** Congressional offices frequently receive questionnaires from outside organizations, and often those organizations use the responses to the questionnaires in deciding whether to endorse the Member for re-election. When a questionnaire is limited to legislative issues and the content of the response would comply with the Franking Regulations, the response may be prepared by congressional staff on official time. Otherwise, the response should be prepared by campaign staff.

**Nonpartisan Voter Registration Materials.** A Member may make nonpartisan voter registration information available in a congressional office, but may not actually register people to vote there. In addition, the franking statute (39 U.S.C. § 3210(a)(3)(H)) provides that nonpartisan voting registration or election information is frankable.

Except as outlined above, the Standards Committee expects Members to enforce the general rule that any campaign-related activities done by staff members will be done on their own time, outside of congressional space, and without the use of any official House resources.

### **Campaign Work by House Employees Outside the Congressional Office and on Their Own Time**

Once House employees have completed their official duties, they are free to engage in campaign activities on their own time, as volunteers or for pay, as long as they do not do so in congressional offices or facilities, or otherwise use official resources. Executive branch personnel are subject to restrictions on partisan political activity by the Hatch Act (5 U.S.C. § 7321 *et seq.*), but those restrictions do not apply to congressional employees.<sup>16</sup>

It should be stressed that although House employees are free to engage in campaign activities on their own time, in no event may a Member or office compel a House employee to do campaign work. To do so would result in an impermissible

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<sup>16</sup>The restrictions on executive branch personnel were considerably eased in a 1993 enactment, the Hatch Act Reform Amendment, Pub. L. 103-94, 107 Stat. 1001 (1993).

official subsidy of the Member's campaign.<sup>17</sup> The prohibition against coercing staff or requiring staff members to do campaign work is quite broad. It forbids Members and senior staff from not only threatening or attempting to intimidate employees regarding doing campaign work, but also from directing or otherwise pressuring them to do such work.

### *What Is an Employee's —Own Time?*

What constitutes a staff member's —own time is determined by the personnel policies that are in place in the employing office. Time that is available to a staff member, under those policies, to engage in personal or other outside activities may instead be used to do campaign work, if the individual so chooses. This free time may include, for example, a lunch period, time after the end of the business day, and annual leave. However, a Member may not adjust the work requirements of the congressional office, or add unpaid interns during the campaign, in order to create more —free time for staff to do campaign work. To help ensure compliance with the rules, office policies on employee leave and other free time should be in writing and distributed to all employees.

The Standards Committee has recognized that the hours that constitute a staff member's —own time will not always correspond to evenings and weekends:

[D]ue to the irregular time frames in which the Congress operates, it is unrealistic to impose conventional work hours and rules on congressional employees. At some times, these employees may work more than double the usual work week — at others, some less. Thus employees are expected to fulfill the clerical work the Member requires during the hours he requires and generally are free at other periods. If, during the periods he is free, he voluntarily engages in campaign activity, there is no bar to this.<sup>18</sup>

In addition to engaging in campaign activity while on annual leave or during other free time, employees may do so by —

- Reducing their employment in the congressional office to part-time status, with a corresponding reduction in salary; or

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<sup>17</sup> Depending on the circumstances, compelling a House employee to do campaign work may also violate a provision of the federal criminal code, 18 U.S.C. § 606. That statute covers intimidation to secure not only monetary contributions for a political purpose, but anything of value, apparently including services.

<sup>18</sup> House Comm. on Standards of Official Conduct, *Advisory Opinion No. 2* (July 11, 1973). However, the professional staff members of House committees should note clause 9(b)(1)(A) of House Rule 10, which provides that such staff members —may not engage in any work other than committee business during congressional working hours.¶

- Going on Leave Without Pay (—LWOP) status for the purpose of working on the campaign.

However, prior to going on LWOP status, an employee should carefully review the requirements for that status that are set out in the *Members' Handbook* and the *Committees' Handbook* issued by the Committee on House Administration and should consult with staff of that committee as necessary.

Employees who do campaign work while remaining on the House payroll should keep careful records of the time they spend on official activities and, separately, on campaign activities, and demonstrate that campaign work was not done on official time. There is no set format for maintaining such time records.

The rules governing campaign work by House employees were implicated in a Standards Committee disciplinary case that was completed in the 106<sup>th</sup> Congress.<sup>19</sup> In that case the Committee determined that a Member had violated the House Code of Official Conduct in that his staff members worked for his campaign during regular office hours without taking annual leave or going on Leave Without Pay status, or taking any other steps to ensure that those services were rendered during time that was properly deemed the employee's —own time.<sup>20</sup> The employees in that office took —administrative leave<sup>21</sup> whenever they performed campaign work. However, they were paid their full congressional salary while on —administrative leave,<sup>21</sup> and the office had no system in place to ensure that time spent in that status was recorded and was either made up at alternate times or charged as vacation time.<sup>21</sup>

### ***Need To Comply With Laws and Rules Applicable to House Employees While Doing Campaign Work***

All House employees who do campaign work should bear in mind that they continue to be bound by the laws and rules applicable to House employees. This applies to employees who go to part-time status, and it applies as well to employees on LWOP status, who continue to be employees of the House (and continue to be eligible for certain employee benefits) even though they are not receiving compensation from the House. House employees should take particular note of the following.

**The Prohibition Against Making a Contribution to One's Employing Member.** A provision of the federal criminal code, 18 U.S.C. § 603, makes it unlawful for any

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<sup>19</sup> H. Rep. 106-979, *supra* note 4

<sup>20</sup> *Id.* at 3G, 3I, 6-7, 51-64.

<sup>21</sup> *Id.* at 54.

federal officer or employee to make certain campaign contributions to —the employer or employing authority of the person making the contribution.¶ Accordingly, an employee of a Member office is prohibited from making a —contribution¶ as that term is used in the statute (*see* below) to his or her employing Member. Regarding the employees of a House committee, the legislative history of the statute provides as follows:

An individual employed by a congressional committee cannot contribute to the chairman of that particular committee. If the individual is employed by the minority that individual cannot contribute to the ranking minority member of the committee or the chairman of the committee.<sup>22</sup>

The contributions to which the statute applies are those made to influence a federal election — that is, the term contribution is defined in the statute by reference to the definition of that term stated in the Federal Election Campaign Act (—FECA¶ ) (2 U.S.C. § 431(8)). The statute goes on to provide that a contribution to an —authorized committee¶ as defined in the Act (*id.* § 432(e)(1)) is considered a contribution to the individual who authorized the committee.

The prohibition against an employee making such a contribution to the individual's employing Member is absolute. A House employee may not make such a contribution even if the contribution was entirely unsolicited and the employee genuinely wishes to make the contribution. As a result of this statute, a House employee may not purchase a ticket to a campaign fundraising event for the employing Member.<sup>23</sup>

The definition of the term contribution in the FECA is quite detailed, setting out a number of items that either do or do not constitute a contribution for purposes of the Act.<sup>24</sup> The definition is elaborated upon in the implementing regulations issued by the Federal Election Commission (—FEC¶ ).<sup>25</sup> Staff members who do

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<sup>22</sup> Comm. on House Admin., *Federal Election Campaign Act Amendments of 1979*, H. Rep. 96-422, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 26 (1979).

<sup>23</sup> Regarding the circumstances in which a House employee may accept a free ticket to a campaign fundraising event, see discussion below on —Gift Rule Provisions Applicable to Campaign Activity.¶

<sup>24</sup> 2 U.S.C. § 431(8). The statute provides that among the items that do **not** constitute a contribution for purposes of FECA is —the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee.¶ *Id.* § 431(8)(B)(i). Thus a House employee does **not** make an impermissible contribution to his or her employing Member by doing volunteer work for the Member's campaign.

<sup>25</sup> 11 C.F.R. § 100.51 *et seq.*

campaign work need to be familiar with those provisions so as to avoid making a prohibited contribution to their employing Member.

In particular, staff members should be aware that under FEC regulations, most **outlays** that an individual makes on behalf of a campaign are deemed to be a **contribution** to that campaign from that individual.<sup>26</sup> **This is so even if it is intended that the campaign will reimburse the individual promptly.** The major **exception** to this rule is for outlays that an individual makes to cover expenses that he or she incurs in **traveling** on behalf of a campaign.<sup>27</sup>

Accordingly, a House employee should **not** make **any** outlay on behalf of the employing Member's campaign, other than outlays for the employee's personal travel expenses that are consistent with the FEC regulations, or for another purpose that is deemed not to constitute a contribution under FECA or the regulations.<sup>28</sup>

**Example 6.** A Member's campaign wishes to purchase some souvenirs from the House gift store to give as gifts to the Member's supporters. An employee of the Member's congressional office may not purchase the items with her own money or a personal credit card, even if the campaign makes arrangements to reimburse her promptly. However, the Member may purchase the souvenirs with his personal funds and receive reimbursement from the campaign.

Thus when a House employee undertakes to do campaign work – on the employee's own time and outside of congressional space, in accordance with the rules summarized above – the individual should make appropriate arrangements with the campaign to ensure that he or she will not be called upon to make any improper outlays. The arrangements may include, for example, providing the individual, in advance, with any funds that might be needed to cover anticipated campaign expenses, or providing the individual with use of a campaign credit card.

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<sup>26</sup> *Id.* § 116.5(b).

<sup>27</sup> Outlays for one's own travel will not be deemed a contribution if either (1) the campaign provides reimbursement within 60 days after the expenses are incurred if payment was made by credit card, or within 30 days in all other cases (*id.* § 116.5(b)(1), (2)), or (2) the individual's outlays for transportation do not exceed \$1,000 with respect to a single election, regardless of whether the campaign reimburses the outlays (*id.* § 100.79(a)).

<sup>28</sup> One set of provisions that may be applicable here is that which excludes from the definition of —contribution— an expenditure by an individual of up to \$1,000 per election for food, beverages, and invitations for a campaign event held in the individual's home or in a church or community center. See 2 U.S.C. § 431(8)(B)(ii) and 11 C.F.R. §100.75-77. Another provision excludes from the definition of —contribution— the use of computer equipment in connection with internet activities for the purpose of influencing a federal election. 11 C.F.R. § 100.94.

While the law prohibits House employees from making campaign contributions to their employing Member, the law does **not** prohibit them from making a campaign contribution to any other candidate, including another House Member. In addition, the law does not prohibit House employees from making contributions to multicandidate political committees, such as a PAC or the Democratic or Republican Congressional Campaign Committees, even though some of the proceeds received by such committees may eventually be spent for the benefit of the contributor's employee. In making such a contribution, however, an employee should not earmark it for use in the campaign of the employing Member, because that could be deemed a contribution from the employee to the Member.<sup>29</sup>

With regard to those contributions from House employees that are not prohibited by 18 U.S.C. § 603, both Members and staff should bear in mind that a separate provision of the federal criminal code, 18 U.S.C. § 606, prohibits the use of intimidation to secure such contributions. Specifically, that statute makes it unlawful for a Senator, Representative, or federal officer or employee to discharge, demote, or promote another federal officer or employee, or to threaten or promise to do so, for making or failing to make —any contribution of money or other valuable thing for any political purpose.¶

**Requirement That Each Employee Perform Duties Commensurate With Compensation.** Under House Rule 23, clause 8 a Member is always responsible for ensuring that each of his or her employees performs **official** duties that are commensurate with the compensation that the employee receives from the House. Thus when it is anticipated that an employee will be assuming significant campaign duties, it may be necessary for the employing Member to make an appropriate reduction in the employee's House pay.

Certainly an appropriate reduction in salary is necessary when a full-time employee goes to part-time status in the congressional office in order to do campaign work. Members and staff should also bear in mind that bonuses, including —lump sum¶ payments, are for the performance of official duties only, and they are **not** to serve as compensation or a reward for campaign work.<sup>30</sup>

**The Gift Rule.** The provisions of the gift rule (House Rule 25, clause 5) that apply with regard to campaign and political activity are summarized below at the end of this chapter. Members as well as staff are subject to those provisions of the gift rule when engaging in campaign or political activity. A full explanation of the gift rule is found in Chapter 2 on gifts.

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<sup>29</sup> See 11 C.F.R. § 110.6.

<sup>30</sup> For guidance on —lump sum¶ payments, see Chapter 7 on staff rights and duties.

**Prohibition Against Representing Others Before Federal Agencies.** Provisions of the federal criminal code (18 U.S.C. §§ 203, 205) generally prohibit House employees from representing anyone before any government agency, department, court or officer in any matter in which the United States is a party or has an interest. The latter statute applies whether or not the House employee is compensated for his or her services.

These statutes would appear to prohibit a House employee from, for example, representing a campaign committee in a matter before the FEC. However, it also appears that these statutes do not prohibit a House employee from completing and signing contribution and expenditure reports to be filed with the FEC<sup>31</sup> (although such work would have to be done outside of congressional space and on the employee's own time, in accordance with the rules summarized above). Further information on these statutes is contained in Chapter 5 on outside employment and income.

**For —Senior Staff, the Annual Limitation on Outside Earned Income and the Outside Employment Restrictions.** House employees who are paid at or above the —senior staff level for more than 90 days in a calendar year are subject both to an annual limitation on their outside earned income and to a set of restrictions on their outside employment.<sup>32</sup> (House Members and officers are subject to these same provisions.) As a general matter, the limit and restrictions apply to senior staff who do campaign or political work on a compensated basis.

The —senior staff pay level is determined on a calendar year basis, and during calendar year 2008, it is an annual rate of \$114,468. Accordingly, any House employee who is paid at or above that rate for more than 90 days during calendar year 2008 is subject to the outside earned income limitation and the outside employment restrictions. The pay threshold for other years is available from the Standards Committee staff.

The dollar amount of the outside earned income limitation is also determined on a calendar year basis, and for calendar year 2008, the limitation is \$25,830. Thus when a House senior staff member works part-time for a campaign, he or she may not receive compensation for campaign services rendered in calendar year 2008 that exceeds \$25,830. The annual limitation applicable to other years is available from the Standards Committee staff.

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<sup>31</sup> See U.S. Office of Government Ethics (—OGE) Advisory Opinions 85 x 3 and 81 x 21, regarding the applicability of 18 U.S.C. §§ 203, 205 to a federal employee preparing income tax returns for others. Copies of OGE advisory opinions are available through OGE's website.

<sup>32</sup> House Rule 25, clauses 1, 4; 5 U.S.C. app. 4 §§ 501-505.

However, the Standards Committee has determined that the outside earned income limitation does **not** apply to the campaign salary received by a senior staff member who is on Leave Without Pay status.

**Example 7.** A senior staff member is paid a total of \$30,000 by her employing Member's campaign for work done during calendar year 2008. Of that amount, \$15,000 was paid for campaign services provided while the staff member was on LWOP status. The staff member has not violated the outside earned income limitation, because the amount paid for work done while on LWOP status does not count toward the annual limitation.

Further information on the outside earned income limitation is found in Chapter 5 on outside employment and income.

The outside employment restrictions define certain activities for which senior staff (as well as House Members and officers) may **not** receive **any** compensation **whatsoever**. The restrictions prohibit senior staff from, among other things, (1) receiving compensation for practicing any profession that involves a fiduciary relationship, including, for example, law or accounting, and (2) serving for compensation as an officer or director of any entity.

Accordingly, a senior staff member, as defined above, may not receive any compensation for either providing legal services to a political organization, or for serving as an officer (such as treasurer) of such an organization. Further information on the employment restrictions applicable to Members, officers, and employees is found in Chapter 5.

### ***Candidacy of a House Employee for Elective Office***

At times a House employee wishes to run for an elective office while continuing as an employee. There is no absolute prohibition against a staff member becoming a candidate for a state or local elective office, but such activity is subject to a number of restrictions. Most importantly, the individual's employing Member must consent to the candidacy, and the employee must comply with the rules and requirements on performing campaign activity that are summarized above. Those requirements include that the employee perform congressional duties that are commensurate with the compensation he or she receives from the House – and thus that compensation be reduced proportionately with any reduction in the employee's time in the congressional office – and that any campaign activity be performed on the individual's own time, and outside of congressional space. Further guidance on the matter of staff candidacy for local office is provided in Chapter 5. An employee considering a candidacy for elective office should contact the Committee for specific advice.



However, different considerations apply when a Member is departing office, and one of the Member's employees wishes to become a candidate to succeed the Member. In that circumstance, the Committee has taken the position that the staff member must terminate his or her employment in the congressional office upon becoming a candidate.<sup>33</sup> Among the considerations on which this Committee determination is based are the significant time demands of a congressional candidacy, and the strong potential for conflict of interest when an employee is seeking to succeed the employee's employing Member.

The Committee has also determined that, subject to certain restrictions, a staff member contemplating becoming a candidate to succeed the individual's employing Member may engage in pre-candidacy, —testing the watersll activities without terminating his or her congressional employment. The restrictions include that the individual may do so only if his or her employing Member consents, the employee complies with the rules and regulations that are generally applicable to campaign activity by employees, and the employee's activities do not go beyond —testing the watersll as defined by the FEC. The permissible —testing the watersll activities are described in the FEC publication, *Campaign Guide for Congressional Candidates and Committees*. Among the activities that are prohibited under that advice are any that indicate that the individual has in fact become a candidate, such as the use of general public political advertising, or the raising of funds beyond those reasonably necessary to determine whether one should become a candidate.

## Campaign Contributions and Contributors

This section addresses the laws, rules, and standards of conduct on three subjects related to campaign or political contributions:

- The solicitation of contributions;
- The receipt and acceptance of contributions; and
- The general prohibition against taking actions in one's official capacity on the basis of political considerations.

### *Soliciting Campaign and Political Contributions*

While the federal gift statute (5 U.S.C. § 7353) broadly restricts the ability of House Members and staff to **solicit** things of value from virtually anyone, even when no personal benefit to the solicitor is involved, legislative materials concerning the

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<sup>33</sup> The same requirement will usually apply when an employee runs for the House in a newly created district resulting from reapportionment, and that district includes part of his or her employing Member's district. Any employee considering running for the House in these circumstances should contact the Committee for specific advice.

statute state that it does **not** apply to the solicitation of political contributions.<sup>34</sup> Consistent with those materials, the Standards Committee has long taken the position that the restrictions on solicitation set forth in that statute do not apply to political solicitations. However, in soliciting campaign or political contributions, Members and staff are subject to a number of other restrictions, as follows.

**No Knowing Solicitation of Federal Employees.** A provision of the federal criminal code, 18 U.S.C. § 602, prohibits Members of Congress and staff (as well as candidates for Congress and other federal employees) from knowingly soliciting any contribution from any other federal officer or employee.

The contributions to which this statute applies are those made to influence a federal election. That is, the term contribution is defined in this statute by reference to the definition stated in the Federal Election Campaign Act (—FECA) (2 U.S.C. § 431(8)). (As discussed above, —contribution is defined in the same manner in the statute prohibiting federal employees from making a contribution to their employer, 18 U.S.C. § 603.)

The statute prohibits the —**knowing** soliciting of contributions from federal employees. Accordingly, an inadvertent solicitation of a federal employee, such as may occur in a general fundraising campaign aimed at the public at large, would not violate the statute.<sup>35</sup> In addition, the statute does **not** prohibit the **receipt** of unsolicited contributions from House or other federal employees (although, as previously noted, a separate statute prohibits those employees from making a contribution to their employer).

It is clear both from the terms of 18 U.S.C. § 602 and from its legislative history<sup>36</sup> that the solicitation of contributions by House Members from **other Members** does **not** violate the statute. It is also permissible under the statute for House and other federal employees to solicit contributions from Members.

**No Solicitation in House Offices, Rooms, or Buildings.** The prohibition against House Members or employees soliciting campaign or political contributions in or from House offices, rooms, or buildings is very broad. With one minor exception that is discussed below, the prohibition applies to **all** forms of solicitations — solicitations made in person, over the telephone, or through the mail — and it applies to solicitations of **any** kind of campaign or political contribution, including

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<sup>34</sup> 136 *Cong. Rec.* H1647 (daily ed. April 24, 1990) (regarding technical corrections to the Ethics Reform Act of 1989).

<sup>35</sup> See 113 *Cong. Rec.* 25,703 (Sept. 11, 1973), and H. Rep. 96-422, *supra* note 22, at 25.

<sup>36</sup> 125 *Cong. Rec.* 36,754 (1979) (statement of Sen. Hatfield).

contributions subject to FECA, and contributions for a state or local campaign, and so-called —soft money— contributions.

A telephone solicitation from a House office or building would **not** be permissible merely because the call is billed to a credit card of a political organization or to an outside telephone number, or because it is made using a cell phone in the hallway. Similarly, when a House Member or employee makes solicitation calls somewhere else, such as at one of the campaign committee offices, and has to leave a message, the individual should **not** leave his or her House office telephone number for the return call. In addition, a fundraising mailing should not be either prepared or assembled in a House room or office, even if no House equipment or supplies are used in the process.

These prohibitions derive from both a provision of the federal criminal code, 18 U.S.C. § 607,<sup>37</sup> as well as from rules and standards of conduct of the House. The criminal statute makes it unlawful —to solicit or receive a donation of money or other things of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties.— The statute prohibits the solicitation or receipt of contributions, including —soft money— contributions, by federal officials and from anyone who is located in a federal building occupied by federal officials or employees used to discharge official duties. (The provisions of this statute regarding the receipt of such contributions in those rooms and buildings are discussed below.) The statute by its terms applies to the House office buildings, the Capitol, and district offices.

In addition, the rules issued by the House Office Building Commission concerning the use of the House office buildings prohibit the soliciting of contributions in the buildings other than for certain charitable purposes.<sup>38</sup> Moreover, as discussed above, the House rooms, offices, and buildings are considered official resources, and as such, they are **not** be used for the conduct of **any** campaign or political activity, including the solicitation of contributions.

However, with one exception,<sup>39</sup> the rules and standards of conduct enforced by the Standards Committee do **not** prohibit **Members** from soliciting (or receiving) campaign or political contributions **from other Members** in the House buildings.

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<sup>37</sup> The statute was amended by § 302 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 96 (March 27, 2002).

<sup>38</sup> Rules of the House Office Building Commission were last revised in February 1999 (available from the Speaker's office).

<sup>39</sup> See House Rule 4, cl. 7 (—A Member, . . . officer, or employee of the House, or any other person entitled to admission to the Hall of the House or rooms leading thereto by this rule, may not knowingly distribute a political campaign contribution in the Hall of the House or rooms leading thereto.—).

Long ago the House took the position that Member-to-Member solicitation is permissible, notwithstanding a criminal statute (predecessor to current 18 U.S.C. § 607) that generally barred political solicitations in federal buildings.<sup>40</sup> The Standards Committee has reiterated that position in a number of advisory memoranda it has issued to the House, the first of which was dated November 21, 1985.

Several points regarding Member-to-Member solicitation in the House buildings should be noted:

- This guidance applies **only** to Member-to-Member solicitations. Staff solicitation of Members in House buildings, even when done at the direction of a Member, or when done from telephones located in a campaign office, is **not** permissible.
- Members may solicit other Members in person, over the telephone, or through the mail, but the use of official stationery in making written solicitations is **not** permissible.
- While the Justice Department has responsibility for enforcing the criminal statute in this area, 18 U.S.C. § 607, so far as the Standards Committee is aware, the Department's assent to the position of the House on Member-to-Member solicitation, as summarized above, has never been sought.

**No Use of Other Official Resources.** The laws, rules, and standards of conduct discussed above that generally prohibit the use of official House resources for campaign or political activity certainly prohibit their use in soliciting campaign or political contributions. The resources subject to this prohibition include office equipment, such as the computers, telephones and fax machines, office supplies, official stationery, and congressional staff time. House employees may be involved in soliciting campaign contributions only on their own time and outside of congressional space, as discussed above.

**No Use of a Facsimile of Official Stationery.** Later in this chapter, the rules on letterhead used for campaign purposes are discussed. Those rules clearly apply to any letter that solicits campaign or political contributions.

**No Link With an Official Action or Special Access.** The chapter on gifts makes the point that a House Member or employee should never accept any gift that is linked to any official action that he or she has taken or is being asked to take, and it includes a discussion on the criminal bribery and illegal gratuities

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<sup>40</sup> 6 *Cannon's Precedents of the House of Representatives* § 401 (1936), concerning a resolution on this matter that was approved by the House in 1913.

statutes. Similarly, no solicitation of a campaign or political contribution may be linked to an action taken or to be taken by a Member or employee in his or her official capacity. An early work on congressional ethics addresses this subject as follows:

It is probably not wrong for the campaign managers of a legislator . . . to request contributions from those for whom the legislator has done appreciable favors, but this should never be presented as a payment for the services rendered. Moreover, the possibility of such a contribution should never be suggested by the legislator or his staff at the time the favor is done. Furthermore, a decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts. Finally, not the slightest pressure should be put upon the recipients of the favors in regard to the campaign.<sup>41</sup>

The Standards Committee has long advised Members and staff that they should always exercise caution to avoid even the appearance that solicitations of campaign contributions are connected in any way with an action taken or to be taken in their official capacity.

**Example 8.** A House staff member is working with representatives of a corporation on legislation supported by that corporation. The staff member may do campaign work consistent with the rules set out above, including soliciting contributions. However, at least while the staff member is doing that legislative work, and for a reasonable period thereafter, he should not solicit contributions from the representatives of that corporation.

**Example 9.** As part of its decision-making process on whether to continue to fund a particular Defense Department procurement, a committee sponsors an official fact-finding trip to the facilities of the manufacturer. Company officials propose to hold a campaign fundraiser for a participating Member while he is in town. The Member should decline the suggestion. (If such a trip were instead sponsored and paid for by the manufacturer, Member attendance at a fundraiser during the course of the trip may be precluded in any event by FEC rules. See Chapter 3 on travel.)

Furthermore, a Member should not sponsor or participate in any solicitation that offers donors any special access to the Member in the Member's official capacity. In this regard, in 1987 a Senate Committee Chairman invited lobbyists and PAC directors to join a —Chairman's Council, the members of which would

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<sup>41</sup> Paul H. Douglas, *Ethics in Government* 89-90 (1952).

donate \$10,000 to his campaign and have breakfast with him once a month, at which legislative matters could be discussed.<sup>42</sup> While the Senator dissolved the club soon after it was publicized,<sup>43</sup> later in the year the Senate Ethics Committee issued a ruling on whether Senators may offer membership in policy discussion groups in return for campaign contributions. In discussing the matter, the Senate Committee observed:

Offering campaign contributors access to those discussions [of policy and legislative issues] in direct return for campaign contributions creates the appearance that contributors receive special access to the Members, and thereby exercise undue influence on the legislative process.

The Senate Committee's ruling was as follows:

While solicitations offering access to policy discussion groups may violate no law or Senate rule, they nonetheless affect public confidence in the Senate. Therefore, Senators should not make solicitations which may create the appearance that, because of a campaign contribution, a contributor will receive or is entitled to either special treatment or special access to the Senator.<sup>44</sup>

House Members should adhere to the same rule with regard to official access.

**Do Not Direct Contributions to a House Office.** A solicitation for campaign or political contributions should not in any way request or suggest that the recipient mail or deliver a contribution to a House office. As explained immediately below, federal law allows the receipt of a contribution in a congressional office, but only if the contribution arrives there unexpectedly. Accordingly, for example, a written solicitation should not include any House office address. (For that matter, a House office address or telephone number should not be included on **any** political communication.) Likewise, oral solicitations should not contain any suggestion that response may be made to the congressional office.

### ***Receipt and Acceptance of Contributions***

The gift rule (House 25, clause 5) prohibits House Members and staff from accepting any gift except as specifically provided in the rule. One of the gifts that Members and staff may accept under a provision of the rule (clause 5(a)(3)(B)) is:

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<sup>42</sup> *Wash. Post*, Feb. 3, 1987, at A1.

<sup>43</sup> *Id.*, Feb. 7, 1987, at A1.

<sup>44</sup> Senate Select Comm. on Ethics, *Interpretative Ruling No. 427* (Sept. 25, 1987).

[a] contribution, as defined in section 301(8) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431) that is lawfully made under that Act, [and] a lawful contribution for election to a State or local government office.

Accordingly, acceptance of an unlawful contribution under either FECA or applicable state law may violate the House gift rule as well.

**Receipt of a Contribution in a House Office.** As indicated above, a provision of the federal criminal code, 18 U.S.C. § 607, generally prohibits the receipt of federal campaign contributions—in a room or building occupied in the discharge of official duties by an officer or employee of the United States.¶ However, the statute includes, in subsection (b), an exception stating that the prohibition does not apply to contributions received by congressional staff, provided that two requirements are satisfied:

- —such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any [federal] room, building, or other facility,¶ and
- —such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(e) of the Federal Election Campaign Act of 1971.¶

Accordingly, receipt of a contribution in a House office is permissible under the statute only if the contribution arrives there unexpectedly. Thus, as stated above, a solicitation should never request or suggest that a contribution be sent or delivered to a House office, and furthermore, Members and employees may not assent in advance to the sending or delivery of a contribution to a House office.

**Example 10.** In a conversation with an individual who will be visiting the Member in the congressional office, a staff person learns that the individual intends to give the Member a campaign contribution during the visit. The staff person should tell the individual that the Member will not be able to accept the contribution in the office and that an alternative means of tendering the contribution will have to be used.

However, merely because a contribution does not violate 18 U.S.C. § 607 in that it was presented or received in the office unexpectedly does **not** necessarily mean that the contribution may be accepted. A contribution that is linked with an official action that a Member or employee has taken or is being asked to take may not be accepted. This would occur, for example, if a purpose of an individual's visit to the office, in addition to presenting a contribution, is to urge the Member to support a particular piece of legislation. This point is further discussed below.

The requirement of 18 U.S.C. § 607 that a contribution be transferred to the campaign within seven days must be satisfied without use of any official resources. Campaign envelopes and stamps may be used to forward such contributions, and thus it may be desirable for a congressional office to have a supply of those envelopes and stamps for use in forwarding both contributions and campaign-related inquiries that are received in the office.

**A Contribution Linked to an Official Action May Not Be Accepted.** As discussed above, no solicitation of a campaign or political contribution may be linked to any action taken or to be taken by a Member or employee in his or her official capacity.

In a similar vein, a Member or employee may not accept any contribution that the donor links to any official action that the Member or employee has taken, or is being asked to take. In this respect, a campaign or political contribution is treated like any other gift, and acceptance of a contribution in these circumstances may implicate a provision of the federal gift statute (5 U.S.C. § 7353) or the criminal statutes on bribery and illegal gratuities.

Further information on this subject is available in Chapter 2 on gifts. Please note, however, that while certain token gifts of appreciation (such as candy or flowers) for an official action may be acceptable, no campaign contribution that is linked to an official action is ever acceptable.

***Example 11.*** An office receives a letter from a constituent requesting casework assistance. A check made out to the Member's campaign is enclosed with the letter, but the letter makes no reference to the check. While the office may assist the constituent, the check must be returned to the constituent. Because the check was sent with a request for assistance, it is impermissibly linked with an official action.

### ***Prohibition Against Linking Official Actions to Partisan or Political Considerations***

As detailed above, a solicitation for campaign or political contributions may not be linked with an official action taken or to be taken by a House Member or employee, and a Member may not accept any contribution that is linked with an action that the Member has taken or is being asked to take. A corollary of these rules is that Members and staff are not to take or withhold any official action on the basis of the campaign contributions or support of the involved individuals, or their partisan affiliation. Members and staff are likewise prohibited from threatening punitive action on the basis of such considerations.

Questions in this area have arisen most frequently on the matter of casework, and on this subject, the Standards Committee has long advised Members



and staff that they are **not** to give preferential treatment to casework requests made by the Member's supporters or contributors. Instead, **all** requests for casework assistance are to be handled according to their merits. *Advisory Opinion No. 1* of the Standards Committee, which was issued in 1970, states that one of the basic standards of conduct regarding casework is the following:

A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.<sup>45</sup>

Essentially the same point was made in a report issued by the Senate Select Committee on Ethics in connection with the —Keating Fivell case:

The cardinal principle governing Senators' conduct in this area is that a Senator and a Senator's office should make decisions about whether to intervene with the executive branch or independent agencies on behalf of an individual without regard to whether the individual has contributed, or promised to contribute, to the Senator's campaigns or other causes in which he or she has a financial, political or personal interest.<sup>46</sup>

While the guidance set forth above is specifically addressed to the handling of casework matters, that guidance is applicable to **all** official actions taken by Members and staff, including with regard to legislation. In this regard, one of the key provisions of the Code of Ethics for Government Service states, in ¶ 5, that government officials should —[n]ever discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not.¶ The Code further provides, in ¶ 10, that —public office is a public trust,¶ and thus the public has a right to expect House Members and staff to exercise impartial judgment in performing their duties.

More generally, one of the ultimate purposes of the ethics rules is to help ensure that each governmental action is taken on the merits of the particular question, rather than any extraneous factors. On this point, one scholar on government ethics has stated: —Ethics rules, if reasonably drafted and reliably enforced, increase the likelihood that legislators (and other officials) will make decisions and policies on the basis of the merits of issues, rather than on the basis of factors (such as personal gain) that should be irrelevant.¶<sup>47</sup>

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<sup>45</sup> The full text of *Advisory Opinion No. 1* is reprinted in the appendices to this Manual.

<sup>46</sup> Senate Select Comm. on Ethics, *Investigation of Sen. Alan Cranston*, S. Rep. 102-223, 102d Cong., 1<sup>st</sup> Sess. 11-12 (1991) (footnote omitted).

<sup>47</sup> Congressional Ethics Reform: Hearings Before the Bipartisan Task Force on Ethics, U.S. House of Representatives, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 113 (1989) (statement of Dennis F. Thompson).

## Proper Use of Campaign Funds and Resources

The first section of this chapter summarizes the rules to which House Members and staff are subject in their use of **official** House resources, and in particular the prohibition against using those resources for campaign or political purposes. **Campaign** resources – campaign funds, as well as the goods and services acquired with campaign funds – are an entirely separate set of resources available to Members. This section addresses the rules to which House Members and their campaign staff are subject in their use of campaign resources.

As detailed in this section, **both** the House Rules **and** the Federal Election Campaign Act (–FECA) include provisions regulating the use of campaign funds and resources. The provisions of the House rules apply to **any** campaign funds under a Member’s control, including those for elections to state or local office, whereas the provisions of FECA apply only to campaign funds for federal office. A Member’s use of campaign funds for federal office is permissible only if it complies with the provisions of **both** the House Rules **and** FECA.

The major provision of the House rules on proper use of campaign funds is found in the House Code of Official Conduct, which is set forth in House Rule 23. House Rule 23, clause 6 provides as follows:

A Member, Delegate, or Resident Commissioner –

- (a) shall keep his campaign funds separate from his personal funds;
- (b) may not convert campaign funds to personal use in excess of an amount representing reimbursement for legitimate and verifiable campaign expenditures; and
- (c) except as provided in clause 1(b) of rule XXIV, may not expend funds from his campaign account that are not attributable to bona fide campaign or political purposes.

In addition, use of campaign funds for official House purposes is limited by provisions of both the House rules and statutory law, including House Rule 24, clause 1 and 2 U.S.C. § 59e(d)(1). At the beginning of the 109<sup>th</sup> Congress, the House rules were amended to permit the use of funds from the principal campaign account to pay for certain, limited types of official expenses. The purpose of the amendment was to conform House rules to current law (*see* section 105, Pub. L. 108-83, 117 Stat. 1018 (2003)), and the amendment mirrored the Senate rules that took effect in 2002.<sup>48</sup>

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<sup>48</sup> See H. Res. 5, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (151 *Cong. Rec.* H13 (daily ed. Jan. 4, 2005)).

Thus, briefly stated a Member of the House –

- May spend campaign funds for –**bona fide campaign or political purposes** only (with limited exceptions described below);
- May **not** convert campaign funds or resources to **personal use**, and must be able to verify that campaign resources have not been so misused; and
- May **not** use campaign funds or resources for **official House purposes**, with limited exceptions.

The rules generally preclude personal or official use of not only campaign funds, but also certain equipment, goods, or services acquired with campaign funds – including, for example, equipment such as a fax machine or computer, and the services of paid campaign staff. However, as discussed later in this chapter, a Member may use campaign funds to pay for a cell phone or –personal digital assistant and use such devices for official and campaign purposes.

Further elaboration is provided below. In addition, reference is made to the provision of FECA on proper use of campaign funds (2 U.S.C. § 439a), and to the regulations and advisory opinions issued by the Federal Election Commission (–FEC) on that subject. In 2002, through the Bipartisan Campaign Reform Act (Pub. L. 107-155, 116 Stat. 81) (–BCRA) (also popularly referred to as –Shays-Meehan or its predecessor measure –McCain-Feingold), which became effective on November 6, 2002, Congress retained the ban on personal use of campaign funds and codified for the most part the FEC’s previously issued regulations on personal use. On December 13, 2002, the FEC published new regulations, which are found in 11 C.F.R. Part 113, retaining its pre-BCRA personal use regulations, with certain exceptions (discussed below).<sup>49</sup>

Members and staff should contact the FEC with questions regarding that agency’s rules. Two points on those rules that are particularly noteworthy.

**First**, in addition to consulting the FEC regulations on the matter of impermissible **personal** use of campaign funds, the FEC has issued numerous advisory opinions and they constitute an important body of law in this area.<sup>50</sup>

**Second**, while FECA allows the use of campaign funds to pay expenses incurred in connection with one’s duties as a federal officeholder, House rules, as noted above, only permit the use of campaign funds for certain **limited** purposes. Accordingly, House Members should not rely on FEC materials that refer to or are

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<sup>49</sup> See 67 *Fed. Reg.* 76962 (Dec. 13, 2002).

<sup>50</sup> *But see* 67 *Fed. Reg.* 76972 (noting that FEC Advisory Opinion 1999-1 (banning the use of campaign funds to pay candidate salaries) has been superseded by BCRA).

based on the FECA's provision allowing the use of campaign funds to pay federal officeholder expenses.<sup>51</sup> However, as explained immediately below, because of the broad manner in which —political purposes‖ is defined for purposes of the House rules, particular uses of campaign funds that the FEC approves as federal officeholder expenses may be permissible under the House rules as —political‖ expenses.

### *Use for Bona Fide Campaign or Political Purposes*

**In General.** While House rules provide that campaign funds may be used for —bona fide campaign or political purposes‖ only, the rules do not include a definition of that term. The Standards Committee has long advised that each Member has wide discretion to determine whether any particular expenditure would serve such purposes, provided that the Member does not convert campaign funds to personal or official uses.

Put another way, the rule is **not** interpreted —to limit the use of campaign funds strictly to a Member's reelection campaign,‖ but instead is interpreted —broadly to encompass the traditional politically-related activities of Members of Congress.‖<sup>52</sup> Thus,

if a Member determines, for example, that advertisements in publications of civic organizations, the mailing of holiday greetings to constituents, or travel to meetings with local party officials, would constitute a political expenditure, as so defined, or are otherwise politically-related, then he may use campaign funds for that purpose.<sup>53</sup>

Accordingly, a Member may use campaign funds to pay for activities that are not overtly political in nature — such as mailing birthday or holiday greetings to constituents — if (1) the Member determines that the activity serves a political purpose, and (2) the activity does not involve a use of campaign funds for any personal purpose. However, as detailed earlier in this chapter, Members and staff must bear in mind that **no** official House resources may be used in support of **any** campaign-funded activity. Thus, for example, holiday greeting cards that are purchased with campaign funds may not be addressed either in the congressional office or by congressional staff while on official time. The same applies to U.S. Capitol Historical Society calendars that are purchased with campaign funds.

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<sup>51</sup> See, in this regard, House Comm. on Standards of Official Conduct, *Advisory Opinion No. 6*, which is reprinted in the appendices, for a further discussion.

<sup>52</sup> House Select Comm. on Ethics, *Final Report*, H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess. 16 (1979).

<sup>53</sup> *Id.*

**Example 12.** As noted in the text, a Member may use campaign funds to mail holiday greetings to his or her volunteers and contributors. However, a Member may not use campaign funds to send such greetings to family members or personal friends (other than those who are also volunteers or contributors), as to do so would constitute a personal use of campaign funds.

Examples of specific uses of campaign funds on which the Standards Committee has received inquiries are set forth below. By and large, these activities may, under House rules, be paid for with campaign funds, provided that the Member determines that the activity would serve a bona fide political purpose and raises no concern about personal use.

The discussion below also notes the applicable FEC advisory opinions that have been issued to date. When a Member wishes to use campaign funds for a purpose on which the Standards Committee has taken a position but the FEC has not, the Member should consult with the FEC before proceeding.

**Charitable or Community Service Projects.** As a general matter, campaign funds and resources may be used to establish or support a bona fide charitable or community service project in the Member's district. On this point, FEC Advisory Opinion 1999-34 is instructive.<sup>54</sup> In that opinion, the FEC approved a Member's use of campaign funds to support a fundraising event for elementary schools in the Member's district. Other participants in the event were local businesses, schools, PTAs, and volunteers. The Member's campaign funds were to be used for printing and postage costs for promotional materials, as well as to match donations made by individuals dollar-for-dollar, up to a maximum donation by the campaign of \$60,000.

One factor in the FEC's decision was that no campaign activity on the Member's behalf would occur at the event or in the promotion or other arrangements for the event. For example, no campaigning would occur at the event, whether by way of speeches, distribution of campaign material, or otherwise, and the campaign would not attempt to use any information on the event's donors for campaign purposes. The opinion indicates that if such campaign activity were planned, then the donations for the event made by individuals and organizations might be deemed campaign contributions to the Member under FECA, and hence subject to the limitations and prohibitions of FECA.

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<sup>54</sup> Copies of this and all other FEC Advisory Opinions are available through the FEC's website at [www.fec.gov](http://www.fec.gov). The FEC issues written advisory opinions in response to specific written requests, and both the requests and the advisory opinions are publicly available. See 2 U.S.C. § 437f; 11 C.F.R. Part 112.

That Advisory Opinion addresses only the requirements of FECA on proper use of campaign funds, and it does not address the applicable provisions of the House rules. However, in the view of the Standards Committee, a Member may properly determine that expenditures for the purposes and in the circumstances described in that opinion serve a bona fide political purpose and hence are permissible under House rules.<sup>55</sup>

Also relevant here are the facts that FECA generally allows Members to donate campaign funds to a charitable organization, *i.e.*, an organization described in §170(c) of the Internal Revenue Code, and such donations are likewise permissible under the House Rules.<sup>56</sup>

**Example 13.** A Member wishes to establish a —Books for Kids‖ program in his district, in which donations of books for use in local libraries are solicited, and the donated books are collected and then made available to libraries. The program may be operated by campaign staff, and campaign funds may be used to pay program costs such as for printing. However, prior to soliciting for books, the Member must obtain the permission of the Standards Committee to make the solicitation (see Chapter 10 for a discussion of the restrictions and limitations on solicitations). In addition, the program must be conducted in compliance with FEC requirements, and no official House resources may be used in furtherance of the program.

In Advisory Opinion 2000-37, the FEC advised a House Member that he could use campaign funds to purchase replica —Liberty Medals‖ from a private company and award them to veterans in his district who had participated in the D-Day landings in France during World War II. The FEC characterized this undertaking by the Member as —a form of community service.‖ Significantly, the FEC characterized the cost of the particular medals (about \$13 to \$17 each) as —relatively low,‖ and went on to caution that the undertaking would be problematic under FEC rules if it entailed the use of campaign funds to confer a —significant personal benefit‖ upon the recipient veterans.

**Payment of Certain Legal Expenses.** The Standards Committee has determined that it is generally permissible under House Rules for a Member to use campaign funds to defend legal actions arising out of his or her campaign, election,

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<sup>55</sup> Another FEC Advisory Opinion, 1996-45, approves a Member's use of campaign funds to pay the expenses of consultants to travel to her district for the purpose of leading a seminar that the Member was sponsoring on racial and ethnic relations. The proposed seminar was to be held after the election and was to include representatives of nonprofit organizations and city agencies in the Member's district.

<sup>56</sup> *Final Report*, H. Rep. 95-1837, *supra* note 52, at 16-17.

or the performance of official duties. The basis of this determination is that the protection of a Member's presumption of innocence in such actions is a valid political purpose. Use of campaign funds to pay the legal expenses incurred in other kinds of legal actions may also be permissible. However, campaign funds may not be used when the action is primarily personal in nature, such as a matrimonial action, or could result in a direct personal benefit for the Member.

Before using campaign funds to pay any legal expenses, a Member should consult with the Standards Committee to ensure that the legal services are ones that the Member may properly pay with campaign funds. A Member should also consult with the FEC before using campaign funds for this purpose. In this regard, under the FEC regulations on proper use of campaign funds, payment of legal expenses is among the uses for which the FEC makes determinations on impermissible personal use on a case-by-case basis.<sup>57</sup> However, the FEC has issued a number of Advisory Opinions on use of campaign funds to pay legal expenses, and an understanding of the approach that the FEC takes on this subject can be obtained through a review of those opinions.<sup>58</sup>

In addition (or alternatively), a Member, officer, or employee may choose to set up a —legal expense fund,|| independent of any campaign fund, for the purpose of paying the expenses of certain legal actions. The requirements for the establishment of a legal expense fund are described in Chapter 2 on gifts.

In Advisory Opinion 2000-40, the FEC advised that House Members could donate campaign funds to a legal expense fund that had been established by another House Member. However, one of the specific bases of the FEC's decision was the nature of the litigation for which the legal expense fund had been established, and thus the opinion should not be read to grant a blanket approval of the donation of campaign funds to any Member legal expense fund. Any Member considering donating campaign funds to a legal expense fund should consult with both the FEC and the Standards Committee.

**Payment of Certain Travel Expenses.** Under House Rules, campaign funds may be used to pay travel expenses when the **primary purpose** of the trip is activity that serves a bona fide campaign or political purpose, provided that the outlays are limited to the expenses that are necessarily incurred in engaging in that activity. Thus, quite clearly, campaign funds may be used to pay the expenses of a trip the primary purpose of which is to attend a campaign or political event, or to engage in other campaign activity. The general prohibition on the use of campaign funds for

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<sup>57</sup> 11 C.F.R. § 113.1(g)(1)(ii)(A).

<sup>58</sup> See, e.g., FEC Advisory Opinions 2006-35, 2005-11, 2003-17, 2003-15, 1998-1, 1997-27, 1997-12, 1996-24, and 1995-23.

personal travel is discussed in the next section of this chapter. The use of campaign funds for official travel is also discussed below.

Notwithstanding the general permissibility of using campaign funds for campaign travel, an amendment to the House Rules enacted during the 110<sup>th</sup> Congress<sup>59</sup> generally prohibits House Members from using campaign funds (as well as official funds and personal funds) for travel on a non-commercial aircraft. *See* House Rule 23, clause 15. The prohibition applies to travel on an aircraft unless one of the exceptions to the rule applies, including one that permits the use of campaign funds for a flight when —the aircraft is operated by an air carrier or commercial operator certificated by the Federal Aviation Administration and the flight is required to be conducted under air carrier safety rules.¶ In other words, campaign funds generally may be used only for commercially scheduled flights and flights provided by a commercial charter service, and may not be used for travel on corporate or other privately-operated aircraft. This prohibition applies to the use of funds from any campaign committee, including funds from a political action committee. Further guidance on the use of non-commercial aircraft is found in the Chapter 3 on travel.

There are circumstances in which campaign funds may properly be used to pay travel expenses of not only a Member, but also his or her immediate family members. For example, when the primary purpose of a trip taken by the spouse of a Member is to accompany the Member at a political event – such as one of the annual party fundraising dinners in Washington – campaign funds may be used to pay the spouse’s travel expenses.

Campaign funds may also be used to pay spouse travel expenses when the primary purpose of the trip is to accompany the Member at certain non-political events that the Member attends in his or her capacity as a Member. For example, the Standards Committee approved the use of campaign funds to pay the travel expenses of spouses and minor children of Members in attending the bipartisan congressional retreats in Hershey, Pennsylvania, and in other locations. The FEC also approved the use of campaign funds to pay the Hershey travel expenses in a 1997 advisory opinion.<sup>60</sup>

In several other advisory opinions as well, the FEC approved the use of campaign funds to pay travel and related expenses of a Member’s spouse and minor children.<sup>61</sup> Another FEC advisory opinion approves the use of campaign funds to

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<sup>59</sup> H. Res. 363, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (May 2, 2007). This resolution amended in its entirety an earlier provision contained in H. Res. 6, 110<sup>th</sup> Cong. 1<sup>st</sup> Sess. (Jan. 4, 2007).

<sup>60</sup> FEC Advisory Opinion 1997-2.

<sup>61</sup> *E.g.*, FEC Advisory Opinions 2005-09 (travel expenses for minor children accompanying Senator and spouse from district to Washington when parents traveling to participate in function  
(*con’t next page*)



pay for child care expenses incurred as a result of a need for the Member's wife to accompany him to certain campaign-related events.<sup>62</sup> However, the approvals granted in all of those opinions were based on the specific circumstances presented in the underlying advisory opinion request, and thus a Member should not rely on any of those opinions without first carefully reviewing them. Another FEC advisory opinion, which is discussed in footnote 55 above, addresses the payment of travel expenses of consultants to attend a seminar sponsored by a Member, and another (1996-20) approves the use of campaign funds to pay the travel expenses of a Member's staff member to attend a national party convention.

The Standards Committee has determined that a Member may, under House Rules, use campaign funds to pay the Member's travel expenses to attend the funeral of a retired Member, or a colleague's immediate family member.<sup>63</sup> (Member travel to the funeral of a Member who dies while in office is generally arranged by the House.)

**Payment of Certain Meal Expenses.** Campaign funds may be used to pay for a meal in a number of circumstances, including, for example, a meal that constitutes a bona fide campaign fund-raising event, and a meal incident to a bona fide meeting on campaign business. Campaign funds may also be used to pay the meal expenses incurred when a Member or campaign worker is traveling on campaign business. Campaign funds may also be used to pay meal expenses when a Member has a social meal with constituents (other than personal friends or relatives of the Member) who are visiting Washington.

Outlays for meal expenses can, in certain circumstances, raise questions of impermissible personal use of campaign funds. The applicability of the prohibition against personal use of campaign funds to the payment of such expenses is addressed later in this chapter.

**Receptions and Related Activities for Visiting Constituents.** Occasionally when a group of constituents visits Washington, whether to tour or to lobby on legislation, the Member wishes to hold a reception or similar event for the participants.

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directly connected to Senator's bona fide official responsibilities); 1996-34 (spouse travel to national party convention, and spouse and child travel to accompany the Member on a campaign trip through his district); 1996-19 (spouse and child travel to national party convention); 1995-47 (spouse travel to national party convention); and 1995-20 (child accompanying parents in travel between Washington and the Member's district for campaign purposes).

<sup>62</sup> FEC Advisory Opinion 1995-42.

<sup>63</sup> The FEC has not issued a formal advisory opinion on this point and should be consulted before campaign funds are used for such a purpose.

Under rules of the Committee on House Administration, official Member and committee funds may be used to pay for food and beverages only when those expenses are incidental to an —official meeting that includes individuals who are not House Members or staff, such as a meeting with constituents to discuss a legislative issue. Official House funds may **not** be used to pay food or beverage expenses related to social activities or social events, including the receptions held by Members in connection with their swearing-in, or on Inauguration Day. However, Members **may** use their campaign funds to pay the costs of such events.

A separate question is whether events of this nature, when paid for with campaign funds, may be held in a House room or office. Prior to the end of the 105<sup>th</sup> Congress, the policy of the Standards Committee was that with only one exception, campaign-funded events may **not** take place in House rooms or offices. That exception was for the receptions held in honor of an individual's swearing-in as a Member of Congress.

However, at the end of the 105<sup>th</sup> Congress, the Standards Committee changed the policy so as to allow Members to use campaign funds to pay not only for swearing-in receptions held in a House room or office, but also for other events that are social in nature, including Inauguration Day receptions, and social events with constituents. Members and staff should bear in mind, however, that as stated above, House rooms and offices are **not** to be used for any events that are political in nature, such as a meeting on campaign business, or a reception for the contributors to one's campaign. This is so even if monies other than campaign funds are used to pay the event's costs, or there is no cost to the event.

**Letters, Mailings, and Other Communications That Are Not Frankable in Content.** At times Members wish to send letters or mailings, or make other communications, that are not frankable in content under the House Franking Regulations, and hence may not be created or sent using official House resources. Examples of such communications include messages to constituents that are not official in nature, such as birthday greetings, holiday greetings, and letters of condolence. In addition, while letters of congratulations for a public distinction are frankable, other letters of congratulation, such as for years of service at a business, or retirement, are not. Under House rules, a Member **may** use campaign funds and resources to create and send cards, letters, and certificates of these types to constituents.

However, such materials may **not** be produced in or sent from any House office, and may **not** be produced or sent using any other House resource, including office equipment or staff while on official time.

**Example 14.** Congressman A wishes to create a —Congressman A Award of Merit certificate that he will present to constituents who

perform meritorious acts or services. The certificates may be printed with campaign funds, but their content must comply with the same restrictions that apply to campaign letterhead (see discussion below on —Laws and Rules on Campaign Letterhead)). In addition, official House resources may not be used to promote the certificates, or in connection with their presentation.

Occasionally Members wish to send a letter or mailing endorsing a particular candidate for elective office, or commenting on a labor union organizing campaign or some other kind of labor dispute in their district. As a general matter, campaign funds and resources may likewise be used to create and send letters of this type. However, the letterhead used on such mailings should comply with the guidance on campaign letterhead found near the end of this chapter and may not resemble official letterhead.

**Letters, Mailings, and Events for House Leadership Elections.** As a general matter, a Member may use campaign funds to pay for activities in furtherance of a campaign for one of the House leadership offices. For example, a Member may use campaign funds to pay for a reception to promote one's candidacy for one of those offices, and generally such an event may be held in a House room or office. Similarly, a Member may use campaign funds or resources to send a mailing regarding a leadership race.

A Member wishing to use any official House resource in furtherance of a campaign for a House leadership office – such as official stationery, the Inside Mail, or official staff time – should consult with the Committee on House Administration or the Franking Commission, as well as with the Standards Committee, on the extent to which those resources may be used for this purpose. However, when a particular activity related to a leadership race is supported with campaign resources, no official House resources may be devoted to that activity except to the extent noted above.

**Example 15.** A Member who is sending a mailing on a leadership race decides to pay the printing and mailing expenses with campaign funds. No official staff time or any other House resources may be used in furtherance of the mailing.

**Special Events for the Member's House or Campaign Staff.** Under House rules, campaign funds may be used to pay the costs of special events for the Member's House or campaign staff that are social in nature. Examples would include a holiday lunch or a farewell party for a departing staff member. A Member may also use campaign funds to pay for food and beverages for staff in other unusual circumstances, such as when the House is in session late or on a weekend. However, the use of campaign funds to pay for food or beverages for staff in other

than special or unusual circumstances may constitute an impermissible use of funds for personal purposes.

**Member Moving Expenses To or From Washington, DC.** Both the Standards Committee and the FEC have long advised that a newly elected Member may use campaign funds to pay the expenses incurred in moving to Washington, D.C.<sup>64</sup> Such expenses are deemed to be campaign-related in that they are a direct result of winning an election.

In addition, in 1996 the FEC advised a departing House Member that he could use campaign funds to pay the expenses of moving both his congressional office furnishings and his personal household furnishings and effects back to his home state.<sup>65</sup> The Standards Committee has similarly advised that House Rules allow a departing Member to use campaign funds for this purpose. It should be noted, however, that the Standards Committee's advice on this matter is applicable only to the extent that such moving expenses are paid prior to the time that the Member leaves office, at which time the Committee loses jurisdiction over the Member.

As a related matter, FEC regulations provide that campaign funds may be used to defray the costs of winding down the office of a former federal officeholder for a period of six months after he or she leaves office. 11 C.F.R. § 113.2(a)(2).

**Gifts and Donations.** The FEC regulations on use of campaign funds provide that campaign funds may be used for —[g]ifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death.<sup>66</sup> Such gifts may include the relatively inexpensive House or Capitol souvenir items sold by the House gift store or the U.S. Capitol Historical Society, and thus a Member may use campaign funds to purchase such nominal-value gifts for the Member's supporters or contributors. Use of campaign funds for a gift or donation is permissible only if the outlay serves a bona fide campaign or political purpose, and in this regard, the regulation specifies that a Member may not use campaign funds to make a gift or donation to a family member. In addition, as noted below in the section of this chapter on the use of campaign funds for official purposes, campaign funds may also be used to purchase a gift for visiting foreign dignitaries.

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<sup>64</sup> Regarding the FEC, see Advisory Opinion 1980-138.

<sup>65</sup> FEC Advisory Opinion 1996-14; see also Advisory Opinion 1996-44.

<sup>66</sup> 11 C.F.R. § 113.1(g)(4). Regarding the limitation to —nominal value<sup>ll</sup> gifts, see FEC Advisory Opinion 2000-37.

**Other Permissible Uses of Campaign Funds.** As noted above, FECA generally allows Members to donate campaign funds to any entity of the kinds described in § 170(c) of the Internal Revenue Code – including a charitable or educational organization, or a governmental entity – provided that there is no conversion to personal use through the donation. In one advisory opinion, the FEC concluded that committee campaign funds, and funds from a nonconnected multicandidate committee, could be used for a portrait of a committee chairman to be donated to the House of Representatives for display, because the House of Representatives is an organization qualified under § 170(c).<sup>67</sup> FECA also allows the transfer of campaign funds –without limitation to any national, State, or local committee of any political party.¶ Thus if otherwise lawful, campaign funds may be transferred to another candidate, or invested for use in a future political campaign, provided, again, that there is no conversion of funds to personal use. Campaign funds may also be used for certain funeral expenses.

### ***No Personal Use of Campaign Funds or Resources, and the Related Verification Requirement***

As noted above, prohibitions against the use of campaign funds for personal purposes are found in **both** the House rules **and** the Federal Election Campaign Act (–FECA¶ ). The manner in which these prohibitions have been implemented by the Standards Committee and the Federal Election Commission (–FEC¶ ) is discussed below.

**House Rules.** The key provision of the House rules barring use of campaign funds for personal purposes is House Rule 23, clause 6(b) which provides that a Member

may not convert campaign funds to personal use in excess of an amount representing reimbursement for **legitimate** and **verifiable** campaign expenditures. [Emphasis added.]

Two other provisions are pertinent here as well. First, House Rule 23, clause 6(a) provides that each Member –shall keep his campaign funds separate from his personal funds.¶ Second, House Rule 23, clause 7 provides that a Member –shall treat as campaign contributions all proceeds from testimonial dinners or other fund-raising events.¶

In addition, the provision of the rule **prohibiting** the use of campaign funds for personal purposes is, of course, directly related to another provision of the rule, discussed above, **requiring** the use of those funds for bona fide campaign or political purposes. The Standards Committee has taken the position that Members, in

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<sup>67</sup> FEC Advisory Opinion 2007-18.

making expenditures of their campaign funds, must observe these provisions strictly:

[A] bona fide campaign purpose is not established merely because the use of campaign money *might* result in a campaign benefit as an incident to benefits personally realized by the recipient of such funds . . . .<sup>68</sup>

The Committee has explained its reasons for taking this position in the following manner:

[T]he Committee believes that any other interpretation . . . would open the door to a potentially wide range of abuse and could result in situations where campaign moneys were expended for personal enjoyment, entertainment, or economic well-being of an individual without any clear nexus that the funds so expended achieved any political benefit.<sup>69</sup>

The Standards Committee has reiterated this position a number of times,<sup>70</sup> and it was incorporated as well into the 1989 Report of the House Bipartisan Task Force on Ethics.<sup>71</sup>

The rule by its terms requires that each campaign outlay made by a Member be not only —legitimate,|| but also capable of being verified as such. This requirement that the proper purpose of each outlay be —verifiable|| is a common-sense requirement. With the huge number of outlays that Members' campaigns typically make, often on a nearly continuous basis, the propriety of particular outlays may not be subject to review for months or years after the fact, when recollections as to the circumstances or specific purposes of an outlay may well have faded. Absent a requirement for verification, the prohibition against converting campaign funds to personal use would be nullified in substantial part. Furthermore, the verification requirement should serve to cause Members and their

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<sup>68</sup> House Comm. on Standards of Official Conduct, *Investigation of Financial Transactions of Rep. James Weaver with His Campaign Organization*, H. Rep. 99-933, 99<sup>th</sup> Cong., 2d Sess. 13 (1986) (emphasis in original).

<sup>69</sup> *Id.*

<sup>70</sup> *E.g.*, House Comm. on Standards of Official Conduct, *In the Matter of Rep. Richard H. Stallings*, H. Rep. 100-382, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3-4 (1987); House Comm. on Standards of Official Conduct, *In the Matter of Rep. Charles G. Rose III*, H. Rep. 100-526, 100<sup>th</sup> Cong., 2d Sess. 23 (1988).

<sup>71</sup> *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. (Comm. Print, Comm. on Rules 1989), *reprinted in 135 Cong. Rec.* 30740, 30751 (1989).

campaign staffs to exercise caution in spending campaign funds, and to ensure that no outlay is for an impermissible personal purpose.

**Members and their campaign staffs should bear in mind that the verification requirement imposed by the House rules is separate from, and in addition to, whatever recordkeeping requirements are imposed by the Federal Election Commission on federal candidates generally (or, with regard to Members who are candidates for a state or local office, the requirements imposed by applicable state or local law).**

**Application of the House Rules.** The Standards Committee has found that Members violated the House rules on proper use of campaign funds in several disciplinary cases. One case involved, among other things, transfers from the Member's campaign account that were made to repay personal loans of the Member and to cover outstanding obligations against his personal checking account.<sup>72</sup> That case resulted in a censure of the Member by the House.<sup>73</sup>

The rule's verification requirement was implicated in a Standards Committee disciplinary case that was completed in the 106<sup>th</sup> Congress.<sup>74</sup> In that case the Committee determined that a Member had, through his campaign committee, engaged in significant misconduct by failing to keep records adequate to verify the legitimacy of the expenditures that had been made by his campaign for meals, including numerous meals in the Washington, D.C. area, and for private airplane travel, particularly between Washington and the Member's district.<sup>75</sup> According to the reports that his committee had filed with the FEC, the expenditures for those purposes were extraordinarily high in number as well as dollar amount,<sup>76</sup> but the Investigative Subcommittee found that the campaign committee had not made—even the most minimal effort to document or verify that the expenditures were related to legitimate campaign activity.<sup>77</sup>

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<sup>72</sup> House Comm. on Standards of Official Conduct, *In the Matter of Rep. Charles H. Wilson*, H. Rep. 96-930, 96<sup>th</sup> Cong., 2d Sess. 5-6, 7-10 (1980).

<sup>73</sup> In addition, in the 104<sup>th</sup> Congress an investigative subcommittee of the Standards Committee adopted a Statement of Alleged Violation against a Member, two counts of which alleged a misuse of campaign resources, including the use of campaign funds to purchase appliances for the Member and to pay for cleaning of the Member's personal residence. No further action was taken in the case, however, because as of the time the investigative subcommittee completed its work, the Member was about to depart the House. See H. Rep. 104-876, *supra* note 7.

<sup>74</sup> H. Rep. 106-979, *supra* note 4.

<sup>75</sup> *Id.* at 3G-3H.

<sup>76</sup> *Id.* at 6-7, 64-79, 170-212.

<sup>77</sup> *Id.* at 78.

Impermissible personal use of campaign funds can arise in a variety of circumstances.

**Example 16.** A book written by a Member on his legislative agenda has been published. The Member's campaign may **not** purchase copies of the book to give as gifts to contributors if the Member would receive royalties or any other personal benefit from the campaign's purchase of those copies.<sup>78</sup>

In this regard, the prohibition is against the use of campaign funds for personal purposes not only of the Member, but rather of **anyone**. Thus, in one of the cases decided by the Standards Committee, a loan made by a Member's campaign to one of the Member's congressional employees for the employee's personal purposes was found to violate the rule.<sup>79</sup> In another case, a Member admitted to violating the rule in that he had authorized the making of loans of his campaign funds to three individuals (each of whom was an employee of his congressional office, his campaign, or one of his private businesses) for their personal purposes.<sup>80</sup>

In that case, the Member also admitted to violating the rule in certain expenditures of his campaign funds that were made to, or otherwise benefited, businesses that were owned and controlled by the Member and members of his family. They included (1) expenditures for salary and benefits to individuals who worked for the campaign, when in fact a portion of the compensation that the campaign paid to them was for services that they rendered those businesses, and (2) expenditures for the utility expenses of those businesses.<sup>81</sup> With regard to the improper expenditures for utility expenses, the Member's campaign office was located in a building owned by a corporation that was in turn owned by the Member and his family, and in which other such businesses had offices. Yet, for a significant period of time, the Member's campaign paid for all of the expenses incurred by the building's tenants for electricity, gas, water, and telephone – rather than only the pro rata share of the campaign office.<sup>82</sup>

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<sup>78</sup> Regarding purchase of a Member's book by his or her campaign committee, see FEC Advisory Opinions 2006-18, 2004-18, and 2001-8.

<sup>79</sup> H. Rep. 100-382, *supra* note 70, at 2-3. FECA (2 U.S.C. §439a(b)(1)) is to the same effect, as it provides that campaign funds may not be converted –by **any** person to any personal use. (Emphasis added).

<sup>80</sup> House Comm. on Standards of Official Conduct, *In the Matter of Rep. Earl F. Hilliard*, H. Rep. 107-130, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. 13-17 (2001).

<sup>81</sup> *Id.* at 17-25, 58-66.

<sup>82</sup> *Id.* at 58-66.



Notwithstanding the variety of circumstances in which impermissible personal use of campaign funds can arise, questions in this area have arisen most frequently regarding certain kinds of campaign outlays, specifically –

- Borrowing of campaign funds;
- Expenditures for travel;
- Expenditures for meals; and
- Expenditures for the purchase of goods or services, or the rental of property, from the Member or a member of his or her family.

As detailed below, it is now well established that borrowing of money from one's campaign is a serious violation of the House Rules. As to outlays for travel or meals – as well as outlays for the acquisition of goods or services from themselves or their family members – Members must exercise great care, because such outlays by their nature raise a concern of personal use. The kinds of records that should be maintained with regard to these kinds of outlays are also addressed below.

**Borrowing Campaign Funds Is Impermissible.** In four cases the Standards Committee determined that Members had violated the rules on proper use of campaign funds by borrowing money from his campaign.<sup>83</sup> The Committee has clearly stated that this practice is impermissible:

The Committee feels that there is no circumstance in which a Member could borrow from his campaign and satisfy the requirement that the use of the funds would exclusively and solely benefit the campaign. Therefore, the Committee takes the firm position that a Member may not borrow funds from his campaign. The act of borrowing shall be construed as a violation of [current House Rule 23, clause 6], which requires that all campaign expenditures must be for a bona fide campaign expense.<sup>84</sup>

In one of these cases, the Member claimed that the withdrawals he had made from his campaign were repayments of loans he had made to the campaign previously. The Committee rejected that claim, however, because no loan agreements had been executed at the time the Member assertedly made the loans to his campaign, and the reports that the campaign filed with the FEC did not show the amounts in question as outstanding obligations to the Member.<sup>85</sup> In that case,

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<sup>83</sup> H. Rep. 99-933, *supra* note 68; H. Rep. 100-382, *supra* note. 70; H. Rep. 100-526, *supra* n. 70; H. Rep. 104-886, *supra* note 7, at 19-20

<sup>84</sup> H. Rep. 100-526, *supra* note 70, at 23.

<sup>85</sup> *Id.* at 24.

the Committee also found a separate violation of the rules in that the Member had used a certificate of deposit belonging to his campaign as collateral on a personal loan.<sup>86</sup>

In another case, a loan to a Member from his campaign was found to be improper when its purpose was to enable the Member to purchase an automobile that the Member intended to use for both personal and campaign purposes in his district.<sup>87</sup> Another of the loan cases decided by the Standards Committee had been initiated as a result of a transmittal of information from the FEC. The information on the Member's receipt of personal loans from his campaign had been developed by the FEC in the course of investigating allegations that his campaign had failed to report certain disbursements and receipts.<sup>88</sup>

In addition, as noted above, in two cases the Committee found a violation of the rule when a Member's campaign funds were used to make loans to other individuals for personal purposes.<sup>89</sup>

**In view of the Committee's decisions in the above-noted cases, all of which were publicly announced at the time they were issued, the Committee believes that all Members are on notice that they may not borrow from their campaigns, and their campaign funds may not be used to make a loan to anyone for a personal purpose.**

**Expenditures for Travel.** As explained in the preceding section, campaign funds may be used to pay airfare or similar transportation expenses when the —primary purposell of the trip is campaign or political in nature. As explained in the following section, campaign funds also may be used for certain official or officially-connected travel. However, when the primary purpose of a trip is personal in nature, the airfare of that trip may **not** be paid with campaign funds, and must be paid with personal funds.<sup>90</sup> While each Member has the responsibility to determine the —primary purposell of any trip the Member takes, that determination must be made in a **reasonable** manner, taking into account all of the activities in which the Member intends to engage during the course of the trip.<sup>91</sup>

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<sup>86</sup> *Id.* at 24-25.

<sup>87</sup> H. Rep. 100-382, *supra* note 70, at 3, 4.

<sup>88</sup> H. Rep. 104-886, *supra* note 7, at 19-20.

<sup>89</sup> H. Rep. 100-382, *supra* note 67; H. Rep. 107-130, *supra* n. 77.

<sup>90</sup> *See* Chapter 3 on travel.

<sup>91</sup> *Id.*

**Example 17.** A Member takes his family on a post-election vacation trip. Even though the trip is made so that the family can rest after the campaign, campaign funds may **not** be used to pay any of the trip expenses.

**Example 18.** A Member is taking a one-week trip that has a recreational purpose, except that during the trip, she will attend a party fund-raising dinner. Campaign funds may **not** be used to pay the airfare for the trip, and may be used solely to pay the additional meal or lodging expenses (if any) that the Member necessarily incurs in attending that dinner.

As noted above, a Member's campaign must be able to verify that there was a proper campaign purpose for any trip that is paid for with campaign funds. To this end, the Standards Committee strongly advises that campaign committees maintain records that specify the politically related activities in which the Member (or other trip participants) engaged during each campaign-funded trip (for example, —attended party meeting at [date/time], attended reception for campaign donors at [date/time] ). When campaign outlays for travel are frequent and extensive, the need to maintain specific, written records is paramount.<sup>92</sup>

Members and their campaign staffs should also refer to the provisions of the FEC —personal use regulations regarding use of campaign funds for travel, and should consult with the FEC as well when a proposed outlay for travel expenses may raise a concern of personal use. The FEC regulations are briefly noted later in this chapter, and under them, payment of travel expenses is one of the uses for which the FEC makes determinations on impermissible personal use on a case-by-case basis. A number of FEC advisory opinions on the permissibility of using campaign funds to pay travel expenses in various circumstances are noted in the preceding section of this chapter.

**Expenditures for Meals.** Circumstances in which campaign funds may be used to pay meal expenses are also addressed in the preceding section of this chapter. However, use of campaign funds to pay for any meal when the only individuals present are a Member and the Member's personal friends or relatives inherently raises concerns of conversion of campaign funds to personal use. The only circumstance in which payment for such a meal with campaign funds may be permissible is if the other attendees actively work in the Member's campaign, and if the meal is merely incident to a meeting having a clear, specific agenda of campaign business.

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<sup>92</sup> In this regard, see H. Rep. 106-979, *supra* n. 4, at 3G-3H, 6-7, 64-79, 170-212.

In order to be able to verify that there was a proper campaign purpose for meal outlays, the Standards Committee strongly advises that campaign committees maintain records that note both the individuals who were present at each meal, and the specific campaign or political purpose served by the outlay. When the attendees include only friends or relatives, and the above-stated requirements for campaign payment for such a meal are satisfied, the maintenance of specific, written records is essential. In these circumstances, the records should specifically describe the campaign agenda of the meal. As with campaign outlays for travel, when the outlays for meals are frequent and extensive, the need to maintain specific, written records is paramount.<sup>93</sup>

**Purchase or Other Acquisition From the Member or a Member of His or Her Family.** At times a Member (or a member of his or her family) has office space or other property that the person wishes to lease to the Member's campaign. Similarly, at times a family member of a Member wishes to sell certain goods or services to the Member's campaign.

Such a transaction is permissible under the House Rules only if (1) there is a bona fide campaign need for the goods, services, or space, and (2) the campaign does not pay more than fair market value in the transaction. Whenever a Member's campaign is considering entering into a transaction with either the Member or one of his or her family members, it is advisable for the Member to seek a written advisory opinion on the transaction from the Standards Committee.

If a Member's campaign does enter into such a transaction with the Member or a member of his or her family, the campaign's records must include information that establishes both the campaign's need for and actual use of the particular goods, services or space, and the efforts made to establish fair market value for the transaction.

In a Standards Committee disciplinary case that was completed in the 107<sup>th</sup> Congress, a Member admitted to violating the prohibition against personal use of campaign funds in leasing space for his campaign office from a building owned by a corporation that was in turn owned and controlled by him and his family. In that case, the Investigative Subcommittee had determined, on the basis of two appraisals done by professionals that it had engaged, that the rent paid by the Member's campaign for that space was substantially in excess of fair market value.<sup>94</sup> In addition, as noted above, the Member admitted to a separate violation of the personal use prohibition in that his campaign had paid not only its own utility

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<sup>93</sup> *Id.*

<sup>94</sup> H. Rep. 107-130, *supra* note 80, at 34-58.

expenses in that building, but also the utility expenses of various family-owned and controlled businesses that were housed in that building as well.<sup>95</sup>

Yet another violation of the personal use prohibition that the Member admitted to in that case concerned lease payments that his campaign had made for certain other office space. That space had previously been leased by a business that was owned in substantial part by the Member and members of his family, and under that lease, the Member was personally liable for the lease payments. Thus every lease payment that the campaign made for that space relieved the Member and his business of their obligation to make that payment. Earlier in the case claims were made on behalf of the Member that the campaign actually used that office space during the period that it paid the rent, but no credible evidence establishing campaign use of the space was produced, *i.e.*, the verification requirement of the rule was not satisfied.<sup>96</sup>

A Member and the Member's campaign staff should also review the FEC regulations on campaign transactions with a candidate or a family member of the candidate before entering into any such transaction.<sup>97</sup> The FEC regulations also essentially preclude a Member's campaign from paying for use of any space in the personal residence of the Member or a member of his or her family. The rules issued by the FEC that define impermissible personal use of campaign funds are addressed generally in the following section.

**The FEC Personal Use Regulations.** As noted above, FECA, as amended in 2002 by BCRA, provides that a contribution or donation accepted by a candidate or the holder of a federal office may not be —converted by any person to any personal use. 2 U.S.C. § 439a(b)(1). Congress codified for the most part the FEC's previously issued regulations on personal use and retained the ban on personal use of campaign funds. Since BCRA's passage, the FEC has published new regulations that, like their predecessor regulations, both (1) provide a general definition of the term —personal use and (2) determine that certain uses of campaign funds constitute personal use and hence are prohibited.

The general definition in the regulations provides that an impermissible —personal use of campaign funds is use to pay an expense of any person that would be incurred even in the absence of the candidacy for office:

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<sup>95</sup> *Id.* at 58-66.

<sup>96</sup> *Id.* at 25-34.

<sup>97</sup> 11 C.F.R. § 113.1(g)(1)(i)(E), (H); regarding the hiring of a Member's relative as a consultant to the Member's campaign committee, *see* FEC Advisory Opinion 2001-10.

*Personal use* means any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign .....[11 C.F.R. § 113.1(g).]

Among the particular uses of campaign funds that are specified in the FEC regulations as constituting an impermissible personal use are payments for the following:

- Household food items or supplies, or clothing;
- Mortgage, rent or utility payments for any part of any personal residence of the candidate or a family member;
- Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign activity;
- Dues, fees or gratuities at a country club, health club, recreational facility or other non-political organization, unless part of the costs of a specific fundraising event; and
- Tuition payments, other than for the training of campaign staff.<sup>98</sup>

11 C.F.R. § 113.1(g)(1)(i). In addition, payments to the candidate or to a member of the candidate's family for real or personal property owned by any of those individuals, or for bona fide services to the campaign, constitute impermissible personal use of campaign funds to the extent the payments are in an amount that exceeds fair market value. *Id.*, § 113.1(g)(1)(i)(E)(2), (H).

As noted previously, the donation of campaign funds to charitable and similar organizations is generally permissible under FECA. However, the FEC personal use regulations prohibit a donation to such an organization if the Member making the donation —receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit.¶ *Id.* § 113.1(g)(2).

As to other possible uses of campaign funds – including for meal expenses, travel expenses, vehicle expenses, and legal expenses – the FEC regulations provide that the Commission will make a determination as to personal use on a —case by case basis.¶ *Id.* § 113.1(g)(1)(ii). The regulations also address two —mixed use situations:

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<sup>98</sup> However, in Advisory Opinion 1997-11, the FEC approved of a Member's proposed use of campaign funds to cover the costs of a Spanish immersion class that she wished to take for the purpose of enabling her to better communicate with her constituents. The Member had represented that her district includes a large number of constituents who spoke little or no English.

- Campaign-funded **travel** that includes both campaign-related activities and personal activities; and
- Use of a **campaign vehicle** for personal purposes in an amount that is more than *de minimis*.

In both of those situations, the person(s) benefiting from the personal use must reimburse the campaign in an appropriate amount within 30 days. *Id.*

§ 113.1(g)(1)(ii)(C), (D). (Regarding use of a campaign vehicle for non-campaign purposes, *see* below.)

Any questions on these rules should be directed to the FEC. In addition, as noted above, the FEC will provide a written advisory opinion in response to a specific, written advisory opinion request on an activity that the requesting person is undertaking or plans to undertake. 11 C.F.R. pt. 112. Both advisory opinion requests to the FEC and the opinions themselves are matters of public record.

In summary, under House rules, except for certain permitted official uses discussed in the following section, campaign funds are to be used for bona fide campaign or political purposes only. Campaign funds are **not** to be used to enhance a Member's lifestyle, or to pay a Member's personal obligations. Members have wide discretion in determining what constitutes a bona fide campaign or political purpose to which campaign funds and resources may be devoted, but Members have **no** discretion whatsoever to convert campaign funds to personal use. Furthermore, House rules require that Members be able to verify that campaign funds have not been used for personal purposes.

### ***Use of Campaign Funds or Resources for Official House Purposes***

In addition to prohibiting the use of campaign funds and resources for **personal** purposes, House rules generally restrict their use for **official House purposes**. As discussed below, the use of campaign funds is specifically prohibited for certain types of official expenses. However, federal law and House rules permit the use of campaign funds in certain circumstances for other official House purposes, which are detailed below. In addition, there are certain activities that a Member may, at his or her discretion, designate as **either** official **or** political. When the Member designates an activity as political, the Member may, subject to certain requirements, pay for the activity with campaign funds, but may not use any official funds. When the Member designates an activity as official, the Member may support the event with campaign funds subject to the limitations below.

**Restrictions on Official Use of Campaign Funds.** Since 1977 the House rules have prohibited Members from maintaining an —unofficial office account,<sup>11</sup> or having such an account maintained for their use. This prohibition is now set forth in

House Rule 24, clause 1. The purpose of the 1977 amendments was to create a —wallll between campaign funds and official allowances, with —campaign funds used only for politically related expenses on one side, and official allowances used only for official purposes on the other.¶ 99The prohibition against using campaign funds for official purposes was enacted into statutory law in 1990, and is found at 2 U.S.C. § 59e(d).

In 2003, § 59e(d) was amended to narrow the prohibition on the use of campaign funds for official purposes to certain categories of expenses. Section 59e(d) now provides that no Member of the House —may maintain or use, directly or indirectly, an unofficial office account or defray official expenses for franked mail, employee salaries, office space, furniture, or equipment and any associated information technology services (excluding handheld communication devices)¶ from

(1) funds received from a political committee or derived from a contribution or expenditure (as such terms are defined in [the Federal Election Campaign Act]);

(2) funds received as reimbursement for expenses incurred by the Senator or Member in connection with personal services provided by the Senator or Member to the person making the reimbursement; or

(3) any other funds that are not specifically appropriated for official expenses. [Emphasis added.]

Clause 1 of House Rule 24 was amended at the beginning of the 109<sup>th</sup> Congress to conform to current law. The effect of these changes, as described more fully below, was to allow the use of campaign funds for official purposes in certain circumstances to eliminate some inconveniences to Members under the previous rules. The following is a description of the congressional expenses that **may** be paid with funds of the Member’s principal campaign committee.

**Expenses of a Motor Vehicle That Is Used for Official House Travel.** It is permissible for a Member to lease or purchase a motor vehicle with campaign funds and to use that vehicle on an unlimited basis for travel for *both* campaign *and* official House purposes. Campaign funds may also be used to pay the expenses incurred in operating the vehicle, such as insurance, maintenance and repair, registration fees, and any property tax.

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<sup>99</sup>House Comm’n on Admin. Review, *Financial Ethics*, H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 17, 18 (1977).



However, when a vehicle that is paid for with campaign funds is used for **personal** purposes – *i.e.*, for driving to and from one’s official or campaign office – it is necessary to reimburse the Member’s campaign committee in an appropriate amount with personal funds. Members should consult with the FEC on how the amount of reimbursement should be determined. FEC regulations provide that reimbursement should be made within 30 days of the personal use, and thus it appears that reimbursement for regular personal use must be made on a monthly basis.

**Example 19.** A Member has three events scheduled in his district in one day. The first and last are political events, and the second is an official event. He may use the car leased by his campaign to travel to all three events.

**Example 20.** A Member wishes to use a vehicle leased by the campaign for regular commuting – *i.e.*, for driving to or from the Member’s official or campaign office. Such use would be a permissible use for which reimbursement must be made from the Member’s personal funds.

**Expenses of a Cell Phone or BlackBerry That Is Used for Official House Business.** It is permissible for a Member to acquire a —handheld communications device (e.g., a cell phone, a BlackBerry, or a combination cell phone/BlackBerry device, and associated communications services) with campaign funds, and to use the device on an unlimited basis on both campaign matters and official House matters. Members should contact the Committee on House Administration for information on connecting any handheld communications device to the House infrastructure.

These amendments discussed above did **not** change the general restrictions on engaging in campaign or political activity in House rooms or offices, or the rules that generally prohibit using congressional office resources for campaign or political purposes. In particular, Members and staff should be aware of the following:

- A Member or staff person may **not** use a campaign-funded communications device to download data or information residing in the House infrastructure (e.g., a correspondence management service (CMS) database, the global address book, or a Listserv database) and then use that data or information for campaign purposes;
- Even though a cellphone or BlackBerry is paid for with campaign funds, it may **not** be used to make or answer campaign-related calls, or to send or respond to e-mails on campaign matters, while the user is in a House room or office;

- Criminal law (18 U.S.C. § 607) prohibits soliciting campaign contributions in federal rooms and buildings and, thus, Members and staff are prohibited from using one of these devices to solicit a campaign contribution while in the Capitol, a House office building, or a district office; and
- Although it is permissible to use a campaign-funded BlackBerry to send or respond to campaign or political e-mails when the user is not in a House room or office, **the use of one's office desktop computer (including one's —mail.house.gov|| e-mail address) to send or receive such communications continues to be prohibited.**

**Expenses of Official or Officially-Related Travel.** A Member may use campaign funds to pay official or officially-related travel expenses. This authority is especially useful for travel that is official in nature, but the expenses of which may not be payable from official allowances (including those for a congressional office job applicant, an unpaid congressional office intern while on official business, and a speaker or guest at an official House event). It is also permissible to use campaign funds for travel expenses associated with a proper officially-connected trip when the sponsor is not able to cover all of the expenses.

**Expenses in Connection With Official House Events.** In a Committee Advisory memoranda of May 8, 2002, the Committee announced a policy allowing Members to use funds of their principal campaign committee to pay for food and beverage expenses at official House events, such as town hall meetings, briefings, caucus events, conferences, and other events sponsored by their Member office, whether in their congressional district or on Capitol Hill. The amendment to House Rule 24 in the 109<sup>th</sup> Congress affirmed this previous Committee guidance on food and beverage expenses, and also permits Members to pay certain other expenses of such an event with campaign funds, such as room rental, rental of a sound system, and as noted above, the travel expenses of a guest speaker or other participant.

**Gifts for Foreign Dignitaries.** It is permissible for a Member to use campaign funds to purchase a gift for a visiting foreign government official as a mark of courtesy.

**Cautionary Points.** Several points should be kept in mind in considering whether to use campaign funds to pay for congressional expenses:

- The **only** campaign funds that a Member may use to pay for congressional expenses are funds of his or her **principal campaign committee** – **not** the funds of a leadership PAC or a multicandidate committee.
- There has been **no** change in the rules insofar as they generally prohibit other private organizations or individuals from subsidizing any congressional office or activity, whether on a cash or an in-kind basis.
- Congressional Member Organizations (—CMOs|| ) are official House entities that have no independent funding, and campaign funds may not be used to

provide funding for, or otherwise directly support such organizations (other than food and beverage expenses at meetings). However, Member or staff involvement in CMOs may be supported with the use of campaign funds, subject to the limitations above (*e.g.*, a campaign-paid cell phone may be used to make CMO-related phone calls). Similarly, campaign funds may not be used to directly subsidize the expenses of a House committee.

- Neither a Member nor anyone working on his or her behalf may either solicit campaign contributions for the payment of congressional expenses or accept campaign contributions that are in any way **earmarked** for the payment of such expenses.
- While it appears that the use of campaign funds as described here is permissible under FECA, Members should nevertheless consult with the FEC on any questions that arise under FECA, including any questions on how payment of any congressional expense is to be disclosed on the reports that a Member's campaign committee files with the FEC.

#### **Congressional Expenses That *May Not* Be Paid With Campaign Funds.**

House Rule 24 sets forth five categories of congressional expenses that may **not** be paid using campaign funds. They are: office space, furniture, equipment and associated information technology services (except for handheld communication devices), mail or other communications, and compensation for services. As a general matter, expenses in these categories **must** be paid with official House funds under regulations issued by the Committee on House Administration. The first three of these categories are generally self-explanatory, while the other two require further explanation.

Use of campaign funds to pay any expenses of **congressional mail** is prohibited. While the prohibition against use of campaign funds clearly applies to payment of the expenses of franked mail, the rules also prohibit a Member from using campaign funds to pay the expenses of preparing or sending any non-franked mail from his or her congressional office.<sup>100</sup>

As a general matter, the forms of congressional —communications that may not be paid with campaign funds are those set out in the regulations issued by the Committee on House Administration on use of official allowances to pay for

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<sup>100</sup> In addition to the limitation in House Rule 24, clause 1, the use of campaign funds (or other non-appropriated funds) to pay official mailing expenses is specifically prohibited by certain other provisions of statutory law and the House Rules. One of these, 2 U.S.C. §59e(c), requires that official mail expenses be paid only from funds specifically appropriated for that purpose and precludes their supplementation by funds from any other source, public or private. Under other provisions, a mass mailing may not be sent under the frank unless the cost of preparing and printing the mailing are paid exclusively from appropriated funds. See 39 U.S.C. § 3210(f); House Rule 24, clause 6.

communications (*e.g.*, advertisements of a town meeting or other House events, the congressional office website, official stationery, and official audio and video recordings and materials).

As noted above, the limitation on the use of campaign funds extends to goods and services that are acquired with campaign funds. In the context of communications, the Standards Committee has long advised that no brochures or any other materials printed using campaign funds may include the address or telephone number of the congressional office.

**Example 21.** A Member's office begins to receive a large amount of mail on a legislative issue that is before the House, and the Member wants the letters to be answered promptly. The Member may **not** refer any of the letters to his campaign staff for response. The only communications that a congressional office may refer to the campaign staff are those relating to the campaign.

With regard to websites, the Standards Committee has advised as follows:

- A Member's campaign website may **not** include a link to the congressional office site; and
- A congressional office site may **not** be advertised on the Member's campaign website or on materials issued by the Member's campaign.

The rules issued by the Committee on House Administration regarding official Member and committee websites are summarized above. Those rules include prohibitions against those sites linking or referring to any site created or operated by a campaign or campaign-related entity.

A Member may not use campaign funds to pay any compensation for **the performance of official duties or for services to his or her congressional office**. Thus, for example, a Member may not use campaign funds to pay an individual to assist the Member in the performance of his or her official duties, even if the work was performed outside the congressional office.

**Activities That May Be Either —Officialll or —Politicalll at the Member's Option.** While, as described above, Members are restricted in using campaign funds to pay official House expenses, there are a number of activities that may be either —officialll or —politicalll at the Member's option. The major examples are events sponsored by a Member on legislative or other governmental topics, such as town hall meetings and conferences; statements or releases issued by a Member on a legislative or other governmental issue; and activities relating to a race for a House leadership office. However, the Standards Committee has stated:

[O]nce the Member makes his determination [on whether an activity is to be official or political], he is bound by it. A single event cannot, for purposes of the House rules, be treated as *both* political and official.

This rule was originally enunciated by the Standards Committee in *Advisory Opinion No. 6*, which was issued on September 14, 1982 and is reprinted in updated form in the appendices. That opinion addressed a Member's inquiry on whether he could use campaign funds to promote a town meeting in areas added to his district by reapportionment after his congressional office had mailed notice of the meeting to his current district under the frank. The Committee advised the Member that he could not do so. The Member could have designated the event as a political (campaign) one or as an official (representative) one. By sending announcements of the meeting under the frank, which can be used only in the conduct of official business, the Member defined the event as an official one. Accordingly, the Member was prohibited from subsequently using campaign funds (or any other private funds) to advertise or to conduct the meeting.

Conversely, if a Member designates an event (or any other activity) as political by using campaign funds for it, no official resources may then be used. This means that congressional staff should not make arrangements for such an event, invitations to it may not go out under the frank, and the congressional telephone number may not be designated for RSVPs.

Of course, in using official House funds or, alternatively, campaign funds, to pay the expenses of any such activity, a Member must comply with any requirements or restrictions imposed by, respectively, the Committee on House Administration and the Franking Commission, or the Federal Election Commission.

## **Other Applicable Laws, Rules, and Standards of Conduct**

### *Laws and Rules on Campaign Letterhead*

Letterhead and envelopes that a Member uses for campaign or political purposes, including the solicitation of funds, are subject to at least three authorities.

**First**, the —facsimile rule,|| which is set forth in House Rule 23, clause 11 prohibits a Member from —

authoriz[ing] or otherwise allow[ing] an individual, group, or organization not under the direction and control of the House to use the words ‘Congress of the United States,’ ‘House of Representatives,’

or ‘Official Business,’ or any combination of words thereof, on any letterhead or envelope.

A Member’s campaign committee is a group or organization—not under the control and direction of the House—and hence is subject to the restrictions of this rule, *i.e.*, the letterheads and envelopes that a Member uses for campaign or political purposes may not include the institutional names cited in the rule or otherwise violate the provisions of the rule. Since it is reasonable to expect, however, that campaign letterhead and envelopes adequately describe the office for which the candidate is running, institutional names may be used if clearly in that context. In other words, letterhead and envelopes may use phrases such as —Smith for Congress, —Smith for House of Representatives, or —Reelect Representative Smith to Congress of the United States. Campaign letterhead and envelopes should not in other respects (such as font or layout) resemble official stationery.

**Second**, a provision of the federal criminal code, 18 U.S.C. § 713, prohibits the use of certain governmental seals on, among other things, stationery, —for the purpose of conveying . . . a false impression of sponsorship or approval by the Government of the United States or by any department, agency, or instrumentality thereof. As amended in 1997, the statute applies to not only the Great Seal of the United States, but also the Seal of the House of Representatives and the Seal of the United States Congress.

**Third**, the Deceptive Mailings Prevention Act provides that any solicitation by a nongovernmental entity that reasonably could be interpreted as implying any federal government connection, approval or endorsement must carry a disclaimer, both on the internal documents and on the envelope, conspicuously stating that it is not an official mailing.<sup>101</sup> Among the features that may, under the statute, raise an implication of governmental approval is the use of a seal or insignia, or citation to a federal statute or the name of a federal program. In addition, such a solicitation may not include a false representation stating or implying that federal government benefits or services will be affected by any contribution or failure to contribute.

In summary, a letter sent by a Member on behalf of either the Member’s campaign or another political organization may **not** have, in the letterhead or on the envelope, either —

- The **institutional names** —Congress of the United States or —House of Representatives, unless clearly in the context describing the office for which the candidate is running, as discussed above;
- The term —Official Business; or

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<sup>101</sup> 39 U.S.C. § 3001(h), (i).

- Any likeness of any official **seal**, including the Seal of the United States, or the Seal of the House or the Congress.

Accordingly, such a letter may **not** be sent on a letterhead that resembles official stationery, even if the stationery was not printed at government expense and bears a disclaimer to that effect.

However, the letterhead and envelope of a campaign or political letter **may** use –

- Personal titles such as –Member of Congress,|| –Representative,|| –Congressman,|| or –Congresswoman;||
- A Member’s title as a chair or ranking member of a full committee, or as a member of the House leadership, as those are considered personal titles as well;
- The district served by the Member, and the Member’s committee assignments; and
- A likeness of the Capitol Dome; the Dome is in the public domain and is therefore not protected in the same manner as official seals.

At times the Standards Committee receives inquiries regarding the stationery that is sold in the House stationery store that bears an embossed seal or –House of Representatives|| in the letterhead. In accordance with the advice set forth above, even when that stationery is purchased with the Member’s personal funds or with campaign funds, it should not be used to solicit campaign support or contributions. (However, it is permissible for a Member to use this stationery, purchased with personal or campaign funds, to send personal thank you notes for contributions or campaign assistance.)

In certain circumstances, FECA and implementing regulations issued by the FEC require that letters sent on behalf of a federal campaign include a campaign disclaimer.<sup>102</sup> Any questions on those rules should be directed to the FEC.

Finally, for reasons set forth above, the letterhead of stationery printed with campaign funds – and in particular any letterhead used for soliciting contributions – may not include any address or telephone number of any House office.

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<sup>102</sup> 2 U.S.C. § 441d; 11 C.F.R. § 110.11.

### *Gift Rule Provisions Applicable to Campaign Activity*

Members and staff are fully subject to the provisions of the House gift rule (House Rule 25, clause 5) while engaging in campaign activity. This includes staff persons who go to part-time status or Leave Without Pay status for the purpose of doing campaign work. A full explanation of the gift rule is found in Chapter 2. Several provisions of the rule apply specifically with regard to campaign and political activity, and those provisions are noted briefly here.

First, the rule provides that among the gifts that a Member or employee may accept is a contribution that is lawfully made under the Federal Election Campaign Act, or a lawful contribution for election to a state or local government office (House Rule 25, clause 5(a)(3)(B)). *See* the discussion on —No Link with an Official Action or Special Access.¶

Second, a Member or employee may accept —[f]ood, refreshments, lodging, transportation, and other benefits . . . provided by a political organization . . . in connection with a fundraising or campaign event sponsored by such organization.¶ (clause 5(a)(3)(G)(iii)). The political organizations to which this provision refers are those described in § 527(e) of the Internal Revenue Code, which encompasses entities organized and operated primarily for the purpose of accepting contributions or making expenditures for the purpose of influencing the election of any individual to a public or political office.

In order to qualify as a fundraising event under this provision, the **primary purpose** of the event must be to raise campaign funds. Thus, Members and employees may participate in a golf tournament or attend a show or other event sponsored by a political organization only if the event is a bona fide fundraising event. In other words, it would **not** be permissible to play a round of golf at third party expense and then for the third party to separately make a donation to a political organization that is not the event organizer.

This provision allows the acceptance of a ticket to a political fundraising or campaign event only from the political organization that is sponsoring the event. It does not allow the acceptance of a ticket from a person that simply donated money or purchased tickets to the event. However, it is possible that a ticket from someone other than the sponsoring political organization may be acceptable under one of the other provisions of the gift rule. For example, a Member or employee may accept a ticket that has a value of less than \$50, provided that the donor is not a registered lobbyist, foreign agent, or entity that employs or retains such a person, and that the gift does not exceed the annual, per-source gift limitation of less than \$100 (clause 5(a)(1)(B)). Under longstanding policy, a ticket to a political fundraising dinner (as well as a charity fundraising dinner) is valued at the cost of the dinner, rather than the face value of the ticket. Thus, depending on the circumstances, it is possible for



a ticket to a fundraising dinner to be acceptable under the less-than-\$50 provision of the gift rule even though the ticket has a face value of greater than \$50.

As more fully described in Chapter 2 on gifts, during the days of the national political party conventions, a Member may not participate in an event held in the Member's honor paid for by a registered lobbyist or an entity that employs or retains such a person. House Rule 25, clause 8.

The gift rule also allows Members and staff to accept travel expenses from a private source to participate in a fact-finding trip or appear for a speaking engagement. Occasionally a question arises as to whether a Member or staff person, while on such a trip, may engage in incidental campaign activity, such as attending a campaign fundraiser. The Standards Committee understands that FEC rules limit the ability of Members and staff to engage in federal campaign activity in the course of privately paid travel. Before undertaking such a trip that would include campaign activity, a Member or staff person should consult with the FEC on the applicability of those rules.

### ***Member Involvement With an Independent Redistricting Fund***

Members are often interested in supporting organizations dedicated to influencing the redistricting process that can arise out of the once in-a-decade census. A Member may associate with and raise money for such a fund only in accordance with the guidance on the solicitation of funds contained in Chapter 10, on involvement with outside organizations. Because such organizations typically are neither political organizations under § 527 of the Internal Revenue Code, nor qualified under § 170(c) of the Code, written Committee authorization to solicit on behalf of such an organization is generally required.

In addition, the Committee understands that the Bipartisan Campaign Reform Act imposed certain limitations on the ability of federal officeholders, including House Members, to solicit on behalf of outside organizations. FEC guidance on the status under FECA of organizations dedicated to influencing the redistricting process is currently unclear,<sup>103</sup> and it is therefore advisable for any Member wishing to raise funds on behalf of such an organization to also contact the FEC.

### ***Other Provisions of the Federal Criminal Code Applicable to Campaign Activity***

A number of the provisions of the federal criminal code that apply to campaign activity are discussed in the preceding sections of this chapter. There are other provisions of the code that House Members and employees should be aware of as well. Under those provisions, a Member or employee may **not** –

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<sup>103</sup> See alternate unapproved drafts of FEC Advisory Opinion 2003-38. See also FEC Advisory Opinions 1990-23, 1982-37, and 1982-14.

- Promise to use support or influence to obtain federal employment for anyone in return for a political contribution (18 U.S.C. § 211);
- Deprive, attempt to deprive, or threaten to deprive anyone of employment or any other benefit provided for or made possible by an Act of Congress appropriating relief funds because of that person's political affiliation (18 U.S.C. § 246);
- Pay or offer to pay any person to vote or to withhold a vote or to vote for or against any candidate in a federal election (18 U.S.C. § 597);
- Solicit, accept, or receive an expenditure in consideration of a vote or the withholding of a vote in a federal election (18 U.S.C. § 597);
- Use any appropriation by Congress for work relief or for increasing employment, or exercise any authority conferred by any appropriations act, for the purpose of interfering with, restraining, or coercing any individual in the exercise of the right to vote (18 U.S.C. § 598);
- As a candidate, directly or indirectly promise to appoint any person to any public or private position for the purpose of procuring support for that candidacy (18 U.S.C. § 599);
- Promise employment or any other benefit provided for or made possible by any Act of Congress as a reward for political activity or support (18 U.S.C. § 600);
- Cause or attempt to cause anyone to make a political contribution by denying or threatening to deny any government employment, or benefit provided for or made possible, in whole or in part, by any Act of Congress (18 U.S.C. § 601);
- Solicit or receive political contributions from persons known to be entitled to or to be receiving relief payment under any Act of Congress (18 U.S.C. § 604);
- Furnish, disclose, or receive for political purposes the names of persons receiving relief payments under any Act of Congress (18 U.S.C. § 605);
- Intimidate any federal officer or employee to secure political contributions (18 U.S.C. § 606),

Elaboration on certain of these provisions is found in a publication of the U.S. Department of Justice, *Federal Prosecution of Election Offenses*, Seventh Edition, May 2007.

# OUTSIDE EMPLOYMENT AND INCOME

## Overview

House Members and employees are subject to various laws, rules, and standards of conduct concerning their outside employment activities. For example, a key provision of the House Code of Official Conduct (House Rule 23, clause 3) generally prohibits a Member, officer, or employee from using his or her official position for personal gain. Another provision (House Rule 25, clause 1(a)(2)) limits (and in some cases absolutely prohibits) the receipt of honoraria. Furthermore, provisions of the federal criminal code (18 U.S.C. §§ 203, 205) generally prohibit Members, officers, and employees from privately representing others before the federal government. The laws, rules, and standards of conduct applicable to all House Members and employees are discussed in the first part of this chapter.

Members and certain highly compensated staff (referred to as —senior staffll or —very senior staffll ) are subject to additional restrictions on the types of paid outside employment they may engage in, as well as an annual limit on the amount of earned income they may receive from their outside employment. In addition, Members and —senior staffll must seek and receive prior Committee approval before engaging in paid teaching or publishing a book. Furthermore, Members and —very senior staffll must notify the Committee on Standards of Official Conduct within three business days after the commencement of any negotiation or agreement for future employment or compensation with a private entity (House Rule 27, clause 1). These individuals are also subject to certain post-employment restrictions after they leave the House (18 U.S.C. § 207(e), (f)). Additional restrictions apply only to Members themselves. For example, a Member who requests an —earmarkll or limited tax or tariff benefit must certify that neither the Member nor the Member’s spouse has a financial interest in the provision being requested. Also addressed are the rules on voting by Members in matters involving a personal financial interest. The provisions applicable to Member and highly compensated staff are discussed later in this chapter. The outside of employment considerations for the spouses of Members and staff are discussed at the end of this chapter.

### **Laws, Rules, and Standards of Conduct Governing the Outside Employment of Members and All Staff**

While staff members who are paid below the senior staff rate are not subject to the specific limitations set out later in this chapter, they are subject to a number of other restrictions on their outside employment. Those restrictions are summarized in this section.

The restrictions set out here are also applicable to the outside employment of Members and senior staff. Thus, when a Member or senior staff person is considering undertaking outside employment, the individual must ensure that the employment complies with both the specific limitations and the following restrictions.

***Prohibition Against Use of One's Position With the House for Personal Gain***

It is fundamental that a Member, officer, or employee of the House may not use his or her official position for personal gain, including any gain that would accrue to the individual in the form of compensation for outside employment activities. A key provision of the House Code of Official Conduct (House Rule 23, cl. 3) provides that a House Member, officer, or employee

may not receive compensation and may not permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress.

As noted in the debate preceding adoption of this rule, an individual violates this provision if he uses —his political influence, the influence of his position . . . to make pecuniary gains.<sup>1</sup> Members and staff, when considering the applicability of this provision to any activity they are considering undertaking, must also bear in mind that under a separate provision of the Code of Official Conduct (House Rule 23, cl. 2), they are required to adhere to the spirit as well as the letter of the Rules of the House. In any event, the Standards Committee routinely advises Members and staff to avoid situations in which even an inference might be drawn suggesting improper conduct.

In addition, the Code of Ethics for Government Service, which applies to House Members, officers, and employees, provides (at ¶ 5) that a federal official should never accept —benefits under circumstances which might be construed by reasonable persons as influencing the performance<sup>2</sup> of official duties. The Committee found that this standard was violated, for example, when a Member persuaded the organizers of a privately held bank to sell him stock while he was using his congressional position to promote authorization for the establishment of the bank.<sup>2</sup> The Member also sponsored legislation to remove restrictions on the development of property in which he had a personal financial interest. Thus, the Member was found to have wrongly used his official position for personal benefit.

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<sup>1</sup> 114 *Cong. Rec.* 8807 (Apr. 3, 1968) (statement of Rep. Price).

<sup>2</sup> *In the Matter of a Complaint Against Rep. Robert L.F. Sikes*, H. Rep. 94-1364, 94<sup>th</sup> Cong., 2d Sess. 3-4 (1976).

In the same vein, the Code of Ethics for Government Service affirms (in ¶¶ 8 and 10) that —public office is a public trust, and provides that a federal official should —[n]ever use any information coming to him confidentially in the performance of governmental duties for making private profit.

One of the purposes of these rules and standards is to preclude conflicts of interest. Although the term —conflict of interest may be subject to various interpretations in general usage, under federal law and regulation, this term —is limited in meaning; it denotes a situation in which an official’s conduct of his office conflicts with his private economic affairs.<sup>3</sup> The ultimate concern —is risk of impairment of impartial judgment, a risk which arises whenever there is a temptation to serve personal interests.<sup>4</sup>

These rules and standards are applicable in a wide range of circumstances relating to outside employment. When there is a potential for a conflict of interest to arise in connection with one’s outside employment or other activities, it would be advisable to consult with the Standards Committee before accepting the position. For example, a conflict of interest may arise when the prospective outside employer is an entity with interests before Congress. In no event may a Member, officer, or employee participate in lobbying or advising on lobbying of either Congress or the Executive Branch on behalf of any private organization or individual, even on an uncompensated basis, as that would conflict with a Member’s general obligation to the public.<sup>5</sup> Other circumstances that implicate these rules and standards of conduct are discussed below, regarding receipt of excessive compensation, Member official activities on matters affecting their personal interests, outside employment of one’s spouse, conflict-of-interest concerns for staff members, and seeking future employment.

With regard to the outside employment of a staff person, it may be possible for conflict-of-interest concerns to be alleviated through a requirement that the staff person have no involvement in any matter coming before the congressional office that would be of interest to his or her outside employer. However, in some circumstances, such a requirement either is not feasible or would not be sufficient to satisfy the applicable rules and standards. In those circumstances, there may be no alternative to the staff person declining or terminating the outside employment.

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<sup>3</sup> Robert S. Getz, *Congressional Ethics* 3 (1967); see also Bayless Manning, *Federal Conflict of Interest Laws* 2-5 (1964); *Black’s Law Dictionary* 319 (8<sup>th</sup> ed. 2004).

<sup>4</sup> Association of the Bar of the City of New York Special Comm. on Congressional Ethics, *Congress and the Public Trust* 39 (1970).

<sup>5</sup> The statutory prohibition against representing others before federal agencies is discussed later in this chapter.

**Example 1.** A newly-hired legislative assistant in a Member's office who had worked for a consulting and lobbying firm in Washington wishes to continue to work for that firm on a part-time basis. His congressional pay is below the senior staff rate. The federal issues on which he would work for the firm are different from those for which he has responsibility in the congressional office, and he would not engage in any lobbying for the firm. Notwithstanding the proposed limitations on his work for the firm, he may not accept any part-time employment with that firm, as it would violate the general principle that Members and staff are not permitted to lobby Congress.

**Example 2.** A Member is considering hiring an individual who is a professional grant writer to research and handle constituent grant requests in his district office. The individual would like to continue to operate her grant-writing business on a part-time basis. Because there would likely be, at a minimum, an appearance of use of her official position for personal gain in such circumstances, she must discontinue her outside business upon accepting employment in the congressional office.

**Example 3.** An outside organization that operates a congressional internship program offers a congressional staff member part-time employment as director of that program. Because such a position would likely require use of contacts and information gained through the individual's employment with the House, the offer must be declined.

At times a Member or staff person wishes to engage in outside employment that involves the selling of goods or services. On the basis of the rules and standards of conduct set out above, a Member should not undertake any outside employment that would involve the Member personally in the selling or endorsement of any goods or services. On the same basis, at a minimum, any staff person who engages in sales may not solicit purchases from either (1) any non-congressional person with whom the employee came into contact through the congressional office or who has interests before the congressional office, or (2) any subordinate staff in his or her congressional office. In addition, in soliciting sales, House employees may not, directly or indirectly, identify themselves as congressional staff, refer to their congressional duties, or otherwise make use of their status as a congressional employee.

The Standards Committee is available to advise Members, officers, and employees on the applicability of the rules and standards of conduct in other specific circumstances.

### ***Rules on Receipt of Honoraria***

Under House Rules, Members, as well as House officers and employees who are paid above the —senior staffll rate, are prohibited from receiving any honoraria.<sup>6</sup> An honorarium, as defined in the rules, is —a payment of money or a thing of value for an appearance, speech, or articlell (House Rule 25, cl. 4(b)). The House Rules further provide that an officer or employee who is paid **below** the senior rate may accept an honorarium, unless any one of three circumstances is present:

- The subject matter of the speech, article, or appearance is directly related to the official duties of the individual;
- The payment is made because of the status of the individual with the House;  
**or**
- The person offering the honorarium has interests that may be substantially affected by the performance or nonperformance of the official duties of the individual (House Rule 25, cl. 1(a)(2)).

A comprehensive ban on honoraria was originally enacted as part of the Ethics Reform Act of 1989 and took effect on January 1, 1991.<sup>7</sup> The reasons for changing the law on honoraria then in effect — under which Members and staff were generally free to accept honoraria of up to \$2,000 per speech, appearance, or article — were explained by the Bipartisan Task Force on Ethics Reform as follows:

Significant increases in honoraria income in recent years have heightened the public perception that honoraria [are] a way for special interests to try to gain influence or buy access to Members of Congress, particularly since interest groups most often give honoraria to Members who serve on committees which have jurisdiction over their legislative interests.

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There is growing concern that the practice of acceptance of honoraria by Members, particularly from interest groups with important stakes in legislation, creates serious conflict of interest problems and threatens to undermine the institutional integrity of Congress.<sup>8</sup>

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<sup>6</sup> House Rule 23, cl. 5; House Rule 25, cl. 1(a)(2).

<sup>7</sup> Pub. L. 101-194, §§ 601 and 804, 103 Stat. at 1760, 1776-78.

<sup>8</sup> House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 13-14 (Comm. Print, Comm. on Rules 1989), *reprinted in 135 Cong. Rec.* H9253, H9256 (daily ed. Nov. 21, 1989) (hereinafter —*Bipartisan Task Force Report*ll ).

In the Ethics Reform Act of 1989, the honoraria ban was both enacted as statutory law (applicable to the executive branch as well as the legislative branch) and incorporated into the House Rules.<sup>9</sup> However, in a case brought on behalf of certain executive branch personnel, the Supreme Court held in 1995 that the statutory honoraria ban violated the First Amendment rights of those personnel.<sup>10</sup> Subsequently, the U.S. Department of Justice determined that the statutory prohibition could not be enforced against any federal employee.<sup>11</sup> The provisions of the House Rules on honoraria were not affected by those actions, however, and thus **House Members, officers, and employees remain subject to those provisions.**<sup>12</sup>

As noted above, for Members, as well as for officers and employees paid at or above the senior staff rate, the ban is absolute. It encompasses **every** appearance, speech, or article, regardless of its subject matter or relationship to official duties, and the Standards Committee has no authority to grant waivers under any circumstances.<sup>13</sup> Through 1998 the honoraria ban was likewise absolute for officers and employees paid below the senior staff rate. However, at the beginning of the 106<sup>th</sup> Congress in 1999, the honoraria ban was modified for staff paid below the senior staff rate. Since then, staff members paid below that rate have been allowed to accept honoraria that, under the criteria specified above, are entirely unrelated to either their official duties or their position with the House.<sup>14</sup>

**Example 4.** A teacher's union offers a staff member who works on education issues \$2,000 to write an article for the union newsletter on legislative initiatives to improve the quality of public education. The employee may write the article, but regardless of her House salary level, she may **not** accept any payment.

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<sup>9</sup> 5 U.S.C. app. 4 § 501(b); House Rule 43, cl. 5 (currently numbered as House Rule 23, cl. 5); House Rule 47, cl. 1(a)(1)(B)) (currently numbered as House Rule 25, cl. 1(a)(2)).

<sup>10</sup> *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 470 (1995).

<sup>11</sup> *Legality of Government Honoraria Ban Following U.S. v. National Treasury Employees Union*, Memorandum from Walter Dellinger, Ass't Att'y Gen., U.S. Department of Justice Office of Legal Counsel, to Attorney General (Feb. 26, 1996) (available on the Office of Legal Counsel website, [www.usdoj.gov/olc](http://www.usdoj.gov/olc)).

<sup>12</sup> The Senate rules prohibiting the receipt of honoraria likewise continue in effect for Members, officers, and employees of the Senate.

<sup>13</sup> It should be noted that because the rules define honorarium as a payment —for an appearance, speech or article . . . *by a Member . . . officer or employee*,<sup>11</sup> the Committee does **not** construe the rules to prohibit payments for services rendered before an individual became a Member, officer, or employee of the House. See House Rule 25, cl. 4(b) (emphasis added).

<sup>14</sup> For a further explanation of this rules change, see 145 *Cong. Rec.* H197-98 (daily ed. Jan. 6, 1999) (statement of Rep. Hansen).



**Example 5.** A staff member writes an article on rare butterflies for a nature magazine. He writes the article in his spare time, using his home computer. The subject of the article has nothing to do with his official duties or status, and the magazine has no interests that could be substantially affected by the performance of his official duties. If the employee's House pay is below the senior staff rate, the honorarium rules do not prohibit him from accepting an otherwise permissible payment for the article from the magazine. However, if his House pay is at or above the senior staff rate, he may not accept any payment for the article.

**Definitions.** The Committee defines the terms —speech,|| —appearance,|| and —article|| as follows:

- A **speech** means an address, oration, talk, lecture, or other form of oral presentation, whether delivered in person, transmitted electronically, recorded, or broadcast over the media, but does not include teaching in an established educational program that conforms to teaching criteria established by the Committee (see section on —Requirement for Prior Committee Approval of Compensation for Teaching,|| below).
- An **appearance** means attendance at a public or private conference, convention, meeting, social event, or similar gathering, possibly but not necessarily involving incidental conversation, discussion, or remarks.
- An **article** means a writing that has been or is intended to be published, for which a payment, if made, would be other than a royalty received from an established publisher pursuant to usual and customary contractual terms. The term includes an article that is to be published in the name of another person (*i.e.*, a —ghost-written|| article).

Occasionally House employees are invited to participate in a **focus group** and are offered a fee if they agree to participate. When the invitation is extended because of the individual's position with the House – and it must be assumed that any such invitation that is received in the congressional office is extended on that basis – the employee may **not** accept the fee, regardless of the level of his or her House pay. Participation in the focus group would constitute an appearance for purposes of the honoraria rules, and acceptance of payment for that appearance would therefore be prohibited.

The term —honorarium,|| as noted above, is defined as a payment of money or thing of value for an appearance, speech, or article (House Rule 25, cl. 4(b)). However, explicitly excluded from the definition of this term is —any actual and necessary travel expenses incurred by [a] Member . . . officer, or employee (and one relative)|| in connection with the appearance, speech, or article —to the extent that such expenses are paid or reimbursed by any other person.|| The rule further

provides that for purposes of the rules, the amount of any honorarium is to be reduced by the amount of any such expenses to the extent that they have not been paid or reimbursed by anyone else.

**Exclusions.** Speaking, appearing, and writing are integral to many jobs. Most jobs require the employee to —appear at the work site in order to perform. The honoraria rules clearly do not preclude outside employment merely because the employee must show up to do the work. The Committee has determined that the following types of compensation are **not** honoraria. However, Members, officers, and employees who are paid at or above the senior staff rate should bear in mind that any such compensation that they receive is subject to the outside earned income limitation discussed later in this chapter.

- Compensation for activities **when speaking, appearing, or writing is only an incidental part** of the work for which payment is made (*e.g.*, conducting research) is not an honorarium.
- **Bona fide awards and gifts** generally are not honoraria. If a Member, officer, or employee is presented with an award, memento, or gift at an event, the Committee does not consider the object to be an honorarium, unless it is specifically given in consideration of the speech or appearance. Similarly, an individual may accept an award for artistic, literary, or oratorical achievement made on a competitive basis under established criteria. Of course, either such item must otherwise be acceptable under the gift rule.
- Paid engagements to perform or to provide entertainment when the **artistic, musical, or athletic talent** of the individual is the reason for the employment, rather than the person's status as a Member or employee of Congress are not honoraria.
- **Witness and juror fees** by a court or other governmental authority are not honoraria. However, under a Committee on House Administration rule that implements statutory law (2 U.S.C. § 130b), a House employee must remit to the House Finance Office any fee that he or she receives for service as either a juror in a United States or District of Columbia court or as a witness on behalf of the United States or the District of Columbia.
- Fees to a qualified individual for conducting **worship services or religious ceremonies** (but not for delivering speeches or invocations at religious conventions) are not honoraria.
- Payments for works of **fiction, poetry, lyrics, or script**, when the payment is not offered because of the author's congressional status are not honoraria.
- **Salary or wages** pursuant to an employer's usual employee compensation plan when paid by the employer for services on a continuing basis that involve appearing, speaking, or writing are not honoraria. Any Member, officer, or employee considering entering into such an arrangement should

first contact the Standards Committee for guidance. This exclusion does **not** apply to any arrangement with an agent, speakers bureau, or similar entity that facilitates appearances or speaking or writing opportunities.

Thus, not all jobs that involve speaking, appearing, or writing are barred. Conducting religious ceremonies plainly involves speaking, yet qualified Members and staff may still accept compensation for these services. The fact that a speech is made before a religious group or at a religious convention, however, will not suffice to remove it from the ban. Similarly, a Member may not accept a fee merely for offering an invocation at the beginning of an event.

Writers, too, may continue to ply their craft in many ways. If the writing is not for publication, or the writing is an incidental part of a job, payment may still be permitted. Congressional authors of fiction, poetry, lyrics, or scripts may accept compensation.

Prior to 1999, House Members and staff were, in certain circumstances, allowed to accept a **stipend**, defined as payment for a **series** of at least three appearances, speeches, or articles. Under the rules then in effect, such a payment was acceptable unless either the subject matter of the appearances, speeches, or articles was directly related to the individual's official duties, or the payment was made because of his or her status with the House.<sup>15</sup> However, an amendment to the House Rules adopted at the beginning of the 106<sup>th</sup> Congress abolished the exclusion for such —stipends. That amendment expanded the definition of the term —honorarium in the rules to include any payment for any —series of appearances, speeches, or articles (House Rule 25, cl. 4(b)).

**Example 6.** A staff member has an outside part-time job with a local university, the duties of which include research and analysis on subjects unrelated to her official duties. In order to inform her faculty supervisor of her findings, she must write them up. Since the writing is incidental to her primary responsibilities, her acceptance of compensation for her services is not prohibited by the honoraria rules.

**Example 7.** A staff member was a music major in college and is an accomplished violinist. He is occasionally invited to play with the local symphony orchestra at evening and weekend concerts and is compensated at the same rate as other musicians of his caliber in the community. Provided that he is hired based on his talent and not his status as a congressional employee, his acceptance of compensation for these performances is not prohibited by the honoraria rules.

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<sup>15</sup> See 5 U.S.C. app. 4 § 505(3), as amended by the Legislative Branch Appropriations Act, 1992, § 314(b), 105 Stat. 447, 469 (1991).

**Example 8.** A staff member works part-time in evenings and on weekends playing the piano. In the course of lobbying her on some legislation, a lobbyist learns of her avocation and, without knowing anything about her musical abilities, offers to hire her to play at his firm's Christmas party. He offers to pay her twice the going rate for such an engagement. The staff member must decline the offer.

**Example 9.** A staff member writes a fictional story that is published by a children's magazine. Since it is a work of fiction, his acceptance of payment for the article is not prohibited by the honoraria rules.

**Example 10.** A Member who is a retired professional athlete is invited to appear at a sports-related event to sign autographs. The contract provides that he must sign 500 autographs and for doing so will be paid a fee of \$2,000. Because the payment is explicitly based on the number of autographs to be signed, the Member's acceptance of the fee is not prohibited by the honorarium rules.

**Example 11.** A philatelic magazine requests that a staff member who is paid at the senior staff rate write a series of articles on stamp collecting. Even though stamp collecting is unrelated to the staff member's official duties and status, and the magazine has no interests that could be affected by her performance of her official duties, the staff member may **not**, under the current honoraria rules, accept the payment for the series, because as senior staff she is subject to the absolute ban.

**Donations to Charity.** Under House rules, the sponsor of a speech, appearance, or article may make a payment in lieu of an honorarium to a charitable organization on behalf of a Member, officer, or employee (House Rule 25, cl. 1(c)). The sponsor may make a donation of up to \$2,000 per speech, appearance, or article, as long as the sponsor makes the payment directly to the charitable organization. Even if the sponsor makes the check payable to the charity, the Member or staff person may **not** accept the check and personally forward it to the charity.

The Member or staff person may suggest a particular charitable organization to receive the donation, within the following limits. The term —charitable organizationll as used in the rule means an organization described in § 170(c) of the Internal Revenue Code.<sup>16</sup> The individual may not receive any tax benefit from the

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<sup>16</sup> House Rule 25, cl. 4(e). Section 170(c) defines contributions that are tax deductible. It includes contributions to the United States; the District of Columbia; any state or possession, or a political subdivision thereof if made for exclusively public purposes; religious, charitable, scientific, literary, or educational organizations; and organizations to foster amateur sports competition or for the prevention of cruelty to children or animals. These organizations may not be operated for profit,  
(con't next page)

donation. Accordingly, the individual may neither add the donation to income nor deduct it for income tax purposes (26 U.S.C. § 7701(k)). The charity may not be one from which the individual or his or her immediate family (parent, sibling, spouse, child, or dependent relative) derives any financial benefit (House Rule 25, cl. 1(c)). The Task Force construed this restriction narrowly:

The task force intends that a financial benefit for purposes of this rule would be a direct benefit to the individual or a family member that is separate from any general benefit that the institution would derive. For example, this provision would not prohibit a payment to a university at which the Member's child is a student, or to a health care facility at which a family member is a patient.<sup>17</sup>

Thus, when the Member, staff person, or family member draws a direct financial benefit (such as a salary) from a particular charity, the Member or staff person may **not** designate that charity to receive payments in lieu of honoraria. In the case of a national or international charity, however, the fact that a family member works for a local unit would not preclude a Member or staff person from designating the parent organization. Any remote benefit to the family member from the donation in that situation would be too indirect to fall within the statute's prohibition.

**Example 12.** Member A gives a speech to a trade association in New Orleans. The Committee approves the association paying the Member's travel, food, and lodging expenses. In connection with the event, the association sends a check for \$2,000 to the Boy Scouts with a note saying: —In lieu of an honorarium, Member A has asked us to make this donation to the Boy Scouts in honor of his speech to our association.¶ The donation on behalf of the Member is permissible under the rules.

**Example 13.** A Member gives a speech to a political club in Chicago. The following week, she receives a check for \$1,500, payable to her, with a note from the club saying: —Thank you for addressing our club. We do not know which charities you support, so we are sending you this check, knowing that you will pass it along to some worthy organization.¶ The Member may **not** accept the check, even if she

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nor may they attempt to influence legislation or participate in political campaigns for public office. 26 U.S.C. § 170(c). Since an organization's tax status is determined by the Internal Revenue Service, a Member or staff person who wishes to designate a particular organization to receive payments in lieu of honoraria should verify with the organization that the IRS has granted it tax deductible status under § 170(c).

<sup>17</sup> *Bipartisan Task Force Report, supra* note 8, at 15, 135 *Cong. Rec.* at H9257.

intends to endorse it over to a charity immediately. She must return the check to the club. If she wishes, she may suggest that the club donate the money to a specific charity of her choice or to any charity of the club's choice that is qualified under § 170(c) of the tax code.

**Example 14.** A Member gives a speech at an executives' roundtable in Kansas City. In honor of the event, the executives' group presents the Member with a check for \$1,000, made out to his favorite charity. He may **not** send the check on to the charity. The Member must return the check to the executives, who may then forward it to the charity themselves.

**Example 15.** A staff member writes an article that is accepted for publication by a magazine. The magazine normally would pay \$500 for a comparable article and asks the staff member if he would like that amount to be donated to a charity. His favorite charity is a homeless shelter in his hometown at which his sister works for pay as a counselor. Since his sister receives a direct financial benefit from the shelter (her salary), the staff member may **not** designate the shelter to receive the payment from the magazine. He may designate another charity.

**Example 16.** A staff member writes an article that is accepted for publication by a magazine that offers to donate \$500 to the charity of her choice. The staff member's husband is a lab technician at the local Red Cross blood bank. Nevertheless, she **may**, if she chooses, designate the national or international Red Cross to receive the payment in lieu of honoraria.

At times Members cooperate with or help organize charitable foundations, which they designate to receive payments in lieu of honoraria and supplement with independent solicitations. Typically, these foundations attempt to address particular needs in the Member's district (such as scholarship funds) or national problems of particular concern to the Member. A Member may designate such a foundation to receive payments in lieu of honoraria **if** the foundation is qualified under § 170(c) of the tax code.

### ***Gift Rule Applicability to Compensation and Other Things of Value Received From an Outside Employer***

The House gift rule defines the term —gift‖ in an extremely broad manner.<sup>18</sup> The rule would be implicated if a Member, officer, or employee were to accept

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<sup>18</sup> See House Rule 25, cl. 5(a)(2)(A); see also Chapter 2 on gifts.

compensation for outside employment in an amount that exceeds the fair market value of the services that he or she renders. Among the relevant factors in determining that value are the specific nature of the services rendered by the individual, the amount of time that he or she devotes to the outside employment, the amount of compensation customarily paid for such services, and the individual's qualifications to render the particular services.

In addition, a specific provision of the gift rule addresses the acceptability of —[f]ood, refreshments, lodging, transportation, and other benefits‖ that result from the outside business or employment activities of a Member, officer, or employee (House Rule 25, cl. 5(a)(G)(i)). Under that provision, such a benefit is acceptable only if two requirements are satisfied: (1) The benefit has not been offered or enhanced because of the official position of the Member or staff person, and (2) it is one that is —customarily provided to others in similar circumstances.‖

### ***Prohibition Against Use of Congressional Office Resources***

Pursuant to federal statute (18 U.S.C. § 1301(a)), official funds may be used only for the purposes appropriated. Thus, House resources acquired with such funds — including the office telephones, computers fax machines and other equipment, office supplies, office space, and staff while on official time — are to be used for the conduct of official House business. Those resources may not be used to perform or in furtherance of any outside employment of any Member, officer, or employee. A provision of the rules issued by the House Administration Committee allows minor, incidental personal use of House equipment and supplies. However, the Standards Committee understands that this provision allows such use of those resources for personal purposes only, and does **not** allow their use for outside employment or business purposes.

### ***Practice of Law***

Although the paid practice of law by Members and senior staff has been severely curtailed since 1991, those individuals generally may still practice without compensation, and non-senior employees may practice for compensation, within the following parameters.

No public official should take on a private obligation that conflicts with the individual's primary duty to serve the public interest. The lawyer's duty of undivided loyalty to clients<sup>19</sup> makes the practice of law particularly susceptible to conflicts with the wide-ranging responsibilities of Members and staff.

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<sup>19</sup> See, e.g., ABA, *Model Rules of Professional Conduct*, Rule 1.7 (2007).

Congressional lawyers who wish to maintain a private practice should also consult their local bar associations with respect to professional restrictions on them.

Federal law prohibits Members from practicing in the United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit (18 U.S.C. § 204). In addition, Members and employees may not privately represent others before federal agencies, as described below.

***Prohibition Against Representing Others Before Agencies or in Court Cases in Which the Government Is a Party or Has an Interest***

Federal criminal law generally prohibits Members, officers, and employees from privately representing others before the federal government. One provision bars these individuals from seeking or receiving compensation (other than as provided by law) for —representational services<sup>19</sup> before any federal government agency, department, court, or officer in any matter or proceeding in which the United States is a party or has an interest (18 U.S.C. § 203).

A second provision forbids any officer or employee from acting —as agent or attorney for anyone<sup>20</sup> (other than in the proper discharge of official duties) before any federal government entity in any particular matter in which the federal government has an interest, **whether or not the individual is compensated** (18 U.S.C. § 205). The individual need not actually be an attorney or have a strict common law agency relationship with another in order to be restricted by the statute.<sup>20</sup> While House officers and employees are covered by this provision, Members are not.

In addition, a provision of the House Rules states that a person —may not be an officer or employee of the House, or continue in its employment, if he acts as an agent for the prosecution of a claim against the Government or if he is interested in such claim, except as an original claimant or in the proper discharge of official duties<sup>21</sup> (House Rule 25, cl. 6).

Under 18 U.S.C. § 203, a Member, officer, or employee of the House may not receive compensation, other than congressional salary, for any dealings with an administrative agency on behalf of a constituent or any other person or organization. Even if contacting a federal agency on behalf of a private individual or organization is within the scope of official duties, an individual who accepts additional compensation for such services has violated the law.<sup>21</sup> In this sense, Section 203 supplements the law against illegal gratuities discussed in Chapter 2.

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<sup>20</sup> *United States v. Sweig*, 316 F. Supp. 1148, 1157 (S.D.N.Y. 1970).

<sup>21</sup> *May v. United States*, 175 F.2d 994, 1005 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949).



Section 203 prohibits the receipt of compensation —directly or indirectly— for services before federal agencies. Therefore, if a Member or staff person, whether through participation in a partnership arrangement or otherwise, shares in fees from services rendered before federal agencies, a violation of this provision may occur even if the individual did not personally perform the services.<sup>22</sup> This same opinion notes, however, that the Office of Government Ethics has interpreted § 203 not to apply to a person who receives a fixed salary as an employee of a firm (as opposed to someone who shares in the firm's profits), even though some of the firm's overall income may be attributable to service covered by § 203.¶ <sup>23</sup> This provision can apply to a law firm retiree when the retiree's pension is based on a percentage of law firm profits if any of those profits are derived from representation activities before the federal government.

Both sections 203 and 205 carry the same possible penalties: Imprisonment for up to one year (or five years if the violation is willful); a civil fine of up to \$50,000 per violation or the amount received or offered for the prohibited conduct (whichever is greater); or a court order prohibiting the offensive conduct (18 U.S.C. § 216). In one case, a federal court held a former Member of Congress liable for repayment of compensation unlawfully received. The court ruled that a violation of § 203

unquestionably demonstrates a breach of trust, for in order to fall within its prohibition, a member of Congress must shed the duty of disinterested advocacy owed the government and his constituents in favor of championing private interests potentially inconsistent with this charge.<sup>24</sup>

Sections 203 and 205 exempt certain activities. Individuals may represent themselves before the federal government. They may also represent their spouse, parent, child, or any person for whom they serve as guardian, trustee, or personal fiduciary (18 U.S.C. §§ 203(d), 205(e)). Even on behalf of these people, however, the individual must refrain if the matter at issue is one in which he or she participated personally and substantially on behalf of the government or one that falls within his

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<sup>22</sup> See U.S. Office of Government Ethics (—OGEll ) Advisory Opinion 99 x 24 (Dec. 14, 1999); see also OGE Advisory Opinion 88 x 3 (Mar. 2, 1988) (same).

<sup>23</sup> OGE Advisory Opinion 99 x 24, *supra* note 22; see also OGE Advisory Opinion 99 x 25 (Dec. 22, 1999) (permitting federal employee to accept compensation from firm that represented clients before federal entities where employee's compensation was not derived from or contingent on those services).

<sup>24</sup> *United States v. Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977), *aff'd*, 572 F.2d 31 (2d Cir. 1978); see also *United States v. Eilberg*, 507 F. Supp. 267, 271 (E.D. Pa. 1980) (stating that the —purpose of the remedy is . . . to provide a means of enforcing the loyalty of [government] agents—).

or her official responsibilities. The statutes also provide that a staff person who wishes to engage in excepted representational activities must have the approval of his or her employing Member. In addition, one may, without compensation, represent anyone in a disciplinary or personnel proceeding (18 U.S.C. § 205(d)).

**Example 17.** A staff member is a caseworker, and because of his experience in dealing with federal government agencies, his brother asks him to represent him in an FCC hearing at which the brother is contesting the agency's denial of his license application. The staff member must decline, even if he does not receive compensation for his services.

**Example 18.** A staff member's parents have a dispute with the Social Security Administration. The staff member **may** represent them at their hearing if her employing Member approves.

**Example 19.** A staff member is a tax lawyer. His college roommate has a dispute with the IRS and asks the staff member to accompany him and to assist him at the hearing. The staff member may **not** do so, even if he receives no compensation.

**Example 20.** A Member who is an attorney wishes to represent in state court, on a *pro bono* (unpaid) basis, union members who were charged with state law violations while picketing their employer. The Member's uncompensated representation would not violate 18 U.S.C. §§ 203 or 205.

### ***Contracting With the Federal Government***

Paragraph 7 of the Code of Ethics for Government Service cautions all government officials not to engage in any business with the federal government, —either directly or indirectly which is inconsistent with the conscientious performance of governmental duties. To do so would raise the appearance of undue influence or breach of the public trust.

Under the federal criminal code, a Member of Congress may not enter into a contract or agreement with the United States government. Any such contract is deemed void, and both the Member and the officer or employee who makes the contract on behalf of the federal government may be fined (18 U.S.C. §§ 431, 432). In addition, public contracting law provides that —no Member of Congress shall be

admitted to any share or part of any contract or agreement with the United States, —or to any benefit to arise thereupon (41 U.S.C. § 22).<sup>25</sup>

The criminal law precludes Members from —directly or indirectly holding, executing, undertaking, or enjoying —in whole or in part any contract with the federal government. The Attorney General has interpreted this language to prohibit a general or limited partnership that includes a Member of Congress from entering into a contract with the federal government.<sup>26</sup> In addition, it is possible that a Member of Congress who receives compensation under an independent organization’s government contract — for example, compensation in the form of a salary from the organization, or through a subcontract with it — may be deemed to be improperly benefiting from that contract.

Unlike a partnership, a corporation with a relationship to a Member of Congress **may** enter into a contract with the federal government for the general benefit of the corporation (18 U.S.C. § 433). Thus, a Member of Congress may be a stockholder, even a principal stockholder, or an officer of a corporation that holds a federal government contract without incurring criminal liability.<sup>27</sup> Similarly, the spouse of a Member may enter into a contract with the federal government. Incorporating for the obvious purpose of circumventing the statute’s prohibition, however, would disqualify an entity from the § 433 exception.<sup>28</sup> It would appear that the statutory exception in the criminal law for contracts with corporations would likewise apply to the contract law provision of 41 U.S.C. § 22, since all the provisions discussed, and the exceptions to them, were originally passed as part of the same act.<sup>29</sup>

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<sup>25</sup> The criminal statute specifically exempts contracts entered into under the Agricultural Adjustment Act, the Federal Farm Loan Act, the Farm Credit Act of 1933, the Home Owners Loan Act of 1933, the Bankhead-Jones Farm Tenant Act, crop insurance agreements, and contracts that the Secretary of Agriculture enters into with farmers (18 U.S.C. § 433). In addition, contracts under the Federal Farm Mortgage Corporation Act are exempt from 41 U.S.C. § 22, as are contracts that the State Department makes in foreign countries (22 U.S.C. § 1472(a)(2)). The public contracting clause must appear, however, in contracts for the acquisition of land pursuant to flood control laws (33 U.S.C. § 702m).

<sup>26</sup> See 22 Op. Off. Legal Counsel 33 (1988). *But see* 4 Op. Att’y Gen. 47 (1842) (permitting company in which Member was a partner to enter sales contract with U.S. Navy, where Member disclaimed any benefit from the contract).

<sup>27</sup> See 39 Op. Att’y Gen. 165 (1938) (Member held 30% of corporation’s stock and was president of company); *see also* 33 Op. Att’y Gen. 44 (1921) (allowing corporations to accept loan from War Finance Corporation, secured by promissory note of company in which Member was a stockholder).

<sup>28</sup> 22 Op. Off. Legal Counsel 33, *supra* note 26.

<sup>29</sup> Revised Statutes §§ 3739-3741, 2 Stat. 484, ch. 48 (Apr. 21, 1808).

When a Member or an entity in which a Member has an ownership interest (other than a publicly held corporation) is considering entering into a contract or agreement with a federal government agency, the Member should first consult with the agency on the possible applicability of these statutes. Similarly, a newly elected Member who has such a contract should immediately consult with the contracting agency on this point.

While these statutes do not apply to House officers and employees, the matter of government contracts with federal employees is addressed in the Federal Acquisition Regulations. The regulations provide that a contract may not knowingly be awarded to a federal employee (including an officer or employee of the House), or a firm substantially owned or controlled by one or more federal employees, except —if there is a most compelling reason to do so, such as when the government’s needs cannot reasonably be otherwise met.|| <sup>30</sup>

**Example 21.** A federal agency is holding an auction of properties. A House Member may **not** purchase anything at the auction because the contract of sale would be a contract with the government.

**Example 22.** A Member is invited to speak at a conference sponsored by an executive branch agency. Although private sector speakers at this conference are paid a speaker’s fee, the Member may **not** accept payment. (Note that such a payment also would constitute a prohibition honorarium).

Comparable prohibitions on the use of Member office and committee funds are set out in rules issued by the House Administration Committee. The *Member’s Handbook* issued by that Committee provides that —no Member, relative of the Member, or anyone with whom the Member has a professional or legal relationship may directly benefit from the expenditure of the MRA [Member’s Representational Allowance],|| unless —specifically authorized by an applicable provision of federal law, House Rules, or [House Administration] Committee Regulations.|| The *Committees’ Handbook* provides that, subject to the same exception, —no Member of the committee, relative of a committee Member, or anyone with whom a committee Member has a professional or legal relationship may directly benefit from the expenditure of committee funds.|| While the application of these rules is within the jurisdiction of the House Administration Committee, it appears that these rules preclude a Member or committee from contracting with a staff member for the acquisition of goods, or of any services outside of the employment context.

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<sup>30</sup> 48 C.F.R. §§ 3.601-3.603.

### ***Dual Federal Government Employment***

A provision of the Constitution (Article I, Section 6, clause 2) generally prohibits Members of the House (as well as the Senate) from holding any other federal office:

[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Decisions of the House and the House Judiciary Committee applying this provision to particular federal offices and in various circumstances are summarized in the *House Rules and Manual* issued by the House Parliamentarian.<sup>31</sup>

House staff persons are not absolutely prohibited from holding a non-House federal job, but a provision of statutory law severely restricts their ability to do so. Under that provision, a House employee may not hold a non-House government job if the annual pay of the two positions combined exceeds a limitation that is calculated at the beginning of each year (5 U.S.C. § 5533(c)(1)). In 2007 this combined limitation was \$30,826.<sup>32</sup> A —position— means —a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government— (*id.*, § 5531(2)). The dual employment bar does not apply when the positions involved are expert or consultant positions and pay is received on a —when-actually-employed— basis for different days (*id.*, § 5533(c)(4)).

The statute further provides that an individual may hold two or more House jobs, provided that the combined salary does not exceed the maximum annual rate of pay authorized to be paid out of a Member's clerk hire allowance (*id.*, § 5533(c)(2)).<sup>33</sup> Thus, the law allows House employees to work part-time in a House office and allows House offices to share an employee, as long as the employee performs duties for each office that are commensurate with the compensation the employee receives from that office, and the employee's combined House salaries do not exceed the cap.

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<sup>31</sup> See, e.g., John V. Sullivan, Parliamentarian, *Constitution, Jefferson's Manual, and Rules of the House of Representatives, One Hundred Tenth Congress*, H. Doc. 109-157, 109<sup>th</sup> Cong., 2d Sess. (2007), §§ 97-101 (hereinafter —*House Rules and Manual*—).

<sup>32</sup> The cited amount is the \$7,724 limit provided by the statute, as adjusted by the House Chief Administrative Officer in accordance with authority contained in 2 U.S.C. § 60a-2. As of the printing of this Manual, the 2008 maximum has not been set.

<sup>33</sup> The maximum annual rates of pay for various House positions are set each year in the Speaker's Pay Order.

### *Holding Local Office*

At times House employees wish to hold an elected or appointed local government office. While no statutory provision or House rule absolutely prohibits a House employee from holding a local office while remaining on the House payroll, the applicable provisions of state or local law on eligibility for office must be consulted. In addition, House employees must take care to avoid any undertaking that is inconsistent with congressional responsibilities.

The holding of a local office by a House employee is subject to all of the restrictions and limitations on outside employment set out in this chapter. For employees who are paid at or above the senior staff rate, the limitations include the outside earned income limitation and all of the —fiduciary relationship— restrictions. As a result, a senior staff person is generally prohibited from receiving compensation for service as an elected or appointed government official. In addition, regardless of their rate of pay, all House employees must adhere to the prohibition against using any House resources to perform the duties of their local office, the requirements that those duties be performed outside the congressional office and on their own time, and the prohibition against representing anyone else — including the local government by which they are employed — before federal agencies.

Furthermore, in making public comment on issues or otherwise dealing with the public, an employee who serves in a local office should always make clear in which capacity the employee is acting. In addition, the employee is prohibited from providing any special treatment to constituents in a congressional capacity and should discourage any suggestion that they will receive preferential treatment from the employee's congressional office.

A staff member considering running for or serving in a local office should first consult with his or her employing Member on the matter, and should refrain from doing so if the Member objects. When the demands of the local office are such that it is impossible as a practical matter for the employee to maintain an absolute separation of the two positions — or when the employing Member concludes that the two positions are incompatible — then the employee will have no alternative but to decline or terminate service in the local office, or to terminate congressional employment.

The laws, rules, and regulations governing campaign activity are discussed in detail in Chapter 4 on Campaign Activity. In particular, employees should be cognizant of restrictions that prohibit performing local elective service or any campaign activity for local office in House office space (including district offices), using House resources, or on official time. In addition, both federal statute and regulations of the House Building Commission prohibit any political solicitation —

including one for local office – from being conducted in a House office space.<sup>34</sup> It is also unlawful to solicit funds from other federal employees.<sup>35</sup>

For a number of reasons – including the full-time nature of the position that a House Member assumes, and provisions of the laws of various states on eligibility to hold office – questions regarding the possibility of a Member holding a local office rarely arise. While the Constitution does not prohibit House Members from simultaneously holding state or local office, the House has determined that—a high state office is incompatible with congressional membership, due to the manifest inconsistency of the respective duties of the positions.<sup>36</sup> Any House Member considering holding a state or local office should first consult with the Standards Committee and, when there may be a question of whether the office involved is a—high state office,<sup>37</sup> the House Parliamentarian.

### ***Prohibition Against Receiving Compensation from a Foreign Government***

The Constitution prohibits any Member or employee of the House (as well as any other federal official) from receiving an—emolument<sup>38</sup> of—any kind whatever<sup>39</sup> from a foreign government or a representative of a foreign state, without the consent of the Congress (Article I, Section 9, clause 8). As the Comptroller General has noted, —it seems clear from the wording of the Constitutional provision that the drafters intended the prohibition to have the broadest possible scope and applicability.<sup>37</sup> Thus, an—emolument<sup>38</sup> has been defined as any—profit, gain, or compensation received for services rendered.<sup>38</sup>

Although Congress has consented, in the Foreign Gifts and Decorations Act, to the acceptance by federal officers of certain **gifts**, no statute grants a general consent for the receipt of emoluments or other **compensation** from foreign governments.<sup>39</sup> The Comptroller General has ruled that transportation or expenses for travel **gratuitously** given by a foreign government would fall within regulations promulgated on the receipt of foreign gifts (see Chapter 2 on gifts). However, if the travel was offered by a foreign government **in return for or in connection with some**

<sup>34</sup> See 18 U.S.C. § 602 and House Office Building Comm'n, *Rules and Regulations Governing the House Office Buildings, House Garages and the Capitol Power Plant* (Feb. 1999), at ¶ 4 (available from the Speaker's Office).

<sup>35</sup> See 18 U.S.C. § 602.

<sup>36</sup> 2 *Deschler's Precedents of the U.S. House of Representatives*, ch. 7, § 13, at 125.

<sup>37</sup> 49 Comp. Gen. 819, 821 (1970).

<sup>38</sup> As used here, the term—local government officell includes not only offices in a county, municipal, or town government, but also membership in a state legislative body.

<sup>39</sup> 5 U.S.C. § 7342. *But see* 37 U.S.C. § 908 (consenting to the civilian employment of retired military and military reserve members by foreign governments, when approved by the relevant Cabinet Secretaries).

**service** that a Member or employee would provide, such as making a speech, then such expenses could be deemed —compensation<sup>40</sup> and thus be an —emolument.<sup>40</sup> Note the difference between this Constitutional provision and the honoraria rules: The honoraria rules generally permit one to accept necessary travel expenses to deliver a speech; the Constitution, however, prohibits the acceptance of such expenses **from a foreign government**.

Members and employees may **not** therefore receive any payment for services rendered to official foreign interests, such as ambassadors, embassies, or agencies of a foreign government.<sup>41</sup> Caution should thus be exercised in accepting expenses or other compensation from any foreign organization (such as a foundation) that receives sponsorship, funding, or licensing from a foreign government, because it could be considered an official arm or an instrumentality of the government. The Comptroller General has ruled, for example, that a Member of Congress could not accept a fee from the British Broadcasting Corporation for participation in a television program to discuss the American Presidency.<sup>42</sup> The BBC, because of its funding relationship with and regulation by the British government, was considered an instrumentality of the British government, and thus a —foreign state<sup>43</sup> under the constitutional ban.

Regardless of compensation, a public official may not act as an agent or attorney for either (1) a foreign principal required to register under the Foreign Agents Registration Act of 1938, as amended, that is, generally, those individuals engaged in lobbying, political, or propaganda activities,<sup>43</sup> or (2) a lobbyist required to register under the Lobbying Disclosure Act of 1995 in connection with the representation of a foreign entity (18 U.S.C. § 219).

### *Additional Considerations Applicable to Staff Outside Employment*

**Proper Performance of Congressional Duties.** A House staff member who engages in outside employment may not do so to the neglect of official congressional duties, nor on —official time<sup>44</sup> for which he or she is compensated with public funds. The House Code of Official Conduct specifically provides that a Member —may not retain an employee who does not perform duties for the offices of the employing

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<sup>40</sup> Opinion of the Comptroller General B-180472 (May 9, 1974) (copy on file with the Standards Committee).

<sup>41</sup> See, e.g., Memorandum of Walter Dellinger, Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Gary J. Edles, General Counsel, Administrative Conference of the U.S. (Oct. 28, 1993) (Emoluments Clause prohibits government employees from accepting a law firm partnership distribution that may include some income received from foreign government clients) (available on the Office of Legal Counsel website, [www.usdoj.gov/olc](http://www.usdoj.gov/olc)).

<sup>42</sup> Comp. Gen. Op. B-180472, *supra* note 40.

<sup>43</sup> See Foreign Agents Registration Act, 22 U.S.C. §§ 611-621.



authority commensurate with the compensation he receives<sup>44</sup> (House Rule 23, cl. 8). Additionally, ¶ 3 of the Code of Ethics for Government Service instructs government employees to “[g]ive a full day’s labor for a full day’s pay.” A House employee is hired and paid from the United States Treasury for the performance of official duties. Any outside employment that would detract from the performance of, or full time and attention to, one’s government job would be contrary to these standards. When the demands of a staff person’s outside employment result in a reduction of the amount of time that he or she devotes to congressional duties, a commensurate reduction in the individual’s congressional pay is required.

Conversely, the provisions of the House Rules prohibiting unofficial office accounts generally preclude Members from accepting privately financed or unpaid services (as well as other in-kind support) for the performance of official House business (House Rule 24, cl. 1). Accordingly, a staff person should not perform congressional duties during time for which the individual is being compensated by a private outside employer, and should not use any resources of a private outside employer for the performance of congressional duties. Particularly where a staff person devotes a significant amount of time to outside employment, or engages in outside employment activities during the regular business day, he or she should keep careful time records for both positions in order to be able to demonstrate compliance with the applicable rules.

In addition, because a staff person’s specific duties and terms of employment are within the discretion of his or her employing Member, the Member’s perspective on a staff person’s outside employment – and particularly whether any specific outside employment may impair the individual’s ability to perform his or her congressional duties or would otherwise be inappropriate – is most important. For that reason, a staff person should consult with his or her employing Member or supervisor before undertaking any outside employment.

The considerations applicable to the performance of campaign work by House staff are detailed in Chapter 4 of this Manual.

**Outside Employment of Professional Committee Staff.** A provision of the House Rules states that the professional staff members of each standing committee “may not engage in any work other than committee business during congressional working hours” (House Rule 10, cl. 9(b)(1)(A)). The legislative history of the provision states that its intent is to confirm that the House Rules on professional committee staff “[do] not prohibit such staff from outside employment on their own time.”<sup>44</sup>

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<sup>44</sup> *Bipartisan Task Force Report, supra* note 8, at 34, 135 *Cong. Rec.* H9262.

**Staff Who File Financial Disclosure Statements.** A provision of the House Code of Official Conduct that was added by the Ethics Reform Act of 1989 restricts the **official** activities of employees who file financial disclosure forms (House Rule 23, cl. 12). These staff persons may not contact other government agencies with respect to non-legislative matters affecting their own significant financial interests. An employing Member may waive this disqualification by notifying the Standards Committee, in writing, that the Member is aware of the employee's financial interest, but deems this person's participation in the matter to be necessary.

**Example 23.** Staff person A, who is the banking expert on a Member's staff, is part owner of a bank in the Member's district. A new banking regulation will adversely affect all the banks in that district, and the Member wishes A to contact the banking regulators on his behalf to urge reconsideration. The Member writes to the Standards Committee stating: —I authorize my staff member, A, to contact banking authorities concerning Regulation 123. I understand that A, as part owner of Central Bank, may benefit if the Regulation is withdrawn. Nonetheless, I waive the application of House Rule 23, clause (12)(a) because A's expertise in this area makes her participation necessary. Upon receipt of the Member's letter by the Committee, A is free to contact the agency.

### *Negotiating for Future Employment*

The Committee's general guidance regarding negotiating for non-congressional employment is that House Members and employees are free to pursue future employment while still employed by the House, subject to certain ethical constraints. However, House Rule 27, which was enacted during the 110<sup>th</sup> Congress,<sup>45</sup> established an additional restriction for House Members. Pursuant to House Rule 27, clause 1, a Member may not —directly negotiate or have any agreement of future employment until after his or her successor has been elected unless the Member discloses those negotiations as required by the rule. House Rule 27 also requires officers, very senior staff, and those Members who are subject to the rule to disclose to the Standards Committee any job negotiations made with a private employer while the individual is still employed by the House, as well as any recusal from official matters that is necessitated by those negotiations.

The term —negotiation is not defined in the legislation or House rule. In its past guidance, the Committee has given deference to court decisions interpreting a related federal criminal statute. That statute (18 U.S.C. § 208) bars executive branch employees from participating in matters affecting the financial interests of

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<sup>45</sup> House Rule 27 was created by the Honest Leadership and Open Government Act of 2007 (—HLOGA), Pub. L. 110-81, § 105, 121 Stat. 735, 741 (Sept. 14, 2007).

an entity with which the employee is negotiating or has any arrangement concerning future employment. Those decisions found that the term negotiation should be construed broadly.<sup>46</sup> However, the Committee makes a distinction between negotiations, which trigger the rule, and [p]reliminary or exploratory talks, which do not. Negotiations connotes a communication between two parties with a view toward reaching an agreement and in which there is active interest on both sides.<sup>47</sup> Thus, merely sending a copy of one's résumé to a private entity is not considered negotiating for future employment.

The general guidance applicable to all Members and House employees – regardless of salary level – who wish to engage in negotiations for future employment is as follows. First and foremost, a Member or House employee may not permit the prospect of future employment to influence the official actions of the Member or employee, or the employing office of the employee. Some Members and employees may determine to use an agent (a headhunter) to solicit job offers on their behalf in order to avoid any appearance of improper activity. Regardless of whether job negotiations are undertaken personally or through an agent, the following generally applicable principles must be observed.

Other, more general, ethical rules also bear on the subject of employment negotiations. The House Code of Official Conduct prohibits House Members, officers, and employees from receiving compensation –by virtue of influence improperly exerted from a congressional position.<sup>48</sup> Paragraph 5 of the Code of Ethics for Government Service forbids anyone in government service from accepting favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties. Federal criminal law prohibits a federal official from soliciting or accepting a bribe – *i.e.*, something of value given in exchange for being influenced in an official act.<sup>49</sup> Although bribery necessarily entails a *quid pro quo* arrangement, the same statute also bans seeking or accepting illegal gratuities – *i.e.*, anything given because of, or in reward for, a future or past official act, whether or not the official action would be, or would have been, taken absent the reward.<sup>50</sup>

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<sup>46</sup> See, e.g., *United States v. Schaltenbrand*, 930 F.2d 1554, 1559 (11th Cir. 1991), cert. denied, 502 U.S. 1005 (1991) and *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980), cert. denied, 454 U.S. 1149 (1982).

<sup>47</sup> *United States v. Hedges*, 912 F.2d 1397, 1403 n.2 (11th Cir. 1990) (quoting jury instruction); see also *Schaltenbrand*, *supra* note 46, at 1559 n.2.

<sup>48</sup> House Rule 23, cl. 3.

<sup>49</sup> 18 U.S.C. § 201(b)(2)(A).

<sup>50</sup> *Id.* § 201(c)(1)(B).

In light of these restrictions, Members and employees should be particularly careful in negotiating for future employment, especially when negotiating with any individual or entity that could be substantially affected by the performance of official duties. It may be prudent for the Member or employee to have an exchange of correspondence with any serious negotiating partner, stipulating that the prospective employer will receive no official favors in connection with the job negotiations. Members and those employees who will be subject to the post-employment restrictions<sup>51</sup> may also wish to establish in correspondence with any prospective employer that the future employer understands that (1) it will receive no official favors as a result of the job negotiations, and (2) the Member or employee is subject to post-employment restrictions, which should be briefly outlined.<sup>52</sup> Former Members and employees who are lawyers should consult their local bar association concerning the application of rules governing their involvement in matters in which they participated personally and substantially during their time with the House.<sup>53</sup> In addition, as addressed more fully below, Members, officers, and very senior staff must disclose the employment negotiations to the Standards Committee.

Provided that Members and employees conduct themselves in accordance with the considerations discussed above, they may engage in negotiations for employment in the same manner as any other job applicant. Discussions may specifically address salary, duties, benefits, and other terms.

**Notification Requirements.** Pursuant to House Rule 27, Members, officers, and very senior staff must notify the Committee on Standards of Official Conduct within three (3) business days after the commencement of any negotiation or agreement for future employment or compensation with a private entity. The notification requirement applies to all job negotiations commenced, and employment or compensation agreements entered into, on or after the effective date

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<sup>51</sup> The post-employment restrictions are discussed in detail in a pair of advisory memoranda – one for Members and officers and another for employees – issued annually by the Committee. Copies of the memoranda are available on the Standards Committee website.

<sup>52</sup> Briefly, House Members may not contact any Member, officer, or employee of the House or Senate on official business for one year after leaving office, nor may they assist any foreign government in securing official action from any federal official during that year. House officers and employees may neither contact the individual's former congressional office or committee members on official business for one year after leaving House employment, nor assist any foreign government in securing official action from any federal official during that year. Detailed guidance on the restrictions is contained in the memoranda referenced in note 51 above.

<sup>53</sup> A former employee who joins a law firm should also be aware that a separate statutory provision, 18 U.S.C. § 203, has been interpreted to prohibit a former federal official who joins a firm from sharing in fees attributable to representational services in federally related matters where those services were provided by the firm while the individual was still employed by the government. OGE Advisory Opinion 99 x 24, *supra* n. 22.

of the rule (September 14, 2007).<sup>54</sup> For 2008, very senior staff are those House employees who are paid at an annual rate of \$126,975 for at least 60 days during their last twelve months of House employment.<sup>55</sup>

In addition, officers, very senior staff, and those Members subject to the notification requirement must recuse themselves from —any matter in which there is a conflict of interest or an appearance of a conflict— with the private entity with which they are negotiating or have an agreement for future employment or compensation, and they must notify the Standards Committee in writing of such recusal.<sup>56</sup> Members who make such a recusal also must file their negotiation notification with the Clerk for public disclosure. The subject of Member recusal from voting is addressed in more detail later in this chapter. Forms to be used for these notification requirements are available on the Committee website ([www.house.gov/ethics](http://www.house.gov/ethics)).

Other provisions of the rules relevant to future employment of Members and staff include the following. For Members and for staff persons required to file a termination Financial Disclosure Statement, any agreement they reach on future employment, whether oral or written, before termination of their service with the House must be disclosed on Schedule IX of that form. The gift rule provides that a Member, officer or employee may accept —[f]ood, refreshments, lodging, transportation, and other benefits . . . customarily provided by a prospective employer in connection with bona fide employment discussions— (House Rule 25, cl. 5(a)(3)(G)(ii). More information on this provision is provided in Chapter 2 of this volume. If an individual accepts travel exceeding \$335 in value from a prospective employer in connection with employment negotiations, that travel must be disclosed on Schedule VII of the individual's Financial Disclosure Statement.

## Background on the Restrictions on Outside Employment and Income

At times a newly elected House Member or a new House employee wishes to continue, in some limited form, the private or other outside employment in which he

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<sup>54</sup> A Member, Delegate, or Resident Commissioner is not subject to this requirement if his or her successor has been elected.

<sup>55</sup> For employees of —other legislative offices,— the salary triggering the post-employment restrictions is level IV of the Executive Schedule. *See* 18 U.S.C. § 207(e)(7)(B). For 2008, that amount is \$149,000. —[O]ther legislative offices— include the Architect of the Capitol, United States Botanic Garden, Government Accountability Office, Government Printing Office, Library of Congress, Office of Technology Assessment, Congressional Budget Office, and Capitol Police. It also includes any other House legislative branch office not covered by the other provisions, such as the Clerk, Parliamentarian, Office of Legal Counsel, and Chief Administrative Officer. *See* 18 U.S.C. § 207(e)(9)(G).

<sup>56</sup> House Rule 27, cl. 4.

or she had been engaged. Also, a House Member, officer, or employee may wish to accept a part-time job or a position with an outside entity or otherwise commence outside employment simultaneously with their service in the House.

As detailed in the remainder of this chapter, federal law and House rules include restrictions on the types of outside employment and a limit on the amount of outside earned income that Members, officers, and employees of the House may accept. —Earned income is income that constitutes compensation for services. The fundamental purpose of the restrictions and limit is to ensure that Members and staff do not use the influence or prestige of their position with the House for personal gain, and to preclude conflicts of interest.

While certain laws, rules, and standards of conduct apply to **all** House Members and staff (as discussed previously in this chapter), other, more specific restrictions on outside earned income and employment apply only to Members and certain highly paid staff, who are referred to in this chapter as —senior staff, —senior employees, or individuals —paid at the senior staff rate. As detailed below, the salary rate at which a House officer or employee becomes subject to these specific limitations is determined for each calendar year by a formula established in both federal law and House rules. In calendar year 2008 the —senior staff rate is an annual rate of **\$114,468**. The senior staff rate for other years is available from the staff of the Standards Committee.

The restrictions on the outside earned income of House Members and senior staff are far more detailed and extensive than those applicable to so-called —unearned income — that is, income that constitutes a return on capital. The House approved the establishment of an annual limitation on outside earned income in 1977 at the recommendation of the House Commission on Administrative Review, and the Commission’s report explains the basic reasons that outside earned income presents significantly greater ethical concerns:

Earned income creates a variety of more serious potential conflicts of interest than does investment income, ranging from overt attempts to curry favor by private groups to subtle distortions in the judgment of Members on particular issues. . . . The Member who has stock holdings can transfer his holdings at any time to another company, and, thus, is not as subject to the same degree of potential conflict as a Member whose . . . salary [from a private company] could be cut off arbitrarily.

Outside earned income also presents a —time conflict between the Member’s private interest and the public interest. Supplementing salary with outside earned income can detract from a Member’s full

time and attention to his official duties and creates subtle distortions in judgment as to how Members should use their time. . . .

Moreover, many citizens perceive outside earned income as providing Members with an opportunity to —cash in on their positions of influence. Even if there is no actual impropriety, such sources of income give the appearance of impropriety and, in so doing, further undermine public confidence and trust in government officials.<sup>57</sup>

Twelve years later, in 1989, the House approved additional, significant restrictions on outside employment and earned income of Members and senior staff upon the recommendation of the House Bipartisan Task Force on Ethics. The report of the Task Force explained the purposes of the limitations then in effect as follows:

The current limitations on outside earned income and honoraria were prompted by three major considerations: First, substantial payments to a Member of Congress for rendering personal services to outside organizations presents a significant and avoidable potential for conflict of interest; second, substantial earnings from other employment is inconsistent with the concept that being a Member of Congress is a full-time job; and third, substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials.

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The earned income limitation was intended to assure the public that (1) Members are not using their positions of influence for personal gain or being affected by the prospects of outside income; and (2) outside activities are not detracting from a Member's full-time attention to his or her official duties.<sup>58</sup>

### **Restrictions on Outside Employment Applicable to Members and Senior Staff**

A Member . . . [or an] officer, or employee of the House [paid at or above the —senior staff rate], may not—

(a) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity that

<sup>57</sup> Comm'n on Admin. Review, *Financial Ethics*, H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 10 (1977).

<sup>58</sup> *Bipartisan Task Force Report*, *supra* note 8, at 12, 135 *Cong. Rec.* at H9256.

provides professional services involving a fiduciary relationship, except for the practice of medicine;

(b) permit his name to be used by such a firm, partnership, association, corporation, or other entity;

(c) receive compensation for practicing a profession that involves a fiduciary relationship, except for the practice of medicine;

(d) serve for compensation as an officer or member of the board of an association, corporation, or other entity; or

(e) receive compensation for teaching, without the prior notification and approval of the Committee on Standards of Official Conduct. [House Rule 25, clause 2. *See also* 5 U.S.C. app. 4 §502(a).]

***Who Is a—Senior Staff Person for Purposes of the Restrictions on Outside Employment and Outside Earned Income Limitations?***

The Ethics Reform Act of 1989 enacted significant limitations on the outside employment and earned income of House Members – primarily with respect to compensation from the practice of any profession and the receipt of honoraria – and also extended those limitations to highly paid staff. The officers and employees to whom those limitations are applicable are those paid, for **more than 90 days in a calendar year**, at a rate equal to or exceeding 120% of the minimum rate of basic pay for GS-15 of the executive branch’s General Schedule (House Rule 25, cl. 4(a)(1)). These limitations do **not** apply to any officer or employee who is paid at or above that rate for 90 days or less in a calendar year.

In calendar year 2008, the GS-15 rate of basic pay is \$95,390 (locality pay is not considered in making this determination). Accordingly, in calendar year 2008, the outside employment and earned income limitations apply to House staff paid at or above the rate of **\$114,468**. As noted above, this chapter refers to the officers and employees paid at or above this rate as —senior staff,|| —senior employees,|| or individuals —paid at the senior staff rate.|| The senior staff rate for other years is available from the staff of the Standards Committee.

Under federal law and House rules, the outside earned income of House Members and senior staff is subject to an overall annual limitation, which is explained in more detail later in this chapter. In calendar year 2008, that limitation is **\$25,830**. In addition, the provisions of law and rules enacted by the Ethics Reform Act of 1989 restrict, and in some cases prohibit, compensation for certain **types** of services, regardless of whether the individual’s income has reached the cap, as follows.

***Prohibition Against Receipt of Compensation for the Practice of Law or Other Professions, and Related Prohibitions***

Under the Ethics Reform Act, Members and senior staff are prohibited from engaging in professions that provide services involving a fiduciary relationship,



including the practice of law and the sale of insurance or real estate. There were essentially two reasons for the establishment of the fiduciary relationship prohibitions. First, these professional activities were believed to pose a particular risk of conflict of interest:

There is also concern that receipt of legal fees and other compensation for professional services, and directors' fees from serving on boards of corporations, associations, nonprofit organizations, and other entities, creates at least the appearance of impropriety and the potential for conflicts of interest. Based on the fundamental principle that a public office is a public trust, all officials of the government are expected to act in the interests of the beneficiaries of that trust, that is, the general public.

When certain private positions and employment create for the Member or public official a fiduciary or a representational responsibility to a private client or a limited number of private parties, then such outside activities create the potential for a serious conflict of interest. The conflict occurs in the clash of those responsibilities and the divergence of public and private interests on a particular governmental matter or in general government policy.<sup>59</sup>

Second, there was a desire to ensure that honoraria – which, as detailed above, was banned under other provisions of the Act – —not reemerge in various kinds of professional fees from outside interests.<sup>60</sup>

**Professions Covered by the Prohibitions.** What types of professional activities are embraced by these prohibitions? The statute does not define —fiduciary,<sup>61</sup> a term generally denoting an obligation to act in another person's best interests or for that person's benefit, or a relationship of trust in which one relies on the integrity, fidelity, and judgment of another.<sup>61</sup> However, the Bipartisan Task Force Report states that in order for the underlying purposes to be achieved, —the term fiduciary [should] not be applied in a narrow, technical sense.<sup>62</sup> The report further states:

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<sup>59</sup> *Id.* at 14, 135 *Cong. Rec.* at H9256.

<sup>60</sup> *Id.* at 16, 135 *Cong. Rec.* at H9257.

<sup>61</sup> See *Black's Law Dictionary* 658, 1315 (8th ed. 2004); *Bipartisan Task Force Report*, *supra* note 8, at 16, 135 *Cong. Rec.* at H9257.

<sup>62</sup> *Bipartisan Task Force Report*, *supra* note 8, at 16, 135 *Cong. Rec.* at H9257.

The task force intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture, or financial.<sup>63</sup>

In the same vein, in the debate preceding passage of this law, one of the Members who served on the Bipartisan Task Force explained that—it eliminates the ability of Members of Congress to earn income from professional fees such as law practice, insurance, or accounting, any income that could be funneled from lobbyists to Members under the guise of personal services.<sup>64</sup>

A Standards Committee advisory memorandum of February 23, 1998 (included in the appendices) contains a Committee determination that the practice of medicine is a profession involving a fiduciary relationship and hence is subject to the fiduciary relationship prohibitions. That memorandum further advised that henceforth, in determining whether a profession is covered by these provisions, the Committee would rely on the above-quoted list of professions in the Bipartisan Task Force Report, and would also look to (1) whether applicable state law establishes any fiduciary relationship with regard to that profession, and (2) the regulations on covered professions issued for the Executive Branch by the U.S. Office of Government Ethics (5 C.F.R. § 2636.305(b)(2) (2006)).<sup>65</sup> However, as discussed further below, the Committee has issued guidance permitting Members to accept fees for the practice of medicine in certain limited circumstances.

The applicability of the fiduciary relationship prohibitions to consulting or advising on business matters and political consulting, and to medical practice, is further addressed in this next section of this chapter.

There are three separate prohibitions relating to professions involving a fiduciary relationship. Except with regard to the practice of medicine, these prohibitions are set forth in virtually identical form in both statutory law and the House rules, as follows.

**Prohibition Against Receiving Compensation From Practice of a Covered Profession.** Members and senior staff are prohibited from—receiv[ing] compensation for practicing a profession that involves a fiduciary relationship.<sup>66</sup> Accordingly, Members and senior staff may not receive compensation for providing professional

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<sup>63</sup> *Id.*

<sup>64</sup> 135 *Cong. Rec.* H8751 (daily ed. Nov. 16, 1989) (statement of Rep. Obey).

<sup>65</sup> This approach superseded a—three-pronged test that the Standards Committee had used to that time to determine whether a particular employment opportunity involved a fiduciary relationship. See *House Ethics Manual*, 102d Cong., 2d Sess. (April 1992), at 103.

<sup>66</sup> House Rule 25, cl. 2(c); 5 U.S.C. app. 4 § 502(a)(3).

services in the fields noted above, and may not participate in any arrangement under which fees for any such services that they render are paid to any other individual or entity.

The prohibition applies only to compensation for services that the individual provides while serving as a Member or senior employee, and it does not apply to compensation for services provided prior to assuming office. Thus, for example, a Member who had been an insurance agent may accept renewal commissions generated by policies sold prior to becoming a Member, and a Member who had been a leasing agent may accept renewal commissions with respect to leases that were entered into prior to that time. It appears that in most such arrangements, payment of the commission is not contingent upon the performance of any future services by the recipient, and the only contingency is that the insured or the lessee continue to pay premiums or rent, as the case may be.<sup>67</sup> Similarly, a Member who had been an attorney may accept a fee for legal work completed prior to becoming a Member.<sup>68</sup>

Any such renewal commission or other income received by a Member or senior employee for services provided prior to assuming office must be reported on Schedule I of the Financial Disclosure Statement of the Member or senior staff person for the year in which the income was received. However, as detailed below, such income does not count against the individual's outside earned income limitation for that year.

As noted above, the prohibition extends generally to **—consulting and advising.** They clearly apply to consulting and advising in professional fields such as law, accounting, investing, and real estate or insurance sales. In addition, as a general matter, the prohibition extends to consulting or advising on **business matters.** However, where certain requirements are satisfied, a Member or senior staff person is not prohibited from accepting compensation for business consulting

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<sup>67</sup> It also appears that in most such arrangements, the level of a renewal commission was set at the time that the original policy or lease was entered into. In any instance in which the level of a renewal commission was not set at that time, but instead is to be determined by the parties at a later time, the Member or senior employee should contact the Standards Committee for advice.

<sup>68</sup> However, such a Member could not participate in an arrangement with his or her former firm in which the Member would be paid income derived from the continuing or future business of clients that the Member had brought into the firm.

Regarding the possibility that receipt of attorney's fees for work in a case against the United States performed prior to the commencement of one's service with the House may be prohibited by 18 U.S.C. §§ 203, 205, see *Attorney's Fees for Legal Services Performed Prior to Federal Employment*, Memorandum of Beth Nolan, Deputy Ass't Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Director, Departmental Ethics Office (Feb. 11, 1999) (available on the Office of Legal Counsel website, [www.usdoj.gov/olc](http://www.usdoj.gov/olc)). The provisions of 18 U.S.C. §§ 203 and 205 are discussed earlier in this chapter.

from a business in which the Member or staff person (or his or her family) holds a controlling interest. In order for business consulting on a paid basis to be permissible, (1) the family-owned business may not be a law firm, an insurance agency, or any other entity that provides professional services involving a fiduciary relationship, (2) the services provided by the Member or senior staff person may not be in a professional field such as law or accounting, and (3) the other limitations on outside earned income and employment set forth in this chapter must be observed. Any Member or senior staff person who wishes to receive compensation for consulting services provided to a family-owned business should first consult with the Standards Committee.

As a general matter, the prohibition also extends to consulting or advising on **political matters** and **public relations**. However, a senior staff person is not prohibited from accepting compensation for political consulting services that he or she provides to either a candidate (including one's employing Member), a political party, or a Member's leadership PAC.<sup>69</sup> Senior staff who wish to consult for any other type of political organization or entity should consult the Standards Committee for guidance before undertaking any such employment. In addition, in order to be permissible, the political consulting services for which the senior staff person is compensated may not be in a professional field such as law or accounting, and the other limitations on outside earned income and employment set forth in this chapter must be observed.

With regard to the **practice of medicine**, as noted above, in 1998 the Standards Committee determined that medical practice is a profession covered by the prohibitions. In 2003 the House amended its rules to exempt medical practice from the fiduciary relationship prohibitions, but no corresponding change has yet been made in the prohibitions as set out in statutory law.<sup>70</sup> Notwithstanding the existing statutory prohibition, the Standards Committee has authorized Member-physicians to practice medicine for a limited amount of compensation. Specifically, the Committee advised that a Member who is a doctor does not violate the prohibition if he or she receives, in any calendar year, fees or other payments for medical services that do not exceed the actual and necessary expenses incurred by the Member during the year in connection with the practice. The particulars of and the reasons for that Committee determination are set forth in the February 1998

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<sup>69</sup> As indicated in the text, such compensation is permissible for senior staff persons only, and not for Members. It should also be noted that Federal Election Commission regulations that were promulgated in 2002 prohibit Members from receiving compensation from their own campaign (11 C.F.R. § 113.1(g)(1)(i)(I)). A Member's receipt of compensation from his or her own campaign is also barred by the provision of the House Rules that prohibits the conversion of campaign funds to personal use (House Rule 23, cl. 6).

<sup>70</sup> 149 *Cong. Rec.* H9, H12 (daily ed. Jan. 7, 2003). This amendment is reflected in the excerpt from the rule that is quoted at the beginning of this section.

memorandum included in the appendices to this Manual. Any Member-physician wishing to accept payment for providing medical services should review that memorandum and consult with the Standards Committee. In particular, Members who practice medicine for compensation must file an annual accounting with the Standards Committee that describes the total fees charged, payments received, and any expenses.

Occasionally a Member or senior staff person is named or requested to act as the **personal representative or executor of the estate** of a deceased individual. If the Member or senior staff person is an attorney, then any fees for serving as personal representative or executor would be deemed to constitute compensation for legal services and hence could not be accepted. However, the Standards Committee has recognized an exception to this rule when the deceased individual is an immediate family member of the Member or senior staff person. In that circumstance, the fees normally paid to a personal representative or executor may be accepted, but they would count against the individual's outside earned income limitation for the year(s) in which the services are rendered.

Finally, occasionally an incoming Member or senior staff practiced a profession involving a fiduciary relationship prior to taking office, and wishes to complete a matter after taking office. As a general rule, any such —winding upll work must be done on an uncompensated basis. Nevertheless, in certain very limited circumstances, the Standards Committee may allow the Member or senior staff person to accept compensation for that work. Any incoming Member or employee wishing to continue work under these circumstances should consult with the Standards Committee for more detailed guidance.

**Example 24.** A Member, before his election to the House, was vice president and general counsel of a small manufacturing company. After he assumes office, the company would like him to continue in his prior capacities, but at a reduced salary to reflect his reduced time commitment to the company. The Member may **not** accept any compensation from the company under these circumstances since the payment would be compensation for providing legal advice, a professional service involving a fiduciary relationship. (Such compensation would also be an impermissible officer's fee (see below).)

**Example 25.** A political consulting firm that specializes in advising candidates for state office offers a consulting contract to a Member. The firm is hoping to attract new clients by making available the demonstrated political savvy and expertise of the Member. The Member may **not** enter into the contract because the consulting services the Member would provide are among those for which a Member may not receive compensation, and in any event, it appears

that the purpose of the contract is to capitalize on the individual's status as a Member.

**Example 26.** A Member who is a lawyer would like to represent an indigent client on a *pro bono* (unpaid) basis. Since she will not be compensated, she may do so, provided that she observes all other limits on the practice of law by Members (see the section on law practice earlier in this chapter).

**Example 27.** The House pay of a staff person is increased to a rate above the senior staff rate. While she was paid below the senior staff rate, she earned outside income as an insurance and real estate broker. As of the time she becomes a senior employee, she may no longer do so.

**Example 28.** A Member who is an attorney is named the executor of his late uncle's estate. Because the service would be on behalf of a family member, he may accept payment of executor's fees at the customary rate.

**Prohibition Against Receiving Compensation for Affiliating With an Entity That Provides Covered Professional Services.** Members and senior staff are also prohibited from —receiv[ing] compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity that provides professional services involving a fiduciary relationship.<sup>71</sup> Under this prohibition, Members and senior staff may **not** receive compensation for affiliating with or being employed by such an entity **in any capacity**.

Under this prohibition, a Member or senior staff person may **not** receive compensation for serving as, for example, a business manager or administrative assistant of a law firm, a medical practice, or a real estate or insurance agency. As to whether a particular firm provides professional services involving a fiduciary relationship (meaning that compensation for the services would be covered by this prohibition), see the description of covered professions that is provided above in this chapter.

**Example 29.** A Member is in her final year in the House, having announced her retirement. Upon leaving the House she will join a law firm and will open a new office for the firm. Before her term expires, she wishes to begin organizing the office by, for example, arranging for office space and interviewing potential employees. She may not

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<sup>71</sup> House Rule 25, cl. 2(a); 5 U.S.C. app. 4 § 502(a)(1).

receive any compensation from the law firm even for any non-legal work that she does in the time before her House term expires.

**Example 30.** A staff person whose House pay exceeds the senior staff rate ceased selling real estate prior after coming to work on the Hill. In order to maintain his license, however, he must remain affiliated with a real estate firm. As long as he is not actively selling and he receives no compensation, he may maintain this affiliation. However, the firm may **not** publicly use his name (see below).

**Prohibition Against Permitting One's Name To Be Used by an Entity That Provides Covered Professional Services.** A Member or senior staff person is further prohibited from —permit[ting] his name to be used by . . . a firm, partnership, association, corporation, or other entity<sup>72</sup> that —provides professional services involving a fiduciary relationship.<sup>72</sup> While the other two fiduciary relationship prohibitions relate to receipt of compensation, the ban on allowing one's name to be used by a covered organization applies **regardless of whether the organization compensates the Member or employee.** The ban extends, for example, to use of the name of the Member or senior staff person on the letterhead, advertising, or signage of any covered organization.

Under this provision, when the name of an incoming Member or senior staff person had been used in the name of a law firm, real estate agency, or other organization that provides fiduciary services, the name of that organization must be changed to eliminate the name of the Member or senior staff person. However, the requirement does not apply when the organization's name in fact reflects a —family<sup>73</sup> name, as opposed to that of the individual Member or staff person. On this point, the Bipartisan Task Force Report states, —the fact that a Member, officer, or employee is presently associated with a law firm founded by, and still bearing the name of, his father would not require the firm to drop the family' name.<sup>73</sup>

In addition, federal law at 5 U.S.C. § 501 provides that a firm, business, or organization that practices before the federal government may not use the name of a Member of Congress to advertise the business. These limitations are in accord with model rules of the American Bar Association (ABA) that prohibit the facade of retaining a government lawyer's name in a firm when the individual is not actively and regularly practicing.<sup>74</sup>

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<sup>72</sup> House Rule 25, cl. 2(b); 5 U.S.C. app. 4 § 502(a)(2).

<sup>73</sup> *Bipartisan Task Force Report*, *supra* note 8, at 16, 135 *Cong. Rec.* at H9257.

<sup>74</sup> See ABA, *Model Rules of Professional Conduct*, Rule 7.5(c) (2007).

**Example 31.** A Member was a name partner in a law firm before election to Congress. Upon his election, the firm changed its name to reflect his resignation but requested that it be allowed to list him as —of counsell on its letterhead so as to maintain the goodwill of his former clients. Even if he accepts no compensation from the firm, the Member must refuse the request.

**Example 32.** Member Jane Doe is a certified public accountant. Prior to her election, she was employed by the accounting firm of Doe & Moe, named for its founder and her father, Joe Doe. Since the firm was not actually named for her, it does *not* have to change its name upon her election.

***Prohibition Against Serving for Compensation as an Officer  
or Board Member of Any Organization***

The ban on paid board service – like the restrictions on paid teaching discussed in the next section – arises from the same set of concerns as the fiduciary relationship prohibitions. The ban on accepting compensation for serving as an officer or board member applies to all entities, including nonprofit and campaign organizations, and governmental entities. As a general matter, Members and senior staff may serve in such capacities, but they may not be paid any directors’ fees or other compensation for that service.<sup>75</sup> They may accept reimbursements for travel and other expenses in carrying out the duties of a board member and may be covered by an insurance policy as a member of a board,<sup>76</sup> provided that acceptance is permissible under the applicable provision of the gift rule (House Rule 25, cl. 5(a)(3)(G)(i)).

**Example 33.** A Member serves on the board of a hospital in his district. He receives no salary, but the hospital pays for his travel expenses if he makes a special trip to attend a board meeting, and he is covered under the hospital’s officers’ and directors’ liability policy. These arrangements do not violate the prohibition against compensated board service.

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<sup>75</sup> The Internal Revenue Code specifically excludes from income any payments in lieu of honoraria made to charities at a Member, officer, or employee’s behest and disallows any tax deduction for them by that individual (26 U.S.C. § 7701(k)). No comparable provision addresses payments to charity in lieu of directors’ fees. Thus, even if a director tried to have his or her fees donated to charity, those fees could still be deemed constructive income to the individual under tax law, which would permit the individual to take an itemized deduction. Any arrangement whereby a Member, officer, or covered employee receives a direct or indirect financial benefit from board service is prohibited under the Ethics Reform Act.

<sup>76</sup> See *Bipartisan Task Force Report*, *supra* note 8, at 16, 135 *Cong. Rec.* at H9257.



**Example 34.** A staff person whose pay is above the senior staff rate works on a Member's campaign on her own time and outside of congressional space. The staff person may be paid for her campaign work, subject to the outside earned income cap, as long as she is not paid as the campaign's treasurer or any other officer for the campaign.

***Requirement for Prior Committee Approval of Compensation for Teaching***

Members and senior staff may **not** teach for compensation **unless** they receive prior written approval from the Standards Committee for each semester or academic year in which the teaching will occur. This requirement ensures that teaching does not become an avenue for circumventing the honoraria ban. In order to receive approval, the teaching must conform to the following criteria:

- (1) The teaching is part of a regular course of instruction at an established academic institution.
- (2) All compensation comes from the funds of the institution and none is derived from federal grants or earmarked appropriations.
- (3) The payment is for services on an ongoing basis, not for individual presentations or lectures.
- (4) The teacher's responsibilities include class preparation and student evaluation (for example, grading papers, testing, and homework).
- (5) The students receive credit for the course taught.
- (6) The compensation does not exceed that normally received by others at the institution for a comparable level of instruction and amount of work.
- (7) No official resources, including staff time, are used in connection with the teaching.
- (8) The teaching does not interfere with official responsibilities nor is it otherwise inconsistent with the performance of congressional duties.
- (9) The employment or compensation does not present a significant potential for conflict of interest.

Items 1 through 6 should be confirmed in writing by the institution at which the paid teaching will occur. Documentation may be in the form of an explanatory

letter or copy of a teaching contract attached to the request for Committee approval. Items 7 through 9 should be affirmed in writing by the individual seeking to teach.

The Standards Committee also normally approves requests to teach for compensation in less formal settings such as Sunday school, piano lessons, aerobics classes, and other situations clearly unrelated to official duties or an individual's status in Congress. No documentation need be submitted from the employing institution in such instances, but Committee approval is required. Compensation received for teaching at any institution is subject to the outside earned income limit for Members and covered staff, discussed later in this chapter.

***Requirement for Committee Approval of Publishing Contracts, and Prohibition  
Against Receipt of Any Advance Payment of Royalties***

Three provisions of House Rule 25 apply where a Member or staff person paid at the senior staff rate wishes to enter into a contract for the publication of a book. Briefly stated, those provisions:

- Prohibit the receipt of copyright royalties unless the contract is first approved by the Standards Committee, with the criteria for approval being that the royalties are to be received from an established publisher pursuant to —usual and customary contractual terms;¶
- Prohibit the receipt of any advance payment on copyright royalties (a researcher or other individual working for a Member on a book may receive an advance directly from the publisher, provided that the individual neither is employed by the House nor is a relative of any House Member, officer, or employee); and
- Exempt from the outside earned income limitation any copyright royalties received under a publishing contract that complies with the above rules.

Elaboration on these provisions follows.

**The Requirement for Prior Approval of Publishing Contracts.** A Member or senior employee may not —receive copyright royalties under a contract . . . unless that contract is first approved¶ by the Standards Committee (House Rule 25, cl. 3(b)). The criteria for Committee approval are that the royalties —are received from an established publisher under usual and customary contractual terms¶ (*id.* cl. 3(b), 4(d)(1)(E)).

In determining whether a publisher is an —established¶ one for purposes of the rule, the Committee will consider, among other things, information on the company that is available in standard industry reference books, such as the year that the company was founded and the number of titles that it has in print. In determining whether the terms of a proposed contract are —usual and customary¶ ones, the Committee requires representations from the publisher as to the contract

terms that it offers to similarly situated authors and whether the terms offered to the Member or employee differ in any way from its standard terms. In reviewing contract terms, the Committee considers, among other terms, those that benefit the author, including the royalty rates, any provision that entitles the author to copies of the book either without charge or at a reduced price, and any provision for a book tour sponsored by the publisher.

At times a Member wishes to enter into a publishing contract that provides that any royalties are to be paid directly to a charity that the Member designates in the contract. Any publishing contract of a Member or senior staff person that provides for the payment of royalties to a charity or other person must nevertheless be submitted to the Standards Committee for prior approval.

Contracts with a publisher for a congressional author to self-publish a book are permitted, provided the contract contains the publisher's standard terms, available to all authors. Such contracts may not provide any advance on royalties.

**The Prohibition Against Receipt of an Advance on Copyright Royalties.** Under a provision of the rules that was approved in late 1995, Members and senior staff are prohibited from —receiv[ing] an advance payment on copyright royalties! (House Rule 25, cl. 3(a)). However, the rule does **not** prohibit an individual who is working with a Member or senior employee on a publication, such as a literary agent or researcher, from receiving an advance on copyright royalties, provided that the individual is neither a House employee nor a relative of a Member or an employee. Specifically, the rule against advances on copyright royalties

does not prohibit a literary agent, researcher, or other individual (other than an individual employed by the House or a relative of a Member, . . . officer, or employee) working on behalf of a Member, . . . officer, or employee with respect to a publication from receiving an advance payment of a copyright royalty directly from a publisher and solely for the benefit of that literary agent, researcher, or other individual.<sup>77</sup>

**Exemption of Certain Copyright Royalties From the Outside Earned Income Limitation.** The outside earned income of Members and senior staff are subject to the outside earned income limitation discussed later in this chapter. However, among the types of income that are **exempt** from the annual limitation are

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<sup>77</sup> House Rule 25, cl. 3(a).

—copyright royalties received from established publishers under usual and customary contractual terms|| (House Rule 25, cl. 4(d)(1)(E)). Underlying this provision of the rules is the concept that such royalties are a return on the author’s intellectual property, akin to other unrestricted returns on property.<sup>78</sup>

It is important to note that the **only** copyright royalties that are exempt from the outside earned income limit are those —received from an established publisher under usual and customary contractual terms.|| In the 104<sup>th</sup> Congress the Standards Committee determined that the amounts a Member had received for the sales of his book did not satisfy the requirements of the rule and hence were not exempt from the outside income limitation.<sup>79</sup> In that instance, the Member’s book was published in a foreign country under an arrangement in which the Member received a flat fee of \$25,000, as well as additional payments from a marketing agent based on a rate of 40% of the proceeds of sales. Moreover, all of the payments from the marketing agent derived from bulk book sales to businesses, trade associations, and other entities in that country. The payments that the Member had received for his book exceeded the outside earned income limit by \$112,258. Because refund of the excess to the purchasers of the book was impracticable, the Committee required the Member to donate the amount in excess of the outside earned income limitation either to qualified charities or the U.S. Treasury for debt reduction.

**Other Rules on Book-Related Activities.** The writing of a book by a Member or staff person is **not** considered official House business, even when the subject of the book is congressional issues or one’s experiences in Congress. The same applies to other book-related activities, such as seeking and entering into a contract with a publisher or others, and promoting one’s book. Instead, such activities are considered outside business activities, and this is so even if the Member or employee has contracted that any royalties will be paid to charity. Accordingly, those activities are subject to the laws, rules, and standards of conduct governing the outside employment of Members and all staff that are discussed earlier in this chapter.

Thus, for example, a Member or staff person may not use any House resources – including office supplies or equipment, or staff time – in any book-related activity in which he or she is engaging. In addition, at times the publisher wishes to arrange a book tour, or an individual or organization wishes to host a book-related event or otherwise assist or further sales of one’s book. For Members

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<sup>78</sup> See Senate Special Comm. on Official Conduct, *Senate Code of Official Conduct*, S. Rep. 95-49, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 39 (1977), *quoted in* House Comm. on Standards of Official Conduct, *Statement in the Matter of Rep. James C. Wright, Jr.*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 32 (1989).

<sup>79</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Rep. Jay Kim*, H. Rep. 105-797, 105<sup>th</sup> Cong., 2d Sess. 56-66 (1998).

and staff, the acceptability of such an offer is governed by the gift rule (House Rule 25, clause 5). As a general matter, the provision of the gift rule implicated by such offers is that which allows a Member or staff person to accept benefits resulting from his or her outside activities, provided that two requirements are satisfied: (1) The benefits have not been offered or enhanced because of the individual's position with the House, and (2) those benefits are customarily provided to others in similar circumstances (House Rule 25, cl. 5(a)(3)(G)(i)).

In addition, under provisions of the House Rules and statutory law that prohibit the conversion of campaign funds to personal use, a Member is prohibited from using campaign funds or resources either to purchase copies of a book from which he or she receives royalties, or in furtherance of any activity that involves sales of such a book (House Rule 23, cl. 6; 2 U.S.C. § 439a). Chapter 8 regarding campaign activity provides further detail on this point.

Another relevant provision of the rules is the honoraria ban, which is discussed in more detail earlier in this chapter. While the ban generally prohibits Members and staff from receiving payment for, among other things, an article, a distinction is made between books and articles. A book author's royalties generally reflect the book's sales, that is, the public's assessment of the book's worth. An article, on the other hand, typically garners a one-time fee, based only on what the publisher is willing to pay the particular author (and not necessarily related to the marketability of the piece). To be exempt from the honoraria prohibition, a book must be published by an established publisher pursuant to a usual and customary royalty agreement, as discussed above.

In an investigation in the 101<sup>st</sup> Congress, the Committee found reason to believe that certain income that a Member reported as book royalties was actually excessive honoraria. The Committee's Statement of Alleged Violations charged that the Member, having reached his outside earned income limit, arranged bulk book sales to groups before whom he spoke in lieu of collecting honoraria.<sup>80</sup> The Member resigned before the Committee could proceed further.

Bulk book sales are not, however, invalid *per se*. In another case, the Committee declined to initiate a Preliminary Inquiry based on allegations (among others) that a bulk book sale might have been an improper gift or political contribution, where the Member received no personal financial benefit from the sale.<sup>81</sup> Unlike the previous case, there were no allegations that the sale was arranged to compensate the Member for personal services.

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<sup>80</sup> *Statement in the Matter of Rep. James C. Wright, Jr.*, *supra* note 78, at 19-42.

<sup>81</sup> House Comm. on Standards of Official Conduct, *Statement Regarding Complaints Against Rep. Newt Gingrich*, 101<sup>st</sup> Cong., 2<sup>d</sup> Sess. 41-43 (1990).

**Example 35.** A Member writes a book of memoirs about his years in public service. An established publisher offers the Member its usual and customary royalty terms for the right to publish the book. The Member **may** have the book published and collect royalties under the contract, once he receives written approval from the Committee. The royalties will be deemed —unearned income<sup>82</sup> and will not count against the Member’s outside earned income cap.

## The Outside Earned Income Limitation Applicable to Members and Senior Staff

### *Amount of the Annual Limitation*

In addition to the limitations on outside employment set forth above, House Members, as well as officers and employees paid at the —senior staff<sup>82</sup> rate for more than 90 days in a calendar year, are subject to an annual limitation on the amount of their outside earned income. The amount of the limit for any year is 15% of the rate of pay for Level II of the Executive Schedule in effect on January 1 of the year. The rate of pay for Executive Level II in 2008 is \$172,200. Accordingly, the outside earned income limit for calendar year 2008 is **\$25,830**. The limitations for other years are available from the Standards Committee.

**Income Subject to the Annual Limitation, and Income Excluded From the Limitation.** The limitation applies only to **earned** income, that is, compensation for services, and not to investment income. The term —outside earned income<sup>83</sup> is defined in the rules as —

wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered.

House Rule 25, cl. 4(d)(1). In the debate preceding adoption of the rule, one Member distinguished earned income as that which one earns —by the sweat of [one’s] brow.<sup>83</sup> The matter of earned versus unearned income is discussed further below.

The limitation applies by its terms to outside earned income that is —attributable<sup>83</sup> to a calendar year. In attributing outside earned income, the

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<sup>82</sup> 5 U.S.C. app. 4 § 501(a)(1); House Rule 25, clause 1(a)(1). The House rule limiting outside earned income was adopted originally on Mar. 2, 1977 (H. Res. 287, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess.) and amended on Dec. 15, 1981 (H. Res. 305, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess.), and again, as a result of the Ethics Reform Act of 1989, Pub. L. 101-194, § 804, 103 Stat. 1716, 1776 (1989).

<sup>83</sup> 123 *Cong. Rec.* 5902 (Mar. 2, 1977) (statement of Rep. Frenzel).

Standards Committee uses the approach reflected in regulations issued by the U.S. Office of Government Ethics for the executive branch, *i.e.*, —[r]egardless of when it is paid, outside earned income is attributable to the calendar year in which the services for which it is paid were provided. 5 C.F.R. § 2636.304(d) (2006).

In addition, in 1978 the House Select Committee on Ethics issued a major advisory opinion on the outside earned income limitation, and a copy of that opinion as updated to reflect changes to applicable laws and rules is reprinted in the appendices to this chapter.<sup>84</sup> That opinion states, —[o]utside earned income is attributed to the year in which the Member’s, officer’s or employee’s right to receive it becomes certain (*i.e.*, under the accrual method) rather than to the year of receipt.<sup>85</sup> Accordingly, for purposes of the limitation, income that a Member or senior employee earns in a particular year may **not** be deferred to a future year in which he or she has less outside earned income, or until after the individual retires from Congress.

The rule explicitly **excludes** the following types of income from the definition of —outside earned income,<sup>86</sup> and hence from the outside earned income limitation:

- The individual’s congressional salary;
- Compensation for services —actually rendered<sup>87</sup> before the individual became a Member or senior employee, or before the effective date of the rule;
- Amounts paid by, or on behalf of, a Member or senior employee to a tax-qualified pension, profit-sharing, or stock bonus plan, and received by the individual from that plan;
- Amounts received from a family-controlled trade or business in which both personal services and capital are income-producing factors, provided that the personal services actually rendered by the Member or senior employee do not generate a significant amount of income; and
- Copyright royalties received from established publishers under usual and customary contractual terms (House Rule 25, cl. 4(d)(1)).

With regard to the exception for income from a family-owned farm or business, the Commission on Administrative Review in the 95<sup>th</sup> Congress offered the following explanation:

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<sup>84</sup> House Select Comm. on Ethics, *Advisory Opinion No. 13* (Oct. 1978), reprinted in H. Rep. 95-1837, and reprinted in updated form in the appendices to this Manual.

<sup>85</sup> *Id.*

[T]he Commission believes that Members should be able to render personal services to manage or protect their equity in a family trade or business without having to allocate these personal services toward the 15-percent limitation. However, if the personal services, in and of themselves, generate any significant amount of income, the resulting income should be subject to the . . . limitation. Conversely, the Commission believes that in implementing this limitation care should be taken to prevent Members from circumventing it by incorporating themselves into a —family business‖ and then withdrawing what in reality are fees for personal services in the form of dividends or profits.<sup>86</sup>

The debate preceding the adoption of this rule emphasized that personal services that generate income do **not** come within the exemption and would thus be subject to the earned income limitation:

The crucial element in determining whether the limitation applies . . . is this: If the personal services produce the income, then it does not matter whether it is a family business . . . or anything else. If those personal services actually produce the income, then it comes under the limitation.<sup>87</sup>

Additionally, *Advisory Opinion No. 13* of the House Select Committee on Ethics (reprinted in updated form in the appendices to this Manual) emphasizes the following with respect to the —family business‖ exemption:

[T]he definition of earned income in Rule 25, which excludes amounts received by a Member from a family controlled business —so long as the personal services actually rendered by the individual . . . do not generate a significant amount of income,‖ was simply intended to assure Members, officers, and employees that they could continue to make decisions and take actions necessary to manage or protect their equity in a family trade or business, and would not be forced to divest themselves of their family business interests. As with any business, a Member, officer, or employee would not be required to allocate a share of the profits of the business as outside earned income when the facts and circumstances show that the income is in reality a return on investment.

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<sup>86</sup> *Financial Ethics*, H. Doc. 95-73, *supra* note 57, at 11.

<sup>87</sup> 123 *Cong. Rec.* 5897 (Mar. 2, 1977) (statement of Rep. Hamilton); *see also id.* at 5902 (statement of Rep. Obey).



**Earned vs. Unearned Income.** The annual limitation applies to compensation for personal services (termed —earned income<sup>ll</sup>), but not to moneys received from ownership or other investments of equity (so-called —unearned income<sup>ll</sup>).<sup>88</sup> In this regard, *Advisory Opinion No. 13* emphasizes that the —real facts<sup>ll</sup> of a particular case would control as to whether moneys received would be deemed earned income:

[T]he label or characterization placed on a transaction, arrangement or payment by the parties may be disregarded for purposes of the Rule. Thus, if amounts received or to be received by a Member, officer, or employee are in fact attributable to any significant extent to services rendered by the Member, officer, or employee the characterization of such amounts as partnership distributive share, dividends, rent, interest, payment for a capital asset, or the like, will not serve to prevent the application of Rule 25 to such amounts. . . .

For purposes of this Opinion, there are two types of income — earned and unearned. If the compensation received is essentially a return on equity, then it would generally not be considered to be earned income. If the income is not a return on equity, then such income would generally be considered to be earned income and subject to the limitation.

**Personal Service Businesses.** In businesses for which capital is **not** a material income-producing factor, the Advisory Opinion states that the entire share of profits is generally considered earned income, unless it can be shown that some income actually derives from a return on investment. Even when the Member performs no personal services, it is presumed, lacking a strong showing to the contrary, that the Member's share of profits from a service business is for attracting or retaining clients and thus is considered earned income. As to law practices specifically, the Advisory Opinion states that —buy-out<sup>ll</sup> arrangements are permitted and will not be counted toward the earned income limit when fair and reasonable in relation to comparable practices. To ensure that these criteria are satisfied, it is advisable for a Member to consult with the Standards Committee before accepting a —buy-out.<sup>ll</sup>

**Business Corporations.** In business corporations, only payment for services the Member performs is considered earned income. An increase in the value of the firm's stock or distribution of profits is **not** considered earned income. This practice, however, cannot be used as a subterfuge, such as a Member incorporating for the purpose of making speeches or writing articles, then having all fees directed to the corporation and later distributed to the Member as —profits.<sup>ll</sup>

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<sup>88</sup> See 123 *Cong. Rec.* 5901-02 (Mar. 2, 1977) (statement of Rep. Frenzel).

**Close Corporations, Partnerships, and Unincorporated Businesses.** When a Member has an ownership interest and also performs some services, as in a close corporation, partnership, or unincorporated business, some of the profits might result from the personal services of the Member and therefore would be considered earned income. *Advisory Opinion No. 13* (included in the appendices) states, —the determining factor is whether the Member’s personal services generate significant income for the business.¶ The Member may protect his or her interest and investments in the business through general oversight and management of investments without generating earned income. However, fees, compensation, or salaries from such a business are earned income. When the Member’s principal function is to refer or to help retain clients, then —the Member would be deemed to be rendering income-producing services, even though the actual time involved might be minimal.¶

## **Administration and Enforcement of the Outside Employment and Outside Earned Income Limitations, and Impact of the Limitations**

### *Administration and Enforcement*

Statutory law provides that with respect to House Members, officers, and employees, the outside employment and earned income limitations are administered by and subject to the rules and regulations of the Standards Committee (5 U.S.C. app. 4 § 503(1)).<sup>89</sup> That statute also authorizes the Committee to render written advisory opinions on these provisions to Members and staff. Under the statute, any Member or staff person who acts in good faith in accordance with a written advisory opinion from the Committee is not subject to sanction under the statute. The Committee therefore encourages anyone with questions regarding outside employment or income to contact the Committee for guidance.

Statutory law further provides that the Attorney General may bring a civil action against any individual who violates the outside employment or earned income limitations, and that the court may assess a civil penalty of up to \$11,000 or the amount of compensation for the prohibited conduct, whichever is greater (5 U.S.C. app. 4 § 504(a)). A Member, officer, or employee who violates any of the limitations is also subject to disciplinary action by the House. In any event, the Standards Committee may require a Member or staff person who receives compensation in violation of any of the limitations to return the impermissible amount to the payor. When return would be impracticable, the Committee may permit the individual instead to make a donation in that amount to a charitable

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<sup>89</sup> Under that statute, the Standards Committee also administers these provisions for certain legislative branch agencies, but it may delegate this authority to those agencies.

organization, with that donation being explicitly designated by the individual as having been made to remedy the violation. As to whether, in a given case, this remedy is permissible is for the Committee, not the individual, to decide.

### ***Impact of the Limitations***

The overall effect of the outside employment limitations as summarized above – particularly when considered with the honoraria ban and the other provisions on outside employment discussed in this chapter – is to severely restrict the ability of Members and senior staff to earn outside income. As a practical matter, relatively few Members receive outside earned income for services they provide on a current basis.<sup>90</sup> For the most part, those having such income receive it either from an approved teaching position or from a business that is controlled by either the Member or the Member's family. By and large, the senior staff members who have such income receive it for outside political work for either their employing Member or another candidate, or a political party.<sup>91</sup>

## **Member Voting and Other Official Activities on Matters of Personal Interest**

Voting on matters before the House is among the most fundamental of a Member's representational duties, and historical precedent has taken the position that there is no authority to deprive a Member of the right to vote on the House floor.<sup>92</sup> Thus, as a general matter, the decision on whether to refrain from voting on a particular matter rests with individual Members, rather than the Speaker or the Committee. However, general ethical principles and historical practice provide specific guidance as to the limited circumstances when it is advisable that a Member abstain from voting on a particular matter. Among these principles is that Members may not use their congressional position for personal financial benefit.

### ***General Requirement That Members Vote on Questions Before the House***

Certain matters go to the very heart of a Member's official responsibilities. Chief among them is voting on legislation. House Rule 3 provides:

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<sup>90</sup> A number of Members receive earned income from services they rendered in the past, such as payments from a pension plan, or, for example, in the case of a Member who had been an insurance agent, renewal commissions generated by policies that he or she sold prior to becoming a Member.

<sup>91</sup> While Members and senior staff are generally prohibited from receiving income for any consulting services, there is an exception for political consulting for a candidate, a political party, or a Member's leadership PAC.

<sup>92</sup> *House Rules and Manual*, *supra* note 31, § 672.

1. Every Member . . . shall vote on each question put, unless he has a direct personal or pecuniary interest in the event of such question.

2. (a) A Member may not authorize any other person to cast his vote or record his presence in the House or the Committee of the Whole House on the state of the Union.

(b) No other person may cast a Member's vote or record a Member's presence in the House or the Committee of the Whole House on the state of the Union.

In the 100<sup>th</sup> Congress, prior to the adoption of this rule, the House reprimanded a Member for allowing another to vote on the floor in his place. In recommending disciplinary action, the Standards Committee expressed its firm belief that —nothing is more sacred to the democratic process than each person casting his own vote.|| <sup>93</sup>

### ***Voting and Other Activities on Matters of Personal Interest***

No statute or rule requires the divestiture of private assets or holdings by Members or employees of the House upon entering their official position. Since legislation considered by Congress affects such a broad spectrum of business and economic endeavors, a Member of the House may be confronted with the possibility of voting on legislation that would have an impact upon a personal economic interest. This may arise, for example, where a bill authorizes appropriations for a project for which the contractor is a corporation in which the Member is a shareholder, or where a Member holds a kind of municipal security for which a bill would provide federal guarantees.

Longstanding House precedents have not found such interests to warrant abstention under the above-quoted House Rule that instructs Members to vote on each question presented unless they have —a direct personal or pecuniary interest in the event of such question.|| Rather, it has generally been found that —where legislation affected a class as distinct from individuals, a Member might vote.|| <sup>94</sup> The rule has been explained as follows:

It is a principle of \_immemorial observance\_ that a Member should withdraw when a question concerning himself arises; but it has been held that the disqualifying interest must be such as affects the Member directly, and not as one of a class. In a case where question

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<sup>93</sup> House Comm. on Standards of Official Conduct, *In the Matter of Rep. Austin J. Murphy*, H. Rep. 100-485, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (1987).

<sup>94</sup> *See 5 Hinds' Precedents of the House of Representatives* § 5952, at 504 (1907) (hereinafter *-Hinds*).

affected the titles of several Members to their seats, each refrained from voting in his own case, but did vote on the identical cases of his associates. While a Member should not vote on the direct questions affecting himself, he has sometimes voted on incidental questions.<sup>95</sup>

Thus, Members holding stock in national banks have voted on legislation —providing a national currency and to establish free banking|| since Members —do not have that interest separate and distinct from a class, and, within the meaning of the rule, distinct from the public interest.||<sup>96</sup> Veterans in the House have properly voted on questions of pay and pensions in the military since such Members —did not enjoy the benefit arising from the legislation distinct and separate from thousands of men in the country who had held similar positions.||<sup>97</sup> The Speaker would not rule that a Member owning stocks in breweries or distilleries should be disqualified in voting on the proposed amendment to the Constitution concerning prohibition of the manufacture and sale of liquor.<sup>98</sup> Members who were stockholders in or had interests in import businesses voted on a tariff bill affecting the import business since —the bill before us affects a very large class The Chair would be surprised if there were not hundreds of thousands of American citizens who were stockholders in these companies ||<sup>99</sup>

Although the rule has been found not to apply when a Member is affected only as a member of a class rather than as an individual, some precedents in the House have indicated that the rule might apply if legislation affects only one specific business or property, rather than a class or group of businesses or properties. Thus, although the Speaker found that a Member interested in breweries or distilleries could vote on —prohibition|| because it affected a class of businesses, the Speaker specifically noted,

[n]ow, if there was a bill here affecting one institution, if you call it that, the Chair would be inclined to rule that a Member interested in it pecuniarily could not vote, but where it affects a whole class he can vote.<sup>100</sup>

Similarly, in ruling that Members with interests in import businesses could vote on a tariff bill, the Speaker observed, —Certainly it would not be within the power of the Chair to deny a Member the right to vote except in the case where the

<sup>95</sup> *House Rules and Manual*, *supra* note 31, § 673 (citations omitted).

<sup>96</sup> *5 Hinds*, *supra* note 94, § 5952, at 503-504.

<sup>97</sup> *Id.* at 504.

<sup>98</sup> *8 Cannon's Precedents of the House of Representatives* § 3071, at 620 (1936).

<sup>99</sup> *Id.* § 3072, at 623.

<sup>100</sup> *Id.* § 3071, at 621.

legislation applied to one and only one corporation.¶ <sup>101</sup>In the case of an amendment to a bill specifically relating to the Central Pacific Railroad, the Speaker suggested that a stockholder Member should disqualify himself from voting, although a ruling disqualifying such Member was not made by the Chair:

In this case if the gentleman from Massachusetts be a stockholder in that road the Chair would rule he had no right to vote. It differs from the case of national banks, which has been brought up in several instances, in the fact that this is a single corporation, and is not of general interest held throughout the country by all classes of people in all communities But if a stockholder in a single railroad corporation, as in this case, has his vote challenged it would be the duty of the Chair to hold, if he is actually a stockholder of the road, that he has no right to vote. \* \* \* The Chair so decides without any knowledge in this particular case. It is for the gentleman from Massachusetts whose delicacy the Chair knows and cheerfully recognizes to relieve the House from any embarrassment on that question.<sup>102</sup>

As shown by more recent applications of the rule, however, even where one corporation or entity is primarily affected by legislation, a Member's interest in such corporation or entity might not be found to be a disqualifying interest in the subject matter. As the Standards Committee noted in a report in a disciplinary case:

House precedents establish the rule that —where the subject matter before the House affects a class rather than individuals, the personal interest of Members who belong to the class is not such as to disqualify them from voting.¶ This principle was followed by the House as recently as December 2, 1975, when the question arose whether House Rule VIII(1) [currently numbered as House Rule 3, cl. 1] would disqualify Members holding New York City securities from voting on a bill to provide federal guarantees for these securities. Speaker Albert ruled that a point of order to disqualify Members holding such securities would not be sustained <sup>103</sup>

The Committee found in that case that the respondent's ownership of 1,000 shares of common stock in a defense contractor corporation, out of more than 4,550,000 shares outstanding, —was not, under House precedents, sufficient to

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<sup>101</sup> *Id.* § 3072, at 623.

<sup>102</sup> 5 *Hinds*, *supra* note 94, § 5955, at 506.

<sup>103</sup> H. Rep. 94-1364, *supra* note 2, at 15.

disqualify him from voting on an appropriations bill authorizing funds for a project for which the corporation was under contract with the government to perform.<sup>104</sup>

In addition, House precedents favor—the idea that there is no authority in the House to deprive a Member of the right to vote.<sup>105</sup> Given the size of today's districts, when a Member refrains from voting, well over half a million people are denied a voice on the pending legislation.

However, while the Standards Committee has endorsed the principle that—each individual Member has the responsibility of deciding for himself whether his personal interest in pending legislation requires that he abstain from voting,<sup>106</sup> it did so after investigating allegations (among others) that a Member had violated the rule by not refraining from voting in a particular instance. The Committee cleared the Member of this charge, but it has occasionally advised Members, in private advisory opinions, that it would be inappropriate for them to vote or to introduce legislation directly affecting significant and uniquely held financial interests. At times a question arises as to whether the—class to which a Member belongs with regard to a piece of legislation—such as, for example, the class of owners of a particular area of land that would be acquired by the government under the legislation—is sufficiently large to warrant the Member voting under the authorities set out above.

The provisions of House Rule 3, clause 1, as discussed in this section, apply only to Member voting on the House floor. They do not apply to other actions that Members may normally take on particular matters in connection with their official duties, such as sponsoring legislation, advocating or participating in an action by a House committee, or contacting an executive branch agency. Such actions entail a degree of advocacy above and beyond that involved in voting, and thus a Member's decision on whether to take any such action on a matter that may affect his or her personal financial interests requires added circumspection. Moreover, such actions may implicate the rules and standards, discussed above, that prohibit the use of one's official position for personal gain. Whenever a Member is considering taking any such action on a matter that may affect his or her personal financial interests, the Member should first contact the Standards Committee for guidance. A Member should also exercise caution before accepting a position on the board of an organization that is subject to the oversight of a committee on which the Member sits.

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<sup>104</sup> *Id.* at 14-16.

<sup>105</sup> *House Rules and Manual*, *supra* note 31, § 672, at 374; *see also* 5 *Hinds*, *supra* note 94, § 5956, at 506.

<sup>106</sup> H. Rep. 94-1364, *supra* note 2, at 15-16; *see also* 121 *Cong. Rec.* 38135 (Dec. 2, 1975).

In addition, as described earlier in this chapter, House Rule 27, clause 4 imposes a new, additional requirement that Members who are negotiating for future employment —shall recuse<sup>107</sup> themselves —from any matter in which there is a conflict of interest or an appearance of a conflict for that Member. Historical practice has established that, with regard to House Rule 3, there is no authority to force a House Member to abstain from voting, and the decision on whether abstention from voting was necessary has been left for individual Members to determine for themselves under the circumstances.<sup>107</sup> At a minimum, Members faced with a vote on a matter that directly impacts a private entity with which they are negotiating would have difficulty balancing the duty they owe to their constituents with the recusal provisions of Rule 27. Members who wish to avoid such conflicts are encouraged to delay any negotiations for future employment until after their successor has been elected.

### **Certification of No Financial Interest in Fiscal Legislation**

The House Rules adopted at the beginning of the 110<sup>th</sup> Congress added a new provision in the Code of Official Conduct requiring Members to make an affirmation regarding their financial interests to the committee of jurisdiction when requesting certain types of fiscal legislative provisions. Specifically, House Rule 23, clause 17 requires any Member who —requests a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers) to certify that neither the Member nor the Member’s spouse have a —financial interest in such congressional earmark or limited tax or tariff benefit.

The committees with jurisdiction over earmark, tax, and tariff benefit requests are responsible for determining whether any particular spending provision triggers the certification required by the rule. A Member who requests an earmark or other provision covered by the rule must provide a written statement to the chairman and ranking member of the committee of jurisdiction of the bill, resolution, or report that contains the following information:

- The name of the Member;
- In the case of an earmark, the name and address of the intended recipient or if there is no intended recipient, the location of the activity;
- In the case of a limited tax or tariff benefit, the name of the beneficiary;
- The purpose of the earmark or limited tax or tariff benefit; and

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<sup>107</sup> See 5 *Hinds*, *supra* note 94, §§ 5950, 5952 at 502, 503-04.



- A certification that both the Member and the Member's spouse have no financial interest in the earmark or limited tax or tariff benefit.

Whether a Member or a Member's spouse has a financial interest in an earmark will most frequently depend on the specific facts and circumstances regarding both the proposed provision and the personal financial circumstances of the Member and spouse. In the great majority of cases Members should readily be able to determine whether they have a financial interest in an earmark. Members are encouraged to consult the Committee for guidance with any fact-specific questions they may have.

The Committee nevertheless provides the following general guidance. As a general matter, a financial interest would exist in an earmark when it would be reasonable to conclude that the provision would have a direct and foreseeable<sup>108</sup> effect on the pecuniary interests of the Member or the Member's spouse. Such interests may relate to financial assets, liabilities, or other interests of the Member and spouse, such as investments in stocks, bonds, mutual funds, or real estate. A financial interest may also derive from a salary, indebtedness, job offer, or other similar interest.

A financial interest would not include remote, inconsequential, or speculative interests. For example, if a Member proposed an earmark or tax or tariff benefit assisting a certain company, the Member generally would not be considered to have a financial interest in the provision by owning shares in a diversified mutual fund, employee benefit plan (e.g., the Thrift Savings Plan or similar state benefit plan), or pension plan that, in turn, holds stock in the company. However, a Member's direct ownership of stock, even a small number of shares in a widelyheld company, likely would constitute a financial interest under Rule 23.

A contribution to a Member's principal campaign committee or leadership PAC generally would not constitute the type of—financial interest<sup>11</sup> referred to in the rule. Nevertheless, a political contribution tied to an official action may raise other considerations. It is impermissible to solicit or accept a campaign contribution that is linked to any action taken or asked to be taken by a Member in the Member's official capacity – such as an earmark request that a Member has made or been asked to make. Accepting a contribution under these circumstances may implicate the federal gift statute or the criminal provisions on illegal gratuities or bribery, which are described in Chapters 2 and 4 on gifts and campaign activity, respectively.

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<sup>108</sup> An effect is foreseeable if it is anticipated or predictable. For additional guidance, see 5 C.F.R. § 2640.103(a)(3) (defining the term —predictable<sup>11</sup> as —real, as opposed to a speculative, possibility that the matter will affect the financial interest<sup>11</sup> ).

## Post-Employment Restrictions

### *Applicability of the Restrictions*

The Ethics Reform Act of 1989 enacted, for the first time, post-employment restrictions on Members, the elected officers, and certain employees of the House and Senate, and certain officers and employees of other legislative branch offices. These restrictions are set out in a criminal statute, 18 U.S.C. § 207, and they took effect in 1991. The restrictions were amended slightly by Honest Leadership and Open Government Act of 2007,<sup>109</sup> which was enacted during the 110<sup>th</sup> Congress.

House staff who are employed in a Member, committee, or leadership office are covered by the restrictions if they were paid, for a period of 60 days or more in the one-year period preceding termination of their House employment, at a rate equal to or greater than 75% of Members' pay (18 U.S.C. § 207(e)(7)(A)). In 2008 the basic rate of Members' pay is \$169,300, and thus the post-employment threshold for employees who leave their House employment in 2008 is **\$126,975**. The threshold for other years is available from the Standards Committee. For employees of other legislative offices,<sup>110</sup> the basic rate of pay triggering the restrictions is level IV of the Executive Schedule, which for 2008 is \$149,000.<sup>111</sup> Because an employee becomes subject to the restrictions where the employee's pay is at the threshold rate for a period as brief as two months, a House employee may become subject to the restrictions as a result of temporary changes in the base rate of pay, such as those made to pay a bonus.<sup>112</sup>

The post-employment restrictions of 18 U.S.C. § 207 are the **only** such restrictions applicable to former House employees. House employees whose pay

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<sup>109</sup> Honest Leadership and Open Government Act of 2007, *supra* note 45.

<sup>110</sup> —[O]ther legislative officesll include employees of the Architect of the Capitol, United States Botanic Garden, Government Accountability Office, Government Printing Office, Library of Congress, Office of Technology Assessment, Congressional Budget Office, and Capitol Police. It also includes any other House legislative branch office not covered by the other provisions, such as the Clerk, Parliamentarian, Office of Legal Counsel, and Chief Administrative Officer. *See* 18 U.S.C. § 207(e)(9)(G).

<sup>111</sup> 18 U.S.C. § 207(e)(6), (e)(7)(B).

<sup>112</sup> Regarding the post-employment implications of paying such an increase in the form of —lump sumll payments, rather than through a temporary adjustment in the employee's regular salary, see Chapter 7 on Staff Rights and Duties. Briefly stated, the Committee determined that lump sum payments, when properly used by an employing office, do not constitute part of the recipient's —rate of basic pay.ll Key factors in making this determination are that lump sum payments are not treated as salary for purposes of employment benefits, do not count in determining the maximum amount an employee can contribute to the Thrift Savings Plan, or the amount of life insurance that the employee may purchase, and likewise they do not count in determining an employee's —high threell years for purposes of calculating retirement benefits.

was **below** the threshold are **not** subject to the post-employment restrictions set out in the statute, and no other provision of federal statutory law or the House Rules establishes any comparable restrictions on post-employment activities.

Section 103(a) of the Honest Leadership and Open Government Act requires the Clerk of the House to provide all departing Members and covered employees (*i.e.*, those employees who are subject to the post-employment restrictions) with a letter notifying the individual —of the beginning and ending date of the prohibitions that apply.¶ Section 103(b) of the Act mandates that the same information be available on a public internet site.

Set out below is a brief summary of the provisions of 18 U.S.C. § 207 as applicable to House Members, officers, and employees. The Standards Committee has also prepared a pair of advisory memoranda – one for House Members and officers and one for House employees – that detail the applicability and scope of the restrictions of 18 U.S.C. § 207. Copies of those memoranda are available from the Standards Committee or its website. Anyone wishing a detailed explanation of the statute should refer to those advisory memoranda.

### *Scope of the Restrictions*

Section 207 imposes a one-year —cooling-off period¶ on the former Members, officers and covered employees. As a general matter, for one year after leaving office, those individuals may not seek official action on behalf of anyone else by either **communicating with** or **appearing before** specified current officials with the intent to influence them. Thus,

- A former **Member** may not seek official action from any current Member, officer, or employee of **either the Senate or the House**, or from any current employee of any other legislative office (§ 207(e)(1)(B)).
- A former **elected officer** of the House may not seek official action from any current Member, officer, or employee of the House (§ 207(e)(1)(B)).
- A covered former employee on the **personal staff** of a Member may not seek official action from that Member or from any of the Member’s current employees (§ 207(e)(3)).
- A covered former employee of a **committee** may not seek official action from any current Member or employee of the employing committee or from any Member who was on the committee during the last year that the former employee worked there (§ 207(e)(4)).
- A covered former employee on the **leadership staff** (*i.e.*, an employee of any leadership office) may not seek official action from any current Member of the

leadership of the House<sup>113</sup> or any current leadership staff employees (§ 207(e)(5)).

- A covered former officer or employee of any other **legislative office** may not seek official action from a current officer or employee of that legislative office (§ 207(e)(6)).<sup>114</sup>

For the purposes of the statute, a detailee is deemed to be an employee of both the entity from which he or she comes and the entity to which the individual is detailed (§ 207(g)).

These restrictions bar certain types of contacts with certain categories of officials, basically former colleagues and those most likely to be influenced on the basis of the former position. The law focuses on communications and appearances. By contrast, if a former official plays a background role, does not appear in person or convey his or her name on any communications, the law does not appear to prohibit that person from advising those who seek official action from the Congress. Such a background role does not pose the risk of improper influence since the current officials are not even aware of the former official's participation.<sup>115</sup> The law does, however, absolutely preclude one set of activities regardless of whether the former official acts openly or behind the scenes. None of the officials subject to the limitations described above may represent, aid, or advise a foreign government or foreign political party before any federal official (including any Member of Congress) with the intent to influence a decision of such official in carrying out his or her official duties (§ 207(f)).

### *Exceptions*

Under 18 U.S.C. § 207(j), these restrictions do not apply to official actions taken by employees or officials of the following: the United States government; the District of Columbia; state and local governments; accredited, degree-granting institutions of higher education; and hospitals or medical research organizations.

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<sup>113</sup> The —leadership— of the House consists of the Speaker; majority leader; minority leader; majority whip; minority whip; chief deputy majority whip; chief deputy minority whip; chairman of the Democratic Steering Committee; chairman and vice chairman of the Democratic Caucus; chairman, vice chairman, and secretary of the Republican Conference; chairman of the Republican Research Committee; chairman of the Republican Policy Committee; and any similar position created after the statute took effect. 18 U.S.C. § 207(e)(9)(L).

<sup>114</sup> For these employees, post-employment restrictions do not apply unless their rate of basic pay equaled or exceeded that in effect for level IV of the Executive Schedule (\$149,000 in 2008). 18 U.S.C. § 207(e)(7)(B).

<sup>115</sup> Former officials who are lawyers should consult their local bar association concerning the application of rules governing their involvement in matters in which they participated personally and substantially in their official capacity.

They further do not preclude activities on behalf of international organizations in which the United States participates where the Secretary of State certifies in advance that such activities serve the interests of the United States. In addition, section 207 does not prevent individuals from making uncompensated statements based on their own special knowledge, from furnishing scientific or technological information in areas where they possess technical expertise, or from testifying under oath. Under 18 U.S.C. § 207(e)(8), individuals are also permitted to contact the Office of the Clerk regarding compliance with lobbying disclosure requirements under the Lobbying Disclosure Act.

### ***Penalties***

Violation of § 207 is a felony, carrying penalties of imprisonment, fines, or both. Section 216 of Title 18 authorizes imprisonment for up to one year (or up to five years for willfully engaging in the proscribed conduct). Additionally, an individual may be fined up to \$50,000 for each violation or the amount received or offered for the prohibited conduct, whichever is greater. The statute further authorizes the Attorney General to seek an injunction prohibiting a person from engaging in conduct that violates the act.

The provisions of 18 U.S.C. § 207 summarized above govern the conduct of former Members, officers, and employees only, and do not apply to the conduct of current Members, officers, or employees. However, current Members and staff who receive improper contacts should be aware that, depending on the circumstances, they may be subject to House disciplinary action. In a Standards Committee disciplinary case that was completed in the 106<sup>th</sup> Congress, a Member admitted to engaging in several forms of conduct that violated the requirement of the House Code of Official Conduct that each Member and staff person—conduct himself at all times in a manner that shall reflect creditably on the House.¶ (House Rule 23, cl. 1). One of those violations was his engaging in a pattern and practice of knowingly allowing his former chief of staff to appear before and communicate with him in his official capacity during the one-year period following the termination of her House employment—in a manner that created the appearance that his official decisions might have been improperly affected.¶<sup>116</sup>

A Member or employee who has any concerns about the applicability of the post-employment restrictions to his or her proposed conduct should contact the Standards Committee for specific guidance. While Committee interpretations of 18 U.S.C. § 207 are not binding on the Justice Department, those interpretations are based on the Committee's analysis of the terms and purposes of the statute, as well

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<sup>116</sup> House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Sixth Congress*, H. Rep. 106-144, 106<sup>th</sup> Cong., 2d Sess., at 10 (2001).

as any applicable opinions or guidance of the Justice Department or the U.S. Office of Government Ethics of which the Committee is aware.<sup>117</sup>

### **Employment Considerations for Spouses of Members and Staff**

Being married to a House Member or staff person does not, of course, preclude one from earning a salary. Nevertheless, certain aspects of a spouse's employment may have implications for the Member or staff person.<sup>118</sup>

Federal law, at 5 U.S.C. § 3110, generally prohibits a federal official from hiring or promoting a relative, including a spouse. Prior to the 107<sup>th</sup> Congress, if a House employee married his or her employing Member, the employee could remain on the Member's personal or committee staff, but could not thereafter receive any promotions or raises other than cost-of-living or other across-the-board adjustments. However, at the beginning of that Congress in 2001, the House amended the Code of Official Conduct to provide that a Member may not retain his or her spouse in a paid position, and that a House employee may not accept compensation for work for a committee on which his or her spouse serves as a member.<sup>119</sup> Accordingly, as a general rule, a Member's spouse may work in the Member's office on an unpaid basis only.<sup>120</sup>

Spouses who accept civil service positions with federal, state, or local governments should be aware of possible limitations relating to their outside political activity under the Hatch Act<sup>121</sup> or a similar law of the employing authority. An individual employed in such a position may be limited in the campaign efforts that may be made on behalf of his or her spouse. A spouse holding such a governmental position should consult with his or her supervising ethics office to determine the propriety of proposed campaign activities.

Neither federal law nor House rules specifically precludes the spouse of a Member or staff person from engaging in any activity on the ground that it could create a conflict of interest with the official's congressional duties. However, House rules and statutory provisions impute to a Member or staff person certain benefits

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<sup>117</sup> It should be noted that one court held that it is a complete defense to a prosecution for conduct assertedly in violation of a related federal criminal strict-liability statute (18 U.S.C. § 208) that the conduct was undertaken in good faith reliance upon erroneous legal advice received from the official's supervising ethics office. *United States v. Hedges*, 912 F.2d 1397 (11th Cir. 1990).

<sup>118</sup> See generally Marc E. Miller, *Politicians and Their Spouses' Careers* (1985).

<sup>119</sup> House Rule 23, cl. 8(c). The provision by its terms does not apply to a spouse whose employment predates the 107<sup>th</sup> Congress.

<sup>120</sup> See Chapter 7 for a further discussion of the law against nepotism.

<sup>121</sup> 5 U.S.C. §§ 7321-7326, 1501-1508.

that are received by his or her spouse. Thus, a question may arise as to whether the official is improperly benefiting as a result of the spouse's employment.

The rules and standards that prohibit the use of one's official position for personal gain, which are set out in this chapter, are fully applicable to Members and staff persons with regard to their spouse's employment. Specifically, a provision of the House Code of Official Conduct, prohibits a Member from receiving any compensation, or **allowing any compensation to accrue to the Member's beneficial interest**, from any source as a result of an improper exercise of official influence (House Rule 23, cl. 3). Additionally, the Code of Ethics for Government Service (§ 5) admonishes officials never to accept benefits for themselves **or their families**—under circumstances which might be construed by reasonable persons as influencing the performance of official duties. The income received by a spouse from employment usually accrues, albeit indirectly, to a Member's interest. Nonetheless, neither of these provisions is triggered by a spouse's employment unless a Member or staff person exerts influence or performs official acts in order to obtain compensation for, or as a result of compensation paid to, his or her spouse.

Two other provisions of the Code of Ethics for Government Service are also applicable to a Member or staff person with regard to the employment activities of one's spouse or any other family member. These are provisions that prohibit a government official from —

- Using —any information coming to him confidentially in the performance of governmental duties as a means of making private profit§ (§ 8); and
- —[D]iscriminat[ing] unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not§ (§ 5).

The prohibition against doing any special favors for anyone in one's official capacity is a fundamental standard of conduct, and it applies to an official's conduct with regard to not only his or her spouse or other family members, but more broadly to any person.

Special caution must be exercised when the spouse of a Member or staff person, or any other immediate family member, is a lobbyist. At a minimum, such an official should not permit the spouse to lobby either him- or herself or any of his or her subordinates. When the spouse of a staff person is a lobbyist, the staff person should inform his or her employing Member before the spouse or anyone with the spouse's firm makes a lobbying contact with anyone on the staff, and no such contacts should occur without the Member's approval. Furthermore, a recently enacted provision of the House rules (House Rule 25, clause 7) requires that the Member prohibit his or her staff from having any lobbying contacts with that

spouse if such individual is a registered lobbyist or is employed or retained by a registered lobbyist to influence legislation."<sup>122</sup>

In certain limited circumstances, the gift rule allows a Member or staff person to accept a meal, travel, or other benefits that result from his or her spouse's business or employment activities (House Rule 25, cl. 5(a)(3)(G)(i)). This provision of the rule is explained in Chapter 2 of this volume, as is the rule's applicability to gifts given to the spouse or another family member of a Member or staff person.

As explained earlier in this chapter, official resources are to be used for official purposes. Thus a Member may not use any congressional resources (including, *e.g.*, staff time or the office computer) on behalf of any private enterprise, including a spouse's professional activities.

Occasionally the Standards Committee has looked into allegations that spouses were not earning their income, but rather that their salaries and benefits were provided as indirect gifts to the Members. In one case, the Committee issued a Statement of Alleged Violations stating, among other things, that there was reason to believe that the Member had violated the gift and financial disclosure rules in that:

- Compensation received by the Member's wife from a business was not in return for identifiable services or work products that she provided to the business;
- The free use of a car that she received from that business was not required for her employment with that business; and
- These apparent gifts were not provided wholly independent of her relationship to the Member."<sup>123</sup>

In that case, the Member resigned before the Committee could proceed further. However, in another case in which there was a complaint against a Member alleging that fees paid to a Member's spouse by a business were a gift received by the Member in violation of the gift rule, the Committee declined to initiate a preliminary inquiry upon receiving documentation of the services that the spouse had performed for the business.<sup>124</sup>

<sup>122</sup> That provision was added by § 302 of HLOGA (see note 45, *supra*).

<sup>123</sup> See *Statement in the Matter of Rep. James C. Wright, Jr.*, *supra* note 78, at 70-81.

<sup>124</sup> See *Statement Regarding Complaints Against Rep. Newt Gingrich*, *supra* note 81, at 34-36.



# FINANCIAL DISCLOSURE

## Overview

The private financial interests and investments of Members and employees, as well as those of candidates who are seeking election to the House of Representatives, may present potential conflicts of interest with official duties. The New York City Bar Association undertook a comprehensive study of Congressional ethics beginning in 1967. The Bar commission's study found that

[t]he most serious charge which can be made against a public official's ethics is that he betrays the public's trust in him by using the office to advance his own financial interests at the public's expense. Much distrust of government flows from ambiguous circumstances where there is ground for suspicion that officials are promoting their own welfare rather than the public's.<sup>1</sup>

The financial disclosure required of House Members, officers, senior employees, and candidates was instituted in part to address this concern.

In addition, all Members, officers, and employees are prohibited from improperly using their official positions for personal gain. As a general matter, however, Members and employees need not divest themselves of assets upon assuming their positions, nor must Members disqualify themselves from voting on issues that generally affect their personal financial interests. Instead, public financial disclosure provides a means of monitoring and deterring conflicts.

To accomplish this disclosure, Members, officers, candidates, and certain employees must file annual Financial Disclosure Statements, summarizing financial information concerning themselves, their spouses, and dependent children. Among other information, these statements must disclose outside compensation, investments and assets, and business transactions.

This chapter is intended to provide only a basic overview of the financial disclosure requirements. Each year, the Committee on Standards of Official Conduct publishes comprehensive instruction booklets detailing the instructions for completing a Financial Disclosure Statement. One booklet covers the instructions for Form A, which is used by current and terminating Members, officers, and employees, and the other is for Form B, which is used by candidates for the House

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<sup>1</sup>Special Comm. on Congressional Ethics, Ass'n of the Bar of the City of New York, *Congress and the Public Trust* 34 (J. Kirby, Jr., exec. director 1970) (hereinafter —*Congress and the Public Trust*).

and covered new House employees. Copies of the current instruction booklets are available from the Standards Committee or the Legislative Resource Center.

### **Statutes and Rules Governing Disclosure of Financial Interests**

No federal statute, regulation, or rule of the House absolutely prohibits a Member or House employee from holding assets that might conflict with or influence the performance of official duties. However, acting partly to address the issues identified by the Bar Commission, Congress passed the Ethics in Government Act of 1978 (—EIGA<sup>1</sup>),<sup>2</sup> which mandated annual financial disclosure by all senior federal personnel, including all Members and some employees of the House. The Ethics in Government Act, as amended, provides the statutory basis for the disclosure currently required of House Members, candidates, and senior House employees.<sup>3</sup>

House Rule 26 adopts Title I of EIGA as a rule of the House.<sup>4</sup> House Rule 26, clause 1 requires the Clerk of the House to publish a report each August 1 compiling all Member Financial Disclosure Statements filed by June 15 of that year.

In addition, statutes and House rules restrict income from outside financial interests or govern aspects of the business dealings or investments of House Members and employees, as follows:

- Members and employees of Congress may not use their official positions for personal gain;<sup>5</sup>
- Members may not enter into or enjoy benefits under contracts or agreements with the United States;<sup>6</sup>
- Members and employees should not engage in any business with the federal government, either directly or indirectly, that is inconsistent with the conscientious performance of their congressional duties;<sup>7</sup>
- Members and employees may not receive any compensation or allow any compensation to accrue to their beneficial interests from any source if its

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<sup>2</sup> Pub. L. 95-521, 92 Stat. 1824 (Oct. 26, 1978). Legislative branch disclosure requirements were then codified at 2 U.S.C. § 701 *et seq.*

<sup>3</sup> See Ethics in Government Act of 1978, as amended, 5 U.S.C. app. 4 § 101 *et seq.*

<sup>4</sup> House Rule 26(2).

<sup>5</sup> See House Rule 23, cl. 3; Code of Ethics for Government Service ¶ 5, H. Con. Res. 175, 72 Stat., Part 2, B12 (1958).

<sup>6</sup> 18 U.S.C. § 431.

<sup>7</sup> Code of Ethics for Government Service, *supra* note 5, at ¶ 7.

receipt would occur by virtue of influence improperly exerted from a position in the Congress;<sup>8</sup>

- Members and employees of the House may not accept benefits under circumstances that might be construed by reasonable persons as influencing the performance of their governmental duties;<sup>9</sup> and
- Members and employees should never use any information received confidentially in the performance of governmental duties as a means for making private profit.<sup>10</sup>

In its very first case, in the 94<sup>th</sup> Congress, the Standards Committee found that a Member had violated the prohibition on the use of one's official position for personal gain when he sought benefits from an organization after he had actively promoted the establishment of that organization in his official capacity. The Committee found that the Member had worked, through his congressional office, to help establish a bank on a military base. During the time he was actively assisting in that effort, he approached organizers of the bank and inquired about the possibility of buying stock in it.<sup>11</sup> He subsequently purchased 2,500 shares of the bank's privately held stock. The Committee noted that —[i]f an opinion had been requested of this Committee in advance about the propriety of the investment, it would have been disapproved.¶<sup>12</sup> The Member was also found to have used public office for private gain in that he had sponsored legislation to remove a reversionary interest and restrictions on land in which he had a personal financial interest.<sup>13</sup> The Member was reprimanded by the House.<sup>14</sup>

## Policies Underlying Disclosure

Members, officers, and certain employees must annually disclose personal financial interests, including investments, income, and liabilities.<sup>15</sup> Financial disclosure provisions were enacted to monitor and to deter possible conflicts of interest due to outside financial holdings. Proposals for divestiture of potentially conflicting assets and mandatory disqualification of Members from voting were

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<sup>8</sup> House Rule 23, cl. 3.

<sup>9</sup> Code of Ethics for Government Service, *supra* note 5, at ¶ 5.

<sup>10</sup> *Id.* at ¶ 8.

<sup>11</sup> See House Comm. on Standards of Official Conduct, *In the Matter of a Complaint against Representative Robert L.F. Sikes*, H. Rep. 94-1364, 94<sup>th</sup> Cong., 2d Sess. 3 (1976).

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 3-4.

<sup>14</sup> 122 *Cong. Rec.* 24379-83 (July 29, 1976).

<sup>15</sup> Title I of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. 4 §§ 101-111.

rejected as impractical or unreasonable.<sup>16</sup> Such disqualification could result in the disenfranchisement of a Member's entire constituency on particular issues.<sup>17</sup> A Member may often have a community of interests with the Member's constituency, and may arguably have been elected because of and to serve these common interests, and thus would be ineffective in representing the real interests of the constituents if the Member was disqualified from voting on issues touching those matters of mutual concern. In rare instances, the House rule on abstaining from voting may apply where a direct personal interest in a matter exists.<sup>18</sup>

Members of Congress enter public service owning assets and having private investment interests like other citizens. Members should not —be expected to fully strip themselves of worldly goods.¶<sup>19</sup> Even a selective divestiture of potentially conflicting assets could raise problems for a legislator. Unlike many officials in the executive branch, who are concerned with administration and regulation in a narrow area, a Member of Congress must exercise judgment concerning legislation across the entire spectrum of business and economic endeavors. Requiring divestiture may also insulate legislators from the personal and economic interests held by their constituencies, or society in general, in governmental decisions and policy.

As noted by the Bipartisan Task Force on Ethics:

The problem of conflicts of interest involves complex and difficult issues, especially with respect to the legislative branch. A conflict of interest is generally defined as a situation in which an official's private financial interests conflict or appear to conflict with the public interest. Some conflicts of interest are inherent in a representative system of government, and are not in themselves necessarily improper or unethical. Members of Congress frequently maintain economic interests that merge or correspond with the interests of their constituents. This community of interests is in the nature of representative government, and is therefore inevitable and unavoidable.

At the other extreme, a conflict of interest becomes corruption when an official uses his position of influence to enhance his personal financial interests. Between these extremes are those ambiguous circumstances which may create a real or potential conflict of interest. The problem is identifying those instances in which an official allows

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<sup>16</sup> See House Comm'n on Admin. Review, *Financial Ethics*, H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 9-10 (1977) (hereinafter *-Financial Ethics*).

<sup>17</sup> *Congress and the Public Trust*, *supra* note 1, at 40.

<sup>18</sup> House Rule 8, cl. 1; see Chapter 5 of this Manual for further discussion of this provision.

<sup>19</sup> *Congress and the Public Trust*, *supra* note 1, at 47.

his personal economic interests to impair his independence of judgment in the conduct of his public duties.<sup>20</sup>

Each situation must be reviewed on a case-by-case basis to determine if an actual conflict of interest exists. The Standards Committee has admonished all Members —to avoid situations in which even an inference might be drawn suggesting improper action.¶ <sup>21</sup>

Thus, public disclosure of assets, financial interests, and investments has been required as the preferred method of regulating possible conflicts of interest of Members of the House and certain congressional staff. Public disclosure is intended to provide the information necessary to allow Members' constituencies to judge their official conduct in light of possible financial conflicts with private holdings. Review of a Member's financial conduct occurs in the context of the political process. As stated by the House Commission on Administrative Review of the 95<sup>th</sup> Congress in recommending broader financial disclosure in lieu of other restrictions on investment income:

In the case of investment income, then, the Commission's belief is that potential conflicts of interest are best deterred through disclosure and the discipline of the electoral process. Other approaches are flawed both in terms of their reasonableness and practicality, and threaten to impair, rather than to protect, the relationship between the representative and the represented.<sup>22</sup>

The House has required public financial disclosure by rule since 1968, and by statute since 1978. The Commission on Administrative Review noted: —The objectives of financial disclosure are to inform the public about the financial interests of government officials in order to increase public confidence in the integrity of government and to deter potential conflicts of interest.¶ <sup>23</sup>The Bipartisan Task Force on Ethics cited two further goals underlying statutory disclosure requirements: (1) Requiring disclosure of only those items that are relevant to potential conflicts of interest; and (2) developing reporting requirements that avoid unnecessary invasions of privacy or excessively burdensome recordkeeping. In short, the financial disclosure requirements must effectively

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<sup>20</sup> House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 22 (Comm. Print, Comm. on Rules 1989), *reprinted in* 135 *Cong. Rec.* H9253, H9259 (daily ed. Nov. 21, 1989) (hereinafter —*Bipartisan Task Force Report*¶ ).

<sup>21</sup> House Comm. on Standards of Official Conduct, *Investigation of Financial Transactions Participated in and Gifts of Transportation Accepted by Representative Fernand J. St Germain*, H. Rep. 100-46, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3, 9, 43(1987).

<sup>22</sup> *Financial Ethics*, H. Doc. 95-73, *supra* note 16, at 9.

<sup>23</sup> *Id.* at 4.

balance the privacy rights of the reporting individual with the governmental interests in informing the public and deterring conflicts of interest.<sup>24</sup>

### Specific Disclosure Requirements

EIGA mandated annual financial disclosure by all senior federal personnel, including all Members and some employees of the House.<sup>25</sup> The Ethics Reform Act of 1989<sup>26</sup> substantially revised these provisions and condensed what had been different requirements for each branch into one uniform title covering the entire federal government. As such, Financial Disclosure Statements **must** disclose outside compensation, holdings, and business transactions, generally for the calendar year preceding the filing date. In all instances, filers may disclose additional information or explanation at their discretion.

The Standards Committee develops forms and instructions for financial disclosure and reviews the completed statements of House Members, officers, employees, candidates, and certain other legislative branch personnel for compliance with applicable laws. The Clerk of the House is responsible for making the forms available for public inspection. The discussion that follows focuses primarily on those requirements that apply to Members, officers, and employees of the House. The instruction booklets issued by the Standards Committee should be consulted for specific guidance when completing a Financial Disclosure Statement.

#### *Who Must File*

All Members of the House and those House employees earning —above GS-15,|| that is, at least 120% of the federal GS-15 base level salary, for at least 60 days during the calendar year must file a Financial Disclosure Statement by May 15 of each year. For 2008, the triggering salary, referred to as the —senior staff rate,|| is \$114,468. Employees who are paid at this rate are termed —senior|| or —covered|| employees. Each Member’s office must also have at least one employee who files (this individual is referred to as the —principal assistant|| ). Thus, if a Member has no employee on his or her personal staff who is paid at the senior staff rate, the Member must designate at least one member of his or her staff as a principal assistant to file. As the Committee first stated in its 1969 financial disclosure instructions, this person will usually be an employee whose relationship with the Member permits the person, under some circumstances, to act in the Member’s name or with the Member’s authority.

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<sup>24</sup> *Bipartisan Task Force Report*, *supra* note 20, at 22; 135 *Cong. Rec.* H9259.

<sup>25</sup> Pub. L. 95-521, 92 Stat. 1824 (Oct. 26, 1978). Legislative branch disclosure requirements were then codified at 2 U.S.C. § 701 *et seq.*

<sup>26</sup> Pub. L. 101-194, 103 Stat. 1716 (Nov. 30, 1989), *amended by* Pub. L. 101-280, 104 Stat. 149 (May 4, 1990), and Pub. L. 102-90, 105 Stat. 447 (Aug. 14, 1991).

An individual who qualifies as a candidate for the House must file within 30 days of becoming a candidate, or on or before May 15, whichever is later, but in any event at least 30 days before any election (including a primary) in which that individual is seeking office. Individuals who do not qualify as candidates until within 30 days of the election must file as soon as they do qualify. An individual seeking office qualifies as a candidate for financial disclosure purposes by raising or spending more than \$5,000 for his or her campaign.<sup>27</sup> Both the office-seeker's own funds and contributions from third parties count towards the threshold. An individual who never raises or spends more than \$5,000 has no financial disclosure obligations with the House, even if that person's name appears on an election ballot. All individuals who do meet this definition must file each year that they continue to be candidates.

### *Spouse and Dependent Information*

In general, reporting individuals must disclose the financial interests of their spouses and dependent children, in addition to their own.<sup>28</sup> Only in rare circumstances, when the financial interest of a spouse or dependent child meets **all three** standards listed below, may a filer omit disclosure of an asset:

- (1) The item is the sole interest or responsibility of the spouse or dependent child, and the reporting individual has no knowledge of the item;
- (2) The item was not in any way, past or present, derived from the income, assets, or activities of the reporting individual; and
- (3) The reporting individual neither derives, nor expects to derive, any financial or economic benefit from the item.<sup>29</sup>

An individual is not required to disclose financial information about a spouse from whom he or she has separated with the intention of terminating the marriage or providing for a permanent separation.<sup>30</sup>

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<sup>27</sup> The —more than \$5,000 threshold is the same as that provided for in the Federal Election Campaign Act as requiring registration as a candidate with the Federal Election Commission. See 2 U.S.C. § 431(2).

<sup>28</sup> 5 U.S.C. app. 4 § 102(e)(1).

<sup>29</sup> *Id.* § 102(e)(1)(E). See also House Comm. on Standards of Official Conduct, *In the Matter of Representative Geraldine A. Ferraro*, H. Rep. 98-1169, 98<sup>th</sup> Cong., 2d Sess. (1984) (finding, in part, that the Member was unable to claim spousal exemption when she derived some personal benefit — such as payment of mortgage or household expenses — from spouse's employment or financial interests).

<sup>30</sup> 5 U.S.C. app. 4 § 102(e)(2).

**Example 1.** Member A sets up an account in his 10-year-old daughter's name, into which he deposits funds that he has earmarked to pay for her college education. Member A must disclose the account.

**Example 2.** Member B's husband has a stock portfolio, entirely in his own name. He uses the income from these investments to finance family vacations and other non-routine family expenses. Member B must disclose the contents of the stock portfolio.

**Example 3.** Member C's wife inherits some real estate. She is the sole owner, but C will inherit the land if his wife predeceases him. C must disclose the property.

### ***Income***

The term —income, as defined in the EIGA, is intended to be comprehensive. For reporting purposes, income is divided into two categories, —earned and —unearned income. Each type of income is explained more fully in this section.

**Earned Income and Honoraria.** —Earned income refers to compensation derived from employment or personal efforts. Such income earned by the filer must be disclosed when it totals \$200 or more from any one source in a calendar year. The source, type, and exact dollar amount of the reporting individual's earnings must be stated.<sup>31</sup> A filer must report the source, but not the amount, of income earned by a spouse when that income exceeds \$1,000. Earned income of a dependent child need not be reported, regardless of the amount.<sup>32</sup>

While Members, officers, and covered employees may not themselves receive honoraria,<sup>33</sup> reporting individuals must still disclose the source and amount of payments that are directed to charity in lieu of honoraria. In addition, a confidential listing of the recipient charities must be filed separately with the Standards Committee.<sup>34</sup> The source and exact dollar amount of spousal honoraria must be disclosed.

**Assets and Unearned Income.** —Unearned income refers to income derived from property held for investment or the production of income, such as real estate, stocks, bonds, savings accounts, and retirement accounts. Any asset held for such

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<sup>31</sup> *Id.* § 102(a)(1)(A).

<sup>32</sup> *Id.* § 102(e)(1)(A).

<sup>33</sup> See Chapter 5 of this Manual for a discussion of the honoraria ban.

<sup>34</sup> 5 U.S.C. app. 4 § 102(a)(1)(A).



an investment purpose must be disclosed if it either was worth more than \$1,000 at the close of the calendar year or it generated income of more than \$200 during the year.<sup>35</sup> Where the value of an item is difficult to determine, a good faith estimate of fair market value may be used.

The identity of the property, in addition to its category of value,<sup>36</sup> must be specified. Each company in which stock worth over \$1,000 is held must be listed separately. Except in limited circumstances, the filer must disclose the specific contents of any investment account, private retirement account (*e.g.*, a 401(k) or IRA), or education savings account (*i.e.*, a 529 plan). In other words, the EIGA requires disclosure of each asset held within such an account that meets the value or income tests described above. Disclosure of real property should include a description sufficient to permit its identification (*e.g.*, street address or plat and map location).

Interest-bearing savings accounts valued at more than \$1,000 must be disclosed only if all such accounts total more than \$5,000 in value. Savings accounts include certificates of deposit, money market accounts, or any other form of deposit in a bank, savings and loan association, credit union, or similar financial institution. Non-interest-bearing checking accounts, on the other hand, need not be disclosed since they produce no income. Financial interests in United States government retirement programs (*e.g.*, the Thrift Savings Plan) need not be reported.

**Example 4.** Member D has a stock portfolio, managed by a stock broker. Member D must disclose each stock in the portfolio that is worth more than \$1,000 at the end of the year or generates more than \$200 in income during the year.

**Example 5.** Member E Lists \$1,200 worth of stock in Company Z on her Financial Disclosure Statement. Over the next year, the company suffers losses such that it declares no dividends during the year and E's stock declines in value to \$900 by year's end. E need not disclose her stock in Z on her next Financial Disclosure Statement. (However, for the sake of clarity, E may wish to list her stock in Z nonetheless, indicating a value of less than \$1,000, rather than delete the asset from her latest filing without explanation.)

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<sup>35</sup> *Id.* § 102(a)(3), (a)(1)(B).

<sup>36</sup> Except for earned income, the exact value of financial interests need not be disclosed; only the range within which an item falls – called the category of value – is required.

**Example 6.** Member F has \$10,000 invested in a money market account with a brokerage firm. The money market fund is managed by an employee of the firm who invests the fund's assets in stocks. Individual investors like F have no control over which stocks the fund holds. F must disclose his investment in the overall fund, but he need not list the individual stocks held within the fund's portfolio.

**Example 7.** Member G's wife has an IRA worth \$12,000. Member G must disclose each asset held in the IRA that is worth more than \$1,000 at year end or that generated more than \$200 in income during the calendar year.

The holdings of and income derived from a trust or other financial arrangement in which the reporting individual, spouse, or dependent child has a beneficial interest in principal or income generally must be disclosed. The three instances when such assets need not be disclosed are when they are held in (1) a qualified blind trust, (2) a qualified diversified trust, or (3) a trust which was not created by the beneficiary and regarding which neither the reporting individual, spouse, nor dependent child have specific knowledge of the holdings or sources of income.<sup>37</sup> Even for such trusts, the category of value of any unearned trust income must be reported if it exceeds \$200. Both qualified blind trusts and qualified diversified trusts must be pre-approved by the Standards Committee. These instruments are discussed in greater detail later in this chapter.

Loans made by the filer on which the filer is charging interest must be disclosed, unless the borrower is the spouse, parent, sibling, or child of the filer. Personal residences not producing rental income, and personal property not held primarily for investment or the production of income (such as artwork displayed in one's home) need not be reported.

**Example 8.** Member H owns a vacation home, which she uses for one month during the year. The rest of the time, she allows family members and close friends to use it at no charge. H need not disclose this property.

**Example 9.** Member I owns a vacation home, which he uses for one month during the year. The rest of the time, he rents it out. I must disclose this property.

**Example 10.** Member J's home includes a basement apartment that he rents to a tenant for \$800 a month. H must disclose this rental

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<sup>37</sup> 5 U.S.C. app. 4 § 102(f)(2).

income, as well as the property that generated it. The —asset value is the value of the entire home, not just the basement apartment.

**Example 11.** Member K owns an antique car worth \$50,000. K never uses the car for commercial purposes; he uses it exclusively for his personal enjoyment. K need not disclose the car.

### **Transactions**

The Financial Disclosure Statement must include a brief description, the date, and category of value of any purchase, sale, or exchange of real property, stocks, bonds, commodities, futures, or other forms of securities (including trust assets) that exceeds \$1,000.<sup>38</sup> The category of value to be reported is the **total purchase or sale price** (or the fair market value in the case of an exchange), regardless of any capital gain or loss on the transaction.

Stock and commodity options, futures contracts, and bonds (corporate and government) are considered types of securities. As such, transactions in these items are reportable. Transactions by a partnership in which the reporting individual has an interest must be disclosed when the partnership is organized for the investment or production of income and is not actively engaged in a trade or business. These partnership transactions need only be reported, however, to the extent that the filer's share of the transaction exceeds \$1,000.

The purchase or sale of property used solely as a personal residence (including a secondary residence not used for rental purposes) of the reporting individual or spouse and transactions solely by and between the reporting individual and his or her spouse or dependent children need not be disclosed. Likewise, the opening or closing of bank accounts, the purchase or sale of certificates of deposit, and contributions to or the rollover of IRAs and other retirement plans need not be reported.

**Example 12.** Member L sells stock in Company Z for \$5,000, realizing a \$700 capital loss. L must report the \$5,000 sale as a transaction. L may add that the sale represents a loss if she so chooses, but this information is not required.

**Example 13.** Member M has a 25% interest in a partnership that buys and sells real estate for investment purposes. The partnership buys a piece of property for \$400,000. M must disclose the partnership's purchase, in the category of value reflecting his \$100,000 share of the transaction.

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<sup>38</sup> *Id.* § 102(a)(5).

Information regarding asset transactions is not required of congressional candidates or new employees.

### *Liabilities*

Personal obligations aggregating over \$10,000 owed to one creditor at any time during the calendar year, regardless of repayment terms or interest rates, must be listed.<sup>39</sup> The identity (name of the creditor), type, and amount of the liability must be stated. Except for revolving charge accounts (*i.e.*, credit cards), the largest amount owed during the calendar year is the value to be reported. For revolving charge accounts, the year-end balance is used; if the account balance declines by the year's end to \$10,000 or less, no reporting is required.

Just as personal liabilities **owed to** a reporting individual by certain relatives need not be reported as assets, liabilities **owed by** a reporting individual to a spouse, parent, sibling, or child of the filer or of the filer's spouse need not be listed. Mortgages and home equity loans secured by a personal residence (including secondary residences not used for rental purposes) as well as personal loans secured by motor vehicles, household furniture, or appliances need not be disclosed as long as the indebtedness does not exceed the purchase price of the item. Filers also need not report contingent liabilities, such as that of a guarantor, endorser, or surety; liabilities of a business in which the reporting individual has an interest; loans secured by the cash value of a life insurance policy; and tax deficiencies.

### *Gifts*

EIGA requires disclosure of gifts received during the year, from someone other than a relative, whose aggregate value exceeds —minimal value,<sup>ll</sup> as defined in the statute. For 2008, —minimal value<sup>ll</sup> is \$335, but gifts valued below \$134 need not be counted towards this limit.<sup>40</sup> Gifts valued below —minimal value<sup>ll</sup> need not be reported. However, because the House gift rule (House Rule 25, clause 5) limits the value of gifts that Members, officers, and employees of the House may accept in a calendar year from any source other than a relative or fellow Member,<sup>41</sup> few gifts exceeding this dollar amount are acceptable.

Notwithstanding the limitations on gift acceptance, there are gifts valued in excess of \$335 which a House Member, officer, or employee may accept that exceed

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<sup>39</sup> *Id.* § 102(a)(4).

<sup>40</sup> Minimal value for purposes of disclosure under EIGA is the same as that for the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342(a)(5). Pursuant to that statute, the General Services Administration sets the minimal value every three years. Minimal value for calendar years 2008 through 2011 is \$335. *See* 73 Fed. Reg. 7475 (Feb. 8, 2008).

<sup>41</sup> See Chapter 2 of this Manual for more information on the rules pertaining to gifts.

the reporting threshold and for which disclosure must therefore be made on a Financial Disclosure Statement. Examples of such gifts include gifts provided on the basis of personal friendship, contributions to a legal expense fund, and commemorative items that exceed the reporting threshold. As a general matter, in each of these instances, the recipient must first seek written approval from the Committee prior to accepting such a gift.

**Example 14.** Member N obtains written permission from the Committee to accept from a personal friend \$500 in travel expenses to attend their college reunion. Member N must report the gift.

The rule contains a number of exceptions to the reporting requirement. Gifts from relatives, personal hospitality, and local meals need not be disclosed.

—Personal hospitality means hospitality extended for a non-business purpose by an individual, at the individual's residence or other property. A —local meal means a meal unconnected with a travel package, at which the host is present. Gifts to a spouse or dependent child that are totally independent of the recipient's relationship with the reporting individual are exempt from both the gift rule and the disclosure statute. If not totally independent, gifts from third parties to a spouse or dependent child are treated the same as gifts to the reporting individual. However, simultaneous gifts to the reporting individual and his or her spouse or dependent child may be treated as separate gifts for the purpose of determining whether the \$122 aggregation threshold has been reached.

**Example 15.** Member O receives from her father a gift of \$10,000. O need not disclose the gift because it is from a relative.

The statute requires disclosure only of gifts received while the filer was a Member or employee of the House. Thus, no information regarding gifts is required from filers who are congressional candidates or new House employees.

### ***Travel Reimbursements***

Travel-related expenses provided by nongovernmental sources for activities such as speaking engagements, conferences, or fact-finding events are not considered gifts, but they must be reported when they total more than \$335 in value from one source in a year. These expenses include those reimbursed to the reporting individual as well as those paid directly by the sponsoring organization. Unlike with gifts, all travel expenses count towards the \$335 limit; there is no \$134 minimum threshold. For reimbursements and gifts of travel, the Financial Disclosure Statement must list the source, travel itinerary, inclusive dates, and nature of expenses provided, but the dollar value of the travel need not be listed. Travel paid for by a private source must be disclosed, even if unrelated to the traveler's congressional duties. Travel paid for by a foreign government under the

Mutual Educational and Cultural Exchange Act (often referred to as —MECEAII )<sup>42</sup> must also be reported.

**Example 16.** Member P gives a speech in Chicago at a meeting of a trade association which pays airfare, food, and lodging for P and his wife to attend. The expenses for Mr. and Mrs. P exceed \$335. P must disclose the source, dates, and nature of the expenses, but he need not report any dollar amounts.

**Example 17.** Member Q's wife works for a law firm that holds an annual retreat at an out-of-state resort for all of its employees. Each employee is allowed to bring his or her spouse, at the firm's expense. Q attends the retreat with his wife. If the cost of Q's attendance exceeds \$335, he must report the trip on his statement, even though his attendance was unrelated to his official duties.

Travel reported on federal campaign filings, such as Federal Election Commission reports, need not be disclosed on a Financial Disclosure Statement, nor need travel provided on an official basis by federal, state, or local government entity. Travel provided by a foreign government pursuant to the Foreign Gifts and Decorations Act<sup>43</sup> is disclosed on a separate form for that purpose, and thus need not be disclosed on a Financial Disclosure Statement.

The statute requires disclosure only of travel taken while the filer was a Member or employee of the House. Thus, no information regarding travel is required from congressional candidates or new House employees.

### ***Positions***

Individuals must disclose any nongovernmental positions, whether or not compensated, that they **currently** hold, unless the Statement is the first one filed with the House. On an individual's first Statement, the individual must disclose all positions they currently hold as well as those held in the previous two years.<sup>44</sup> Included are such positions as officer, director, trustee, partner, proprietor, representative, employee, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution. Positions held in a religious, social, fraternal, or political entity, and positions solely of an honorary nature need not be disclosed.

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<sup>42</sup> 22 U.S.C. § 2458a.

<sup>43</sup> 5 U.S.C. § 7342.

<sup>44</sup> 5 U.S.C. app. 4 § 102(a)(6)(A).

The title or nature of each position and the name of the organization should be stated. Only positions held by the reporting individual need to be disclosed, not those held by a spouse or dependent child.

### ***Agreements***

Any agreements or arrangements of the reporting individual concerning future employment, leave of absence during government service, continuation of payments from a private source, deferred compensation plans, or continued participation in an employee benefit or welfare plan of a former private employer must be disclosed.<sup>45</sup> The parties, dates, and terms should be reported by Members, officers, and employees. This information is not required of a candidate, or of the spouse or dependent children of a filer.

Continued payments or benefits from a former employer would include, for example, interest in or contributions to a pension fund, profit-sharing plan, or life and health insurance; buyout agreements; and severance payments. A deferred compensation plan would include an arrangement for the delayed payment of amounts due for services rendered by a reporting individual. Deferred compensation is not subject to outside earned income limitations, but it is reportable.

Only agreements to which the reporting individual is a party need be disclosed, not those of a spouse or dependent child.

### ***Compensation in Excess of \$5,000 Paid by One Source***

**New** officers and employees and **candidates** must disclose any compensation in excess of \$5,000 received from a single source other than the United States.<sup>46</sup> Reporting individuals need disclose only their own compensation in this section, not that received by their spouses or children. The information must cover two calendar years.

Specifically, a reporting individual who was a member or partner of a firm or association that provided services (such as legal, architectural, or accounting services) must disclose the clients or customers of that firm or association to whom he or she directly provided services. The clients or customers of a filer who was the sole proprietor of a business or professional practice must be disclosed in the same manner. The nature of the duties performed only need be described generally. Thus, a client name (which may be a company name, if the client is a corporation)

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<sup>45</sup> *Id.* § 102(a)(7).

<sup>46</sup> *Id.* § 102(a)(6)(B).

and —legal services— would be sufficient for services rendered by an attorney. The amount of compensation also need not be disclosed.

### *Trusts*

A reporting individual must usually provide the same information for trust assets and income as for other items, with three exceptions. The first exception from reporting is for trusts that were not created by the reporting individual, his spouse, or dependent, when none of the three has specific knowledge of the holdings or the sources of income of the trust. The other exceptions are for qualified blind trusts and qualified diversified trusts.<sup>47</sup>

In a **qualified blind trust**, an official places financial assets under the exclusive control of an independent party. All assets or holdings transferred to a trust at the time of its creation or any time thereafter must be identified, valued, and publicly disclosed. Eventually, through the sale of existing assets and the acquisition of new ones, the identity of specific assets owned by the trust will be unknown to the official and will thus be eliminated as a factor in influencing official decision-making.

A qualified blind trust must satisfy a number of requirements, including the following:

- The trustee must be an independent financial institution, lawyer, certified public accountant, broker, or investment advisor;
- There may be no restrictions on the disposal of the trust assets;
- The trust instrument must limit communications between the trustee and interested parties; and
- The trust instrument and the trustee must be approved by the Standards Committee.

The third exception from trust disclosure is for a qualified diversified trust, an arrangement not generally well suited to use in the legislative branch because of the breadth of legislators' official duties. Such a trust must meet the following requirements:

- The trust must consist of a diversified portfolio of readily marketable securities;

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<sup>47</sup> *Id.* § 102(f).



- The trust assets may not consist of securities of entities having substantial activities in the area of primary responsibility of the reporting individual;
- The trust instrument must prohibit the trustee from publicly disclosing or informing any interested party of the sale of any security;
- The trustee must have power of attorney to prepare the personal income tax returns of the individual and any other returns that may contain information pertaining to the trust; and
- The trustee as well as the trust instrument must be approved in advance by the Standards Committee.

### Termination Reports

Within 30 days of leaving House employment, a reporting individual must file a termination report.<sup>48</sup> The termination report covers all financial activity through the person's last day on the payroll. An individual who leaves the House to take a federal government position that also requires a **public** Financial Disclosure Statement need not file a termination report. Such an individual should inform the House Clerk in writing of the new position. A requirement to file a **confidential** disclosure statement in the new position will not excuse the filing of a termination report.

**Example 18.** Member A resigns from Congress to take a position as a Cabinet Secretary. A must file a public financial disclosure statement in his new position. A need not file a termination report with the House, but he must advise the House in writing that he is going to a covered position that requires the filing of a public Financial Disclosure Statement.

### Filing Deadlines, Committee Review, and Amendments

A report must be physically filed or postmarked by the due date, unless an extension has been granted by the Committee pursuant to a written request. Total extensions for any report may not exceed 90 days.<sup>49</sup> An individual who files a report more than 30 days after it is due must pay a late filing fee of \$200, unless the Committee waives the fee in exceptional circumstances.<sup>50</sup>

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<sup>48</sup> *Id.* § 101(e).

<sup>49</sup> *Id.* § 101(g).

<sup>50</sup> *Id.* § 104(d).

Within 60 days of receipt, the Committee on Standards of Official Conduct reviews Financial Disclosure Statements of filers under its jurisdiction to determine whether the reports have been filed in a timely manner, appear substantially accurate and complete, and comply with applicable conflict of interest laws and rules.<sup>51</sup> If the review indicates a possible problem, the reporting individual is notified and given an opportunity to amend within a specified period.

A filer may also amend a Financial Disclosure Statement on his or her own initiative. Such amendments are normally given a presumption of good faith by the Committee if submitted before the end of the year in which the report was originally filed.<sup>52</sup>

To amend a Financial Disclosure Statement, a filer may, but is not required to, submit an entirely new form. Instead, an amendment can be in the form of a letter addressed to, and filed with, the Clerk of the House. Both the original filing and the amendment are made public.

### **Retention of and Public Access to Reports**

The House Clerk retains the reports of House Members and employees for six years and the reports of unsuccessful candidates for one year.<sup>53</sup> The Clerk makes all forms on file available for inspection by the public within thirty days of receipt.<sup>54</sup> In addition, pursuant to the Honest Leadership and Open Government Act, the Clerk must make the reports of all Members filed after June 1, 2008 available on a public, searchable website within 45 days of their filing.<sup>55</sup>

Anyone wishing to review a report on file with the Clerk must provide his or her name, occupation, and address; the name of any other person or entity on whose behalf the information is sought; and a statement that he or she is aware of the prohibitions on use of the information.<sup>56</sup> It is unlawful to use the information contained in Financial Disclosure Statements for any commercial purpose other than new reporting, any unlawful purpose, to establish a filer's credit rating, or for charitable, political, or other solicitations.<sup>57</sup>

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<sup>51</sup> *Id.* § 106.

<sup>52</sup> The Committee's amendment policy, contained in a letter sent to all Members on April 23, 1986, is included in the appendices to this Manual.

<sup>53</sup> 5 U.S.C. app. 4 § 105(d).

<sup>54</sup> *Id.* § 105(b)(1).

<sup>55</sup> Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, § 304, 121 Stat. 735, 752-53 (Sept. 14, 2007).

<sup>56</sup> *Id.* § 105(b)(2).

<sup>57</sup> *Id.* § 105(c)(1), (2).

## Failure To File or Filing False Disclosure Statements

The financial disclosure provisions of EIGA have been incorporated by reference as a rule of the House of Representatives,<sup>58</sup> over which the Standards Committee has jurisdiction.<sup>59</sup> In addition to any Committee action, EIGA authorizes the Attorney General of the United States to seek a civil penalty of up to \$11,000 against an individual who knowingly and willfully falsifies or fails to file or to report any required information.<sup>60</sup> Moreover, under federal criminal law, anyone who knowingly and willfully falsifies or conceals any material fact in a statement to the government may be fined up to \$11,000, imprisoned for up to five years, or both.<sup>61</sup>

The Committee is authorized to render advisory opinions interpreting the financial disclosure provisions of EIGA for any person under its jurisdiction. An individual who acts in good faith in accordance with a written advisory opinion shall not be subject to any sanction under the Act.<sup>62</sup>

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<sup>58</sup> House Rule 26.

<sup>59</sup> See House Rule 10, cl. 1(t).

<sup>60</sup> 5 U.S.C. app. 4 § 104(a).

<sup>61</sup> 18 U.S.C. § 1001.

<sup>62</sup> 5 U.S.C. app. 4 § 106(b)(7).



# STAFF RIGHTS AND DUTIES

## Overview

The House has adopted specific rules and regulations governing the employment relationship. In addition, the Congressional Accountability Act of 1995, the first law passed by the 104<sup>th</sup> Congress, applies the rights and protections of twelve civil rights, labor, and other workplace laws to employees of the legislative branch of the government.<sup>1</sup> This chapter covers the laws, rules, and standards concerning:

- Restrictions against discrimination in hiring and compensation;
- Nepotism;
- —Kickback schemes and other illegal hiring, firing, and compensation practices;
- Regulations on employment and compensation, including lump sum payments;
- Guidelines affecting interns, fellows, volunteers, and detailees; and
- Consultants.

The general terms, conditions, and specific duties of House employees traditionally have been within the discretion of the employing Member or committee.<sup>2</sup> Nonetheless, certain general limitations and restrictions apply to all House employees. Employees of the House are paid from funds of the United States Treasury to perform public duties. These duties include assisting the Members in their official responsibilities<sup>3</sup> and working on official committee business,<sup>4</sup> but they

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<sup>1</sup> See Congressional Accountability Act of 1995, Pub. L. 104-1, 109 Stat. 3 (1996) (codified at 2 U.S.C. § 1301 *et seq.*).

<sup>2</sup> Some House employees, generally those under the employ of an officer of the House, will be subject to the House Employees Position Classification Act (2 U.S.C. §§ 291-303) and regulations on applicable employment standards issued by the Committee on House Administration.

<sup>3</sup> See 2 U.S.C § 57b(a)-(b). During each session of Congress, each Member gets a single allowance, known as the Members' Representational Allowance (—MRA) to conduct official and representational duties. The Clerk Hire Allowance, the Official Expenses Allowance, and Official Mail Allowance have all been merged into the MRA. *See also* Legislative Branch Appropriations Act, 2008, Pub. L. 110-161, Division H, title I - House of Representatives - Members' Representational Allowances Including Clerk Hire, Official Expenses of Members, and Official Mail.

<sup>4</sup> See House Rule 10, cl. 9(a)(1).

do **not** include performing nonofficial, personal, or campaign duties.<sup>5</sup> The Code of Official Conduct (House Rule 23) instructs Members and officers to retain no one on their staffs—who does not perform official duties for the offices of the employing authority commensurate with the compensation he receives (House Rule 23, clause 8).<sup>6</sup>

## Discrimination

### *House Rules*

In addition to federal law, House rules have long prohibited discriminatory conduct in employment. Part of the Code of Official Conduct (House Rule 23, clause 9) provides:

A Member, Delegate, Resident Commissioner, officer, or employee of the House may not discharge and may not refuse to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the race, color, religion, sex (including marital or parental status), disability, age or national origin of such individual, but may take into consideration the domicile or political affiliation of such individual.

This provision has been part of the Code, in substantially this form, since 1975.<sup>7</sup>

**Standards Committee Action.** The Committee on Standards of Official Conduct is charged with investigating alleged violations of the Code of Official Conduct (House Rule 10, clause 1(q)). In the 101<sup>st</sup> Congress, the Committee undertook a preliminary inquiry into charges that a Member had sexually harassed two female employees on his personal staff. In that case, the Committee affirmed

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<sup>5</sup> See *United States v. Rostenkowski*, 59 F.3d 1291, 1307-11 (D.C. Cir. 1995), *reh'g denied*, 68 F.3d 489 (D.C. Cir. 1995); *United States v. Diggs*, 613 F.2d 988, 994-97, 1002 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

<sup>6</sup> See also Comm. on House Admin., *U.S. House of Representatives Members' Congressional Handbook* (hereinafter *-Members' Handbook*); Comm. on House Admin., *U.S. House of Representatives Committees' Congressional Handbook* (hereinafter *-Committees' Handbook*); Code of Ethics for Government Service ¶ 3, H. Con. Res. 175, 85<sup>th</sup> Cong., 2d Sess., 72 Stat., pt. 2, B12 (1958). The text of the *Members' Handbook* and the *Committees' Handbook* is available on that Committee's website.

<sup>7</sup> See H. Res. 5, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. (121 *Cong. Rec.* 20-32 (Jan. 14, 1975)). The rule was amended by H. Res. 5, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., to preclude discrimination on the basis of age (133 *Cong. Rec.* H6-16 (daily ed. Jan. 6, 1987)), and by the Ethics Reform Act of 1989, to preclude discrimination on the basis of marital or parental status and handicap and to exclude domicile and political affiliation (see Pub. L. 101-194, § 802(b)(2), 103 Stat. 1716, 1773 (1989))—matters that are also now addressed by the Congressional Accountability Act of 1995.

that sexual harassment is a form of sex discrimination, that the Member charged had indeed harassed his employees, and that this behavior violated the Code of Official Conduct. The Committee report stressed that the applicable provision of the Code (House Rule 23, clause 9) tracks the language of Title VII of the Civil Rights Law of 1964 and should be interpreted in light of judicial and administrative decisions (*e.g.*, those of the Equal Employment Opportunity Commission) construing that law.<sup>8</sup>

While the Committee may conduct investigations and disciplinary hearings and make recommendations to the full House that it formally sanction a Member, the Committee does not have the authority to order remedies such as monetary relief for an aggrieved employee. Employees seeking such remedies have recourse to the Office of Compliance.

**Example 1.** Member A, a Californian, only hires other Californians. A is not violating House rules.

**Example 2.** Member B, a Republican, only hires other Republicans. B is not violating House rules.

**Example 3.** As a matter of policy, Member C refuses to hire women except for clerical positions. C is in violation of House Rule 23.

**Example 4.** District manager D dismisses Employee E after E turns 55, on the ground that the office needs to maintain a youthful and energetic image. D has violated House Rule 23.

### ***Congressional Accountability Act of 1995***

Effective January 23, 1996, the Congressional Accountability Act of 1995 extended the rights and protections of the following federal employment laws, including those laws that prohibit various forms of discrimination, to covered Congressional employees and employing offices:

- Title VII of the Civil Rights Act of 1964, as amended by the *Civil Rights Act of 1991*, which prohibits discrimination in employment because of race, color, religion, sex, or national origin;
- The Age Discrimination in Employment Act of 1967, which prohibits employment discrimination against individuals 40 years of age and over;

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<sup>8</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Jim Bates*, H. Rep. 101-293, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 8-10 (1989). The Committee issued a public letter of reproof to the Member. *Id.* at 25-26.

- Title I of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, which prohibit employment discrimination against qualified individuals with disabilities;
- The Fair Labor Standards Act of 1938 (—FLSA), which governs overtime pay, minimum wage, and child labor protection, and prohibits pay discrimination on the basis of sex;
- The Family and Medical Leave Act of 1993, which entitles eligible employees to take leave for certain family and medical reasons;
- The Employee Polygraph Protection Act of 1988, which restricts the use of lie detector tests by employers;
- The Worker Adjustment and Retraining Notification Act, which assures employees of notice before shut-downs and mass lay-offs; and
- Section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994, which protects job rights of individuals who serve in the military and other uniformed services.

The application of three other laws had a delayed effective date:

- The Federal Service Labor-Management Relations Act, which establishes the rights of individuals to form, join, or assist a labor organization, or to refrain from such activity, and to collectively bargain over conditions of employment through their representatives (effective October 1, 1996);
- The Occupational Safety and Health Act of 1970, which protects the safety and health of employees from physical, chemical, and other hazards in places of employment (effective January 1, 1997); and
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibits discrimination against qualified individuals with disabilities in the areas of public services and accommodations (effective January 1, 1997).

The Congressional Accountability Act established the Office of Compliance, an independent office within the legislative branch, with a five-member Board of Directors, an Executive Director, a Deputy Executive Director for the Senate, a Deputy Executive Director for the House, and a General Counsel. That office administers formal and informal procedures to resolve disputes and provides monetary awards and other appropriate remedies for congressional employees if a violation is found. The Office of Compliance has published a guide to the Congressional Accountability Act, which is available on its website. It also provides educational services and information to congressional employees and their employing offices. Employees with questions about their rights under these statutes should contact the Office of Compliance. The Committee on House Administration has published a *Model Employee Handbook*, available on that Committee's website, that provides office policies that comply with applicable House



rules and federal employment laws and regulations.<sup>9</sup> In addition, the House Office of Employment Counsel is available to provide advice and guidance to House Members and other employing authorities on employment matters and on the establishment of office policies consistent with these House rules, laws, and regulations.

### *Fair Labor Standards*

Certain federal employment protections applied to staff even before the enactment of the Congressional Accountability Act. House employees have long been entitled to the minimum wage and overtime protection (except for exempt employees<sup>10</sup>), the requirement of equal pay for equal work, protection against oppressive child labor conditions,<sup>11</sup> and protection against retaliation for exercising any of these rights.<sup>12</sup> The Office of Compliance now administers these provisions.

Pursuant to regulations issued by the Office of Compliance, the minimum wage and overtime provisions of the FLSA do not apply to staff—employed in a bona fide executive, administrative, or professional capacity.<sup>13</sup> In light of this standard, the Committee on House Administration has incorporated in its *Model Employee Handbook* provisions establishing written leave policies, job descriptions for each employee stating whether or not the position is exempt from the pay provisions and time-keeping procedures. The equal pay provisions of the FLSA and Office of Compliance regulations prohibit paying lower wages based on gender:

for equal work on jobs[,] the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex <sup>14</sup>

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<sup>9</sup> See Comm. on House Admin., U.S. House of Representatives, *Model Employee Handbook* (Sept. 1999).

<sup>10</sup> See *Office of Compliance Manual*, section 5, part C, FLSA Regulations, § 541 *et seq.* (exemption criteria). The text of the manual is available on the Office of Compliance's website.

<sup>11</sup> See 29 U.S.C. § 203(l) for the definition of—oppressive child labor.

<sup>12</sup> See Fair Labor Standards Amendments of 1989, Pub. L. 101-157, § 8, 103 Stat. 938, 944 (1989).

<sup>13</sup> See *Office of Compliance Manual*, *supra* note 10.

<sup>14</sup> 29 U.S.C. § 206(d)(1). An employer may not comply with this provision by reducing anyone's wages. *Id.*

## Nepotism

Federal law, at 5 U.S.C. § 3110, generally prohibits a federal official, including a Member of Congress, from appointing, promoting, or recommending for appointment or promotion any —relative<sup>15</sup> of the official to any agency or department over which the official exercises authority or control. The statute defines a relative, for these purposes, as:

an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.

The law bans the employment only of these specifically named relatives.<sup>15</sup> The statute does not prohibit a Member from employing two individuals who are related to each other but not to the Member. In addition, the 107<sup>th</sup> Congress amended the Code of Official Conduct (House Rule 23, clause 8(c)(1)) to prohibit a Member from retaining a spouse in a paid position, and to prohibit a House employee from accepting compensation for work on a committee on which the spouse serves as a member.<sup>16</sup>

The employing Member or committee and subcommittee chairman must certify, on the monthly payroll authorizations, each employee's relationship (or lack thereof) to **any** Members of Congress. The anti-nepotism law, as applied in the House, thus prohibits the hiring of a relative of a Member on that Member's staff or on the staff of a committee or subcommittee that the Member chairs. The prohibition, however, does not apply —in the case of a spouse whose pertinent employment predates the One Hundred Seventh Congress<sup>16</sup> (House Rule 23, clause 8(c)(2)).

If a House employee becomes related to the employing Member through marriage (*e.g.*, an employee in the Member's congressional office marries a relative of the Member), the employee may remain on the Member's personal or committee staff, **unless** the employee is the spouse of the employing Member or the works for a Committee on which the Member serves. Similarly, if a Member becomes the supervisor of a relative (other than a spouse) who was hired by someone else (*e.g.*, the Member ascends to the chairmanship of a committee or subcommittee for which the relative is already working), the relative may remain on the payroll. However,

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<sup>15</sup> See *Lee v. Blount*, 345 F. Supp. 585, 588 (N.D. Cal. 1972).

<sup>16</sup> See H. Res. 5, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (147 *Cong. Rec.* H6-10, H8 (Jan. 3. 2001)).

the Member may **not** then give that individual further promotions or raises, other than cost-of-living or other across-the-board adjustments. Changing an employee's status from part-time to full-time would not be considered a raise or promotion and, therefore, would be permitted under 5 U.S.C. § 3110.

Similarly, regulations issued by the Committee on House Administration prohibit the use of Committee funds for the benefit of a Member or relative of a Member by way of a contract or otherwise. Specifically, those regulations state that —[u]nless specifically provided by federal laws, House rules, or Committee on House Administration regulations, no Member, relative of the Member, or anyone with whom the Member has a professional or legal relationship may directly benefit from the expenditure<sup>ll</sup> of either the clerk hire or the official expenses allowance.<sup>17</sup> A comparable provision applies to House committees. The anti-nepotism restrictions apply only to employees on the Member's or a committee's official payroll. Campaign workers are not covered.

**Example 5.** Member D would like to hire his uncle by marriage to work in his congressional office. Member D would be in violation of House Rule 23 by hiring a specifically named relative.

**Example 6.** Employee F has been a caseworker in Member E's district office for two years, and she later marries Member E's son. Employee F may remain on Member E's payroll.

**Example 7.** Employee G works on Member F's committee, and Employee G and Member F get married. Employee G may no longer receive compensation from the committee on which Member F serves.

### Illegal Hiring and Firing Practices

Criminal provisions of the United States Code prohibit offering or threatening federal jobs to induce payments, political activities, or contributions. Specifically, federal law prohibits anyone from asking for or receiving anything of value, including a campaign contribution, in return for promising to help someone obtain a federal post.<sup>18</sup> Further, candidates may not directly or indirectly promise appointment or use of influence or support in obtaining —any public or private position or employment<sup>ll</sup> in return for someone's political support.<sup>19</sup> Federal law also bars any individual from promising a federal job, contract, or benefit to a person as consideration or reward for political support or opposition to any

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<sup>17</sup> *Members' Handbook*, *supra* note 6.

<sup>18</sup> *See* 18 U.S.C. § 211.

<sup>19</sup> *See* 18 U.S.C. § 599.

candidate or party.<sup>20</sup> Moreover, no one may deprive or threaten to deprive anyone of a federal job or benefit as a way to induce political contributions, including services, for a candidate or party.<sup>21</sup> These provisions carry penalties ranging to fines of \$10,000 and imprisonment for two years.

In addition to these provisions, during the 110<sup>th</sup> Congress, the House amended the Code of Official Conduct (House Rule 23, clause 14) to prohibit any Member, Delegate, or Resident Commissioner from influencing an employment decision or employment practice of any private entity on the basis of partisan political affiliation.

### ***Salary Kickbacks***

Federal law contains no statutory provision that specifically bars —kickbacks.<sup>22</sup> However, the Department of Justice, under general fraud statutes, has prosecuted several Members of Congress and congressional aides involved in kickback schemes. Section 1001 of title 18, for example, specifically prohibits the making of any false, fictitious, or fraudulent statements or knowingly covering up or concealing, by any trick or scheme, any material fact concerning matters in the jurisdiction of the executive, legislative, or judicial branch of the government.<sup>23</sup> A Member or employee who uses the mail to distribute payroll checks or other funds in furtherance of a kickback scheme may also be violating the federal mail fraud statute.<sup>24</sup>

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<sup>20</sup> See 18 U.S.C. § 600.

<sup>21</sup> See 18 U.S.C. § 601.

<sup>22</sup> The term kickback generally refers to a scheme whereby an employee is coerced, as a condition of employment, into remitting a portion of the individual's salary to the employer or into spending a portion of the salary for goods or services for the employer's benefit. It may also include the designation by an employer of certain persons on the payroll who actually perform no duties but turn over their salaries to the employer.

<sup>23</sup> In 1996, the statute was amended to expressly extend its coverage to —any matter within the jurisdiction of the executive, *legislative*, or judicial branch.<sup>23</sup> False Statements Accountability Act of 1996, Pub. L. 104-292, § 2, 110 Stat. 3459 (1996) (emphasis added). The Supreme Court had held that a previous version of this statute prohibited making a false or fraudulent statement or falsifying or concealing a material fact on a payroll voucher or certification to a disbursing officer of the House to further a kickback scheme. See *United States v. Bramblett*, 348 U.S. 503 (1955). That decision was overruled by *Hubbard v. United States*, 514 U.S. 695, 715 (1995), which held that the false statements statute in effect at the time the conduct occurred did not apply to statements made in a *judicial* proceeding. See also *United States v. Oakar*, 111 F.3d 146 (D.C. Cir 1997) (relying on *Hubbard* and holding that the false statements statute did not apply to statements made to the House Committee on Standards).

<sup>24</sup> See 18 U.S.C. § 1341; see also *Rostenkowski*, 59 F.3d at 1294-95; *Diggs*, 613 F.2d at 997-99, 1002-03; *United States v. Clark*, Crim. No. 78-207 (W.D. Pa. 1978).

**Court and Standards Committee Actions.** The United States Court of Appeals for the District of Columbia Circuit upheld the conviction of a Member of the House under an earlier version of 18 U.S.C. § 1001, concluding that the Member's failure to disclose to the House payroll office the real purpose of pay to employees in a kickback scheme, in which such funds were used for personal and congressional expenses of the Member, was a material omission in violation of the criminal law.<sup>25</sup> In the course of a subsequent Committee investigation of the Member, he admitted that he had misused the clerk hire allowance (the clerk hire allowance is now included in the Members' Representational Allowance (—MRAII ))<sup>26</sup> in violation of then-House Rule 43, clauses 1 and 8, part of the Code of Official Conduct, and that he had been unjustly enriched thereby. He agreed to make restitution to the House, apologized, and was censured by the House.<sup>27</sup>

With respect to the MRA, this Committee has long taken the view that:

it is improper to levy, as a condition of employment, any responsibility on any clerk to incur personal expenditures for the primary benefit of the Member or of the Member's congressional office operations . . . .

The opinion clearly would prohibit any Member from retaining any person from his [MRA] under either an express or tacit agreement that the salary paid to the individual is in lieu of any present or future indebtedness of the Member, any portion of which may be allocable to goods, products, printing costs, campaign obligations, or any other nonrepresentational service.<sup>28</sup>

In the 100<sup>th</sup> Congress, a Delegate and his administrative assistant pleaded guilty to having conspired to defraud the United States in violation of the criminal conspiracy statute<sup>29</sup> by submitting payroll forms and collecting salary checks for individuals who did no work for the House. The Standards Committee found that the Delegate had used the checks to pay for hotel and meal expenses for visiting constituents and staff, campaign expenses, and travel for the Delegate and his family, in violation not only of the conspiracy statute, but also of the House Code of Official Conduct and the Code of Ethics for Government Service. The Delegate and

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<sup>25</sup> *Diggs*, 613 F.2d at 999.

<sup>26</sup> See note 3, *supra*.

<sup>27</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Charles C. Diggs, Jr.*, H. Rep. 96-351, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1979); 125 *Cong. Rec.* 21584-92 (July 31, 1979).

<sup>28</sup> House Comm. on Standards of Official Conduct, *Advisory Opinion No. 2* (July 11, 1973), reprinted in 119 *Cong. Rec.* H6073-74 (July 12, 1973), and in the appendices to this Manual.

<sup>29</sup> See 18 U.S.C. § 371.

employee resigned before the Committee could hold a disciplinary hearing to consider sanctions.<sup>30</sup>

In the 107<sup>th</sup> Congress, a Member was convicted of, among other things, conspiracy to violate the federal bribery statute<sup>31</sup> by agreeing to employ an individual as a member of the Member's congressional district staff in exchange for certain gratuities, including the payment by that individual of \$2,500 a month of his congressional salary.<sup>32</sup> In a subsequent Committee investigation, an investigative subcommittee stated in a letter transmitting a Statement of Alleged Violation to the full Committee that the individual had described in his trial testimony in detail how each month he deposited an envelope containing \$2,500 under the door of the Member's private office.<sup>33</sup> The Committee found that the conduct by the Member violated clauses 1-3 of the Code of Official Conduct (House Rule 23). On the basis of this violation, as well as other conduct found to be in violation of the Code of Official Conduct, which taken together were —of the most serious character meriting the strongest possible Congressional response,<sup>34</sup> the Committee recommended that the House of Representatives adopt a resolution that the Member be expelled.<sup>35</sup> The House later voted to expel the Member.<sup>36</sup>

## General Employment and Compensation Provisions

The Committee on House Administration has promulgated regulations covering the Members' Representational Allowance (—MRA<sup>37</sup>) and the employment of committee staff. The *Members' Handbook* and *Committees' Handbook* contain these regulations.<sup>38</sup> A summary follows.

### *Personal Staff*

Each Member of the House may employ up to 18 permanent employees and a total of not more than four additional employees appointed as interns, part-time

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<sup>30</sup> House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundredth Congress*, H. Rep. 100-1125, 100<sup>th</sup> Cong., 2d Sess. 15-16 (*In the Matter of Delegate Fofo I.F. Sunia and Matthew K. Iuli*).

<sup>31</sup> See 18 U.S.C. § 201(c).

<sup>32</sup> *United States v. James A. Traficant, Jr.*, Crim. No. 4:01CR207 (N.D. Ohio 2002).

<sup>33</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative James A. Traficant, Jr.*, H. Rep. 107-594, 107<sup>th</sup> Cong., 2d Sess. 120 (2002).

<sup>34</sup> *Id.* at 2.

<sup>35</sup> See H. Res. 495, 107<sup>th</sup> Cong., 2d Sess. (148 *Cong. Rec.* H5375-93 (July 24, 2002)).

<sup>36</sup> *Id.*

<sup>37</sup> See note 3, *supra*.

<sup>38</sup> See note 6, *supra*.

employees, shared employees, temporary employees, or staff on leave without pay to serve as the Member's staff. The regulations issued by the Committee on House Administration establish the maximum and minimum annual rates of employee salaries. A portion of the MRA is used for securing staff to provide assistance to Members in the discharge of official and representational duties.<sup>39</sup> A statute that required that individuals compensated from the then-clerk hire allowance<sup>40</sup> work either in Washington, D.C., or in the state or district that the Member represents was repealed in 1996, thereby permitting employees to —telecommute.<sup>41</sup> The Committee on House Administration has issued a policy statement on telecommuting, which is available on that committee's website. As discussed in that policy statement, telecommuting is entirely at the discretion of the employing office, and employing offices are under no obligation to offer a telecommuting option to employees. An employee with a telecommuting work arrangement is subject to the same rules, regulations, and procedures applicable to all staff of an employing office, including those contained in the House rules, the Committee on House Administration's regulations set forth in the *Members' Handbook* and *Committees' Handbook*, the employing office's employee manual, applicable federal laws, and guidance of the Standards Committee.

### *Committee Staff*

Provisions of the House rules establish a ceiling on the number of professional and clerical staff that may be employed by each standing committee of the House and address the pay of these employees (House Rule 10, clauses 9(a) and 9(c)). The *Committees' Handbook* sets out regulations and guidelines for employment and compensation of committee staff.

The House rules state that professional staff members of the standing committees of the House —may not engage in any work other than committee business during congressional working hours<sup>42</sup> and that they —may not be assigned a duty other than one pertaining to committee business<sup>43</sup> (House Rule 10, clauses 9(b)(1)(A) and 9(b)(1)(B)). Thus, committee staff may *not* be used to supplement the personal office needs of committee members.

### *All Staff*

The regulations of the Committee on House Administration require employing Members to provide monthly salary certifications for their staff. A salary may be disbursed to an employee only upon submission of a signed statement by the appropriate Member certifying that the Office of Human Resources has correctly

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Pub. L. 104-186, Title II, § 204(43), 110 Stat. 1718, 1736 (Aug. 20, 1996).

listed the name and salary of each employee, and that the employees have certified that they have no relationship to any current Member of Congress, unless specifically noted. Compensation may be received only for duties performed within the preceding month.

The Ethics Reform Act of 1989 amended what is now House Rule 23, clause 8, —to strengthen and broaden [Members' and officers'] accountability for the pay and performance of staff.<sup>42</sup> Whereas the old rule explicitly addressed only Members as employing authorities, the revised rule explicitly applies as well to House officers, committee chairs, subcommittee chairs, and ranking minority members in their supervisory roles. Clause 8, in pertinent part, provides:

(a) A Member, Delegate, Resident Commissioner, or officer of the House may not retain an employee who does not perform duties for the offices of the employing authority commensurate with the compensation he receives.

(b) In the case of committee employee who works under the direct supervision of a member of the committee other than a chairman, the chairman may require that such member affirm in writing that the employee has complied with clause 8(a) (subject to clause 9 of rule X) as evidence of compliance by the chairman with this clause and with clause 9 of rule X.

Thus, when a Member other than a committee chair (*e.g.*, a subcommittee chair or ranking minority member) directly supervises committee staff, the chair may require the supervising Member to certify the staff's performance. According to the Bipartisan Task Force report,

[t]he purpose of this requirement is to ensure accountability for employee performance. The rule specifically states that, if a supervising Member has affirmed in writing that the employee under his authority has met the criteria of the rule, this written affirmation is sufficient evidence that the chairman is in compliance with the rule's provisions. Any violation would consequently become the responsibility of the supervising Member.<sup>43</sup>

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<sup>42</sup> *Bipartisan Task Force on Ethics*, Report on H.R. 3660, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 60 (Comm. Print, Comm. on Rules 1989), reprinted in 135 *Cong. Rec.* H9253, H9270 (daily ed. Nov. 21, 1989) (hereinafter —*Bipartisan Task Force Report*). See also Ethics Reform Act of 1989, Pub. L. 101-194, § 802(b)(1), 103 Stat. 1716, 1773 (1989).

<sup>43</sup> *Bipartisan Task Force Report*, *supra* note 42, at 33; 135 *Cong. Rec.* H9262.



Guidelines of the Committee on House Administration prohibit two or more employees from holding the same House position and from dividing a House salary. In addition, House employees are prohibited from subletting any portion of their official duties to someone else.<sup>44</sup> One employee may be shared between two or more House employing authorities (e.g., one staffer may work for two Members or for both a Member and a committee). Part-time work is also permitted.<sup>45</sup>

The underlying standard for the receipt of compensation by an employee of the House is that the employee has regularly performed official duties commensurate with the compensation received. The Code of Ethics for Government Service instructs every employee to —[g]ive a full day’s labor for a full day’s pay; giving to the performance of his duties his earnest effort and best thought.¶<sup>46</sup> Employees are paid United States Treasury funds to perform public duties. Appropriated funds are to be used solely for the purposes for which appropriated.<sup>47</sup> Funds appropriated for congressional staff to perform official duties should be used only for assisting a Member in his or her legislative and representational duties, working on committee business, or performing other congressional functions. Employees may not be compensated from public funds to perform nonofficial, personal, or campaign activities on behalf of the Member, the employee, or anyone else.

There is no conclusive listing of a Member’s —official and representational duties.¶ However, the Supreme Court discussed such a concept in a different context and stated that —legitimate¶ activities of a Member include things said or done in the House relating to official duties and include —legitimate ‘errands’ performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called ‘news letters’ for constituents, news releases and speeches delivered outside the Congress.¶<sup>48</sup>

**Standards Committee Actions.** In one case considered by the Standards Committee in the 100<sup>th</sup> Congress, involving the misuse of clerk hire funds, the Committee found that a Member maintained an employee on the payroll of a subcommittee the Member chaired, while knowing that the employee was not

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<sup>44</sup> See 2 U.S.C. § 101.

<sup>45</sup> See *Members’ Handbook* and *Committees’ Handbook*, *supra* note 6.

<sup>46</sup> See Code of Ethics for Government Service ¶ 3, *supra* note 6.

<sup>47</sup> See 31 U.S.C. § 1301(a).

<sup>48</sup> *United States v. Brewster*, 408 U.S. 501, 512 (1972). See also *McCormick v. United States*, 500 U.S. 257, 272 (1991) (—Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.¶ ).

coming to work. The House reprimanded the Member for, among other things, violating the Code of Official Conduct (currently clause 8 of House Rule 23).<sup>49</sup>

In the 104<sup>th</sup> Congress, the Standards Committee considered several allegations also involving a Member's misuse of clerk hire funds. One matter concerned, among other things, a Member's regular assignment to an employee of duties that were clearly personal in nature, including paying the Member's bills, retrieving personal mail, cleaning the Member's home, serving as a point of contact for vendors and service providers in connection with the Member's personal affairs, and performing a variety of personal services, such as curling the Member's hair and making shopping trips to department stores, grocery stores, and furniture stores, during work hours.<sup>50</sup>

In another matter, the Committee self-initiated a complaint against a Member involving allegations that, among other things, the Member had —misused congressional staff for personal purposes<sup>51</sup> and —failed to repay personal debts incurred by personal staff on the [Member's] behalf.<sup>51</sup>

In the 106<sup>th</sup> Congress, a Member admitted to a Statement of Alleged Violation charging that he brought discredit to the House of Representatives by, among other things, permitting employees under his supervision and control to work for the Member's campaign, to —the detriment of the time they were required to spend on official duties.<sup>52</sup> The Committee determined that contributing to this misconduct was the failure of the Member —to establish a comprehensive and comprehensible policy for his congressional staff to record the annual, sick[,] and administrative leave taken by each employee in his congressional office.<sup>53</sup>

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<sup>49</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Austin J. Murphy*, H. Rep. 100-485, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 5, 9 (1987); 133 *Cong. Rec.* H11686-96 (daily ed. Dec. 18, 1987).

<sup>50</sup> See House Comm. on Standards of Official Conduct, *In the Matter of Representative Barbara-Rose Collins*, H. Rep. 104-876, 104<sup>th</sup> Cong., 2d Sess. 14-17. In that matter, an investigative subcommittee adopted a Statement of Alleged Violation against the Member, alleging, among other things, the improper performance of personal services by House employees. No further action was taken in the matter, however, because as of the time the investigative subcommittee completed its work, the Member was about to depart the House. See *id.* at 4.

<sup>51</sup> The Committee lost jurisdiction over the matter when the Member resigned from the House. See House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Fourth Congress*, H. Rep. 104-886, 104<sup>th</sup> Cong., 2d Sess. 19 (*In re Rep. Mel Reynolds*).

<sup>52</sup> House Comm. on Standards of Official Conduct, *In the Matter of Rep. E.G. —Bud Shuster*, H. Rep. 106-979, 106<sup>th</sup> Cong., 2d Sess., 6-7 (2000).

<sup>53</sup> *Id.* at 63.

**Court Actions.** The Department of Justice has on four separate occasions pursued criminal charges, against two then-current and two former Members of the House, for allegedly placing persons on the congressional payroll who did not regularly perform official congressional duties but rather performed personal services or duties for or on behalf of the Members.<sup>54</sup> The charges included fraud, mail fraud, perjury, and embezzlement of government funds. The sitting Members were convicted;<sup>55</sup> the former Members pleaded guilty.<sup>56</sup>

In one of these cases, the United States Court of Appeals, summarizing the testimony of a House officer, stated that it is —within a congressman’s discretion to define the parameters of an employee’s responsibilities as long as those responsibilities related to the congressman’s official and representative duties.<sup>57</sup> Nevertheless, the court, in upholding the fraud conviction of the Member of Congress, stated that although the employees had performed some official services for the Member, —only a nominal percentage of [the employees’] responsibilities were congressionally related,<sup>58</sup> and thus a jury had sufficient evidence to conclude that such employees were paid from clerk hire allowances —with the intention of compensating them for services rendered to the [defendant Member’s private business] or the defendant.<sup>59</sup> Thus, while it might have been argued that —it was a matter of [the Member’s] discretion to fix their duties and salaries as congressional employees,<sup>60</sup> the —defendant’s representations to the House Office of Finance that the [employees] were *bona fide* congressional employees were fraudulent and material in violation of 18 U.S.C. § 1001.<sup>61</sup>

In a more recent case, the Court of Appeals observed that, although —the House has not attempted to define a Member’s official and representative duties,<sup>62</sup> and has in large measure vested Members with discretion to fix the terms and conditions of employment of staff members,<sup>63</sup> Congress —has drawn a line between use of the Clerk Hire Allowance to employ staff assisting in the discharge of official and representative duties (permissible under the Annual Appropriations Acts) and use of that allowance to defray personal, political or campaign related allowances (prohibited by 2 U.S.C. § 57; 31 U.S.C. § 1301; and the [Members’ Congressional] Handbook.<sup>64</sup> The court stated that where to draw the line between —official work

<sup>54</sup> See, e.g., *United States v. Rostenkowski*, Crim. No. 94-0226 (D.D.C.); *United States v. Diggs*, Crim. No. 78-142 (D.D.C.); *United States v. Clark*, Crim. No. 78-201 (W.D. Pa.).

<sup>55</sup> See notes 5 and 33, *supra*.

<sup>56</sup> See *Congressional Quarterly’s News, Hill News Highlights* (Apr. 9, 1996); *Congressional Quarterly Weekly Report* 1263 (June 23, 1979).

<sup>57</sup> *Diggs*, *supra* note 5, 613 F.2d at 997.

<sup>58</sup> *Id.* at 1002 (emphasis added).

<sup>59</sup> *Id.* at 997.

<sup>60</sup> *Rostenkowski*, *supra* note 5, 59 F.3d at 1309 (emphasis added).

and —personal services— may not always be clear. In concluding that certain counts of the criminal indictment against a former Member were justiciable (*i.e.*, capable of resolution by the court), the court determined that staff's involvement with engraving gift items and mounting souvenirs on plaques as gifts and performing bookkeeping duties for a private insurance company owned by the Member would be prohibited by House rules and regulations as personal services, but the court could not say that —picking up [a Member's] laundry and driving his family members around Washington— could not be considered official rather than personal activities —[b]ecause the performance of those activities might, in some circumstances, directly — even vitally — aid a Congressman in the performance of his official duties.¶<sup>61</sup>

During the 107<sup>th</sup> Congress, a Member was convicted of conspiracy to defraud the United States by, among other things, soliciting and receiving payments from the salaries of congressional employees, directing members of his congressional staff to perform labor and services to maintain his boat, and by having members of his congressional staff perform labor and services at the Member's farm.<sup>62</sup> In a subsequent investigation by the Standards Committee, an investigative subcommittee stated that such personal services included baling hay, running and repairing farm equipment, repairing farm structures, building a horse corral, converting a corn crib to another use, and performing electrical and plumbing repairs. For example, one employee testified at trial that he spent most of his time at the Member's farm doing work which included plumbing, wiring, and other handyman work. That employee further testified that he also spent time in Washington, D.C., as a part of his part-time congressional employment for the Member, but that he performed no official duties at the congressional office. Instead, he performed work on the Member's boat, which included painting, varnishing, and repairing brass fittings.<sup>63</sup> For their personal services, the employees received no compensation other than their congressional salaries.<sup>64</sup> Following the investigation, the adjudicatory subcommittee found that the Member's conduct in directing and having members of his congressional staff perform personal services and labor violated clauses 1-3 of the Code of Official Conduct.<sup>65</sup>

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<sup>61</sup> *Id.* at 1310.

<sup>62</sup> *See* note 33, *supra*.

<sup>63</sup> *Id.* at 121.

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 2.

## Annual Ethics Training Requirement

The House rules adopted at the beginning of the 110<sup>th</sup> Congress included a new provision that requires the Standards Committee to provide annual ethics training to all House Members, officers, and employees.<sup>66</sup> The rule also requires that House officers and employees certify by January 31 of each year that they have attended annual ethics training in the prior calendar year under the guidelines established by the Standards Committee. All new officers and employees must receive ethics training within 60 days after beginning their service to the House.

## Lump Sum Payments

House offices have had broad authority to make lump sum payments to employees since 1997. The House Administration Committee has, under authority granted by the lump sum payment statute,<sup>67</sup> issued a set of regulations governing the making of such payments. Those regulations are published in both the *Members' Handbook* and the *Committees' Handbook*.<sup>68</sup> While those regulations set out basic rules on the making of lump sum payments, it is the responsibility of the Standards Committee to determine the manner in which those payments are to be treated for purposes of the House Code of Official Conduct and other ethics laws, rules, and standards. The Standards Committee has provided the following guidance.

Any lump sum payment must be made in compliance with the provision of the House rules requiring that each employee perform duties for his or her employing office that are commensurate with the compensation paid to that employee (House Rule 23, clause 8). Before making any lump sum payment, a Member must be satisfied that the employee has performed services for the congressional office that are commensurate with the amount the employee is to be paid in the lump sum combined with his or her regular salary. Furthermore, an employee may not be compensated from public funds, including by means of a lump sum payment, for the performance of nonofficial, personal, political, or campaign activities on behalf of the Member, the employee, or anyone else.

In addition, the Standards Committee has determined that, as a general rule, a lump sum payment will **not** count in the determination whether an employee is being paid at a rate that results in the employee being subject to the requirement to file a Financial Disclosure Statement, the outside earned income limitation and restrictions, and the post-employment restrictions on lobbying. A key factor in this

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<sup>66</sup> See House Rule 11, cl. 3(a)(6)

<sup>67</sup> See 2 U.S.C. § 60o.

<sup>68</sup> See note 6, *supra*.

Committee determination is the fact that by and large, the provisions of law involved here look to the employee's —rate of basic pay.¶<sup>69</sup> In the Committee's opinion, lump sum payments, when properly used by an employing office, do not constitute part of the recipient's —rate of basic pay.¶ Another important factor here is that the Committee has been advised that lump sum payments are not treated as salary for purposes of employment benefits. Thus, according to the information provided to the Committee, those payments do not count in determining the maximum amount an employee can contribute to the Thrift Savings Plan, or the amount of life insurance that the employee may purchase, and likewise they do not count in determining an employee's —high three¶ years for purposes of calculating retirement benefits.

The Standards Committee has cautioned, however, that Members should **not** use lump sum payments as means of enabling employees to evade the financial disclosure requirements, the outside earned income limitation and restrictions, or the post-employment restrictions. For example, an intent to evade may be inferred when an employee's regular salary rate is below the applicable thresholds, but that employee is regularly given a lump sum payment in an amount that, if it had been paid in the form of regular salary instead, would have subjected the employee to one or more of these requirements or restrictions. Receiving a lump sum end-of-the-year bonus or other one time payment recognizing a particular accomplishment is generally permissible. Members and staff are reminded that the House Code of Conduct specifically requires them to adhere not only to the letter but also to the spirit of the House Rules (House Rule, 23, clause 2). A Member who uses lump sum payments with the intent to enable an employee to evade any of these requirements or restrictions will be subject to disciplinary action by the Committee. In addition, when the Committee finds that lump sum payments were made with such an intention, the Committee reserves the right to determine that those payments should be treated as part of the recipient's basic rate of pay, thus subjecting that individual to the applicable requirements and restrictions.

### **Volunteers, Interns, Fellows, and Detailees**

House rules prohibit unofficial office accounts, that is, private supplements to the funds available to Members through their clerk hire and official expenses allowances.<sup>70</sup> In *Advisory Opinion No. 6*, interpreting the unofficial office account prohibition, the House Select Committee on Ethics, 95<sup>th</sup> Congress, concluded that in addition to money, the prohibition on unofficial office accounts proscribes the private, in-kind contribution of goods or services for official purposes. The Select Committee found that —no logical distinction can be drawn between the private contribution of in-kind services and the private contribution of money, and that

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<sup>69</sup> See 5 U.S.C. app. 4 §§ 109(13)(B), 501(a)(1); 18 U.S.C. § 207(e)(6).

<sup>70</sup> A full explanation of this topic is available in Chapter 10 of this Manual.

both perpetuate the very kind of unofficial office accounts and practices that are prohibited by the rule.<sup>71</sup>

The Select Committee did, however, recognize several exceptions to the general prohibition against acceptance of services including the following:

- Services provided by federal, state, or local government agencies; and
- Intern, fellowship, or similar educational programs that are primarily of educational benefit to the individual, as opposed to primarily benefiting the Member or office, and which do not give undue advantage to special interest groups.

### **Definitions**

The Committee defines the terms —employee, —intern, —fellow, —volunteer, and —detail as follows:

- An **employee** means a person appointed to a position of employment in the House of Representatives by an authorized employing authority, whether that person is receiving a salary disbursed by the Chief Administrative Officer, or is in a Leave Without Pay or Furlough status.
- An **intern** means an individual performing services in a House office on a temporary basis incidental to the pursuit of the individual's educational objectives. Some interns receive no compensation from any source, while some receive compensation or other assistance from an educational institution or other sponsoring entity. Although some interns may receive compensation from House allowances,<sup>72</sup> this discussion deals primarily with those who do not receive such House compensation.
- A **fellow** means an individual performing services in a House office on a temporary basis as part of an established mid-career education program, while continuing to receive the usual compensation from his or her sponsoring employer.
- A **volunteer** means an individual performing services in a House office without compensation from any source.

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<sup>71</sup> House Select Comm. on Ethics, *Advisory Opinion No. 6* (May 9, 1977), reprinted in *Final Report of the Select Committee on Ethics*, H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess. app. at 65 (1979), and in the appendices to this Manual.

<sup>72</sup> The *Members' Handbook* and *Committees' Handbook* include provisions for **paid** interns, but they provide that such individuals may work for no more than 120 days in a twelve-month period. See note 6, *supra*.

- A **detailee** means an executive branch employee assigned to a committee staff for a period of up to one year.<sup>73</sup>

### *Internship and Fellowship Programs*

A Member or House office may accept the temporary services of an intern participating in a program, as discussed below, which is **primarily of educational benefit** to the participant, irrespective of whether the individual is being compensated by a third-party sponsoring organization. Similarly, a Member or House office may accept the temporary services of a fellow participating in a mid-career education program, as discussed below, while the individual receives compensation from his or her employer. An internship or fellowship program should be operated by an entity not affiliated with a congressional office, and the organization should be willing to indicate its sponsorship of the intern or fellow in writing.

**Restrictions on Establishing Internships and Fellowships.** House Members and staff may not raise or disburse funds for programs that place interns or fellows in their own offices.<sup>74</sup> Offices that have established their own internship program for students may advertise intern openings.<sup>75</sup> In addition, Members do have the right to select or approve those program participants who will be working in their offices.

While internship and fellowship programs are often sponsored by educational institutions, other public or private organizations may act as sponsors, provided the arrangement does not give undue advantage to special interests. Therefore, an intern or fellow should not be assigned duties that will result in any direct or indirect benefit to the sponsoring organization or anyone else with which the individual is affiliated (including the employer or a fellow), other than broadening the individual's knowledge.

An individual who is serving as a **paid** intern or fellow must comply with all the laws, rules, and standards of conduct applicable to House employees, including the Code of Official Conduct (House Rule 23), the gift rule (House Rule 25, clause 5), the ban on solicitations (5 U.S.C. § 7353), and the limitations on accepting a payment for a speech, article, or appearance (House Rule 25, clause 1(a)(2)). In addition, under provisions of the criminal code (18 U.S.C. §§ 203, 205), such individuals are prohibited from representing anyone before any federal agency or

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<sup>73</sup> See generally 2 U.S.C. § 72a(f); *Members' Handbook* and *Committees' Handbook*, *supra* note 6.

<sup>74</sup> See *Advisory Opinion No. 6*, *supra* note 71.

<sup>75</sup> See *Members' Handbook* and *Committees' Handbook*, *supra* note 6.



official or in any matter in which the federal government is a party or has a direct and substantial interest.

**Foreign nationals.** Generally, it is permissible for a foreign national to serve an unpaid internship or fellowship for a Member in either a personal or committee office. Such an internship or fellowship would be subject to the same conditions and restrictions as other such educational programs. Thus, the foreign national should not be assigned any matter of interest to the individual's employer (if any) or the program sponsor. In addition, the foreign national should not be assigned any duties that enable the individual to influence United States policy in a way that benefits the individual's home country. Because of concerns arising under Article I, section 9, clause 8 of the Constitution (the Emoluments Clause), the Standards Committee should be contacted for advice about any prospective internship or fellowship involving a foreign national receiving a salary, or some other form of support, from the individual's home country while serving in a House office.

**Example 8.** Student A writes to Member B offering to work in B's office for one semester, as part of his college's government internship program. A encloses a copy of the college's brochure on its internship program and a letter from the dean, indicating that A will get college credit for his participation. B may accept A's services.

**Example 9.** Scientist C works for a pharmaceutical company that sponsors a mid-career fellowship program. In conjunction with the program, C writes to the Science Committee, offering her services for one year, during which time the company would continue to pay her salary. The Committee may accept C's services, provided that she does not work on legislation that will directly benefit her employing company.

**Example 10.** Student D's college does not have a formal internship program. D's political science professor has offered to give him independent study credit if he volunteers in a congressional office and writes a paper on what he learns about the legislative process. A Member could accept D's services as a volunteer under these circumstances (see discussion below on —Volunteers‖). The independent study credit demonstrates the educational benefit to Student D.

**Example 11.** E, a foreign national, has applied through an educational program in Washington, D.C., to serve as a —visiting fellow‖ in Member F's office for six months. The program will pay E a stipend and will pay for the individual's health insurance during the fellowship. E will receive no other salary or form of support from any source. Member F

may accept E's services, provided that she is not assigned any duties that would benefit the sponsoring program or the fellow's home country.

### *Volunteers*

A Member or House office may accept the **temporary** services of a volunteer, provided the Member or office has a clearly defined program to assure that: (1) The voluntary service is of **significant educational benefit** to the participant; and (2) such voluntary assistance does **not** supplant the normal and regular duties of paid employees. In this regard, limitations should be imposed on the number of volunteers who may assist a congressional office at any one time, as well as the duration of services any one volunteer may provide. A volunteer should be required to agree, in advance and in writing, to serve without compensation and not to make any future claim for payment, and to acknowledge that the voluntary service does not constitute House employment.<sup>76</sup>

A Member or House office wishing to use the services of an individual seeking to volunteer may also place the individual in a temporary paid position on the Member's clerk hire payroll or other personnel fund, as authorized by regulations of the Committee on House Administration. If so, the individual would have to comply with the laws, regulations, and standards of conduct applicable to House employees.

**Immediate Family Members May Volunteer.** A Member may accept volunteer services without limit from his or her own immediate family, *i.e.*, spouse, children, or parents. As discussed previously in this chapter, however, 5 U.S.C. § 3110 and House rules prohibit Members from appointing relatives to **paid** positions.

**Example 12.** A recent college graduate seeking work on Capitol Hill offers to volunteer in Member A's office while looking for a paying job. Unless A has a program in the office to ensure that volunteers derive

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<sup>76</sup> Federal law, at 31 U.S.C § 1342, provides:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . .

In Opinion B-69907 (issued on February 11, 1977), the Comptroller General of the United States determined that the statute applies to Members of Congress and other legislative branch officers and employees. However, because the statute was enacted to prevent funding deficiencies, it was deemed not to prohibit a Member of Congress from using volunteers to assist in the performance of official functions of the Member's office, provided such volunteers agree in advance to serve without compensation, so that there is no basis for a future claim for payment.

significant educational benefit and do not merely fill in for busy staffers, A may *not* accept the offer.

**Example 13.** A retiree in Member B's district offers to volunteer two days a week in the district office, answering telephones, making copies and generally freeing up the paid staff to do more substantive work. B may *not* accept this volunteer's services because they are not of significant educational benefit to the volunteer, and they supplant the normal and regular duties of paid employees.

**Example 14.** Member C runs a program for senior citizens in C's district office. One or two retirees at a time volunteer for six-month periods during which time they receive regular briefings on legislative issues of concern to seniors and act as liaisons to other seniors in the district. Because the volunteers' services are temporary, of significant educational benefit to the participants, and do not supplant the normal and regular duties of paid employees, this program complies with Committee guidelines.

**Example 15.** Member D's spouse offers to volunteer in the district office as an extra caseworker. As long as the spouse receives no pay, Member D may accept.

**Example 16.** A social services agency in Member E's district wishes to include the Member's district office as a work site in a welfare-to-work program. A participant in the program wishes to be assigned to the office for up to 12 months to provide clerical services. The program participant would not displace any incumbent employee or fill a vacant, unfilled position. Because the job training program sponsored by the agency serves essentially the same purpose as in internship or volunteer program providing a significant educational benefit to the participant, E may participate in the welfare-to-work program.

Volunteers, interns, and fellows should be made aware of the implications their activities have for the Members in whose offices they work. Technically, House rules cannot be enforced against individuals who are not House employees. However, such individuals may be in a position to take actions and make representations in the name of a Member, for which the Member may be responsible. The government may also be subject to a claim of liability for work-related injuries to, or caused by, a volunteer, intern, or fellow acting within the scope of his or her position with the House. The Committee recommends that Members and House offices obtain the agreement of such individuals that, although not House employees, they will conduct themselves in a manner that reflects creditably on the House. **Members are also encouraged to obtain the Committee's**

**guidance regarding their participation in any volunteer, internship, or fellowship program in which they wish to participate.**

**Business Cards.** In a June 29, 1990, letter from the Standards Committee to all Members addressing the circumstances under which the services of volunteers may be accepted in congressional offices, the Committee concluded that individuals not paid by the House of Representatives (which also includes interns and fellows) may not use or obtain business cards or other materials suggesting an employment relationship with the House.<sup>77</sup>

**Standards Committee Actions.** In recent years, the Standards Committee has investigated a number of complaints involving the inappropriate use of volunteers. In the 104<sup>th</sup> Congress, the Committee considered two complaints involving the misuse of volunteer services by a Member. In one matter, the Committee found that the Member made inappropriate use of volunteer services during the period in which he was assembling a leadership staff to become the Speaker of the House.<sup>78</sup> In addition, the Committee found that the routine presence of a volunteer in the Member's congressional office created the appearance of improper commingling of political and official resources and, thus, violated the prohibition on unofficial accounts.<sup>79</sup> In the second matter, the Committee found that while the Member's office took steps to ensure that a volunteer's activities were proper, the volunteer's participation as an —informal advisor‖ did not comply with the Committee's guidelines governing interns or volunteers because the services were not part of a clearly defined educational program.<sup>80</sup> The Committee directed the Member to take immediate steps to not only prevent the reoccurrence of similar incidents and ensure compliance with the Committee's standards, but also to guard against even the appearance of any impropriety.<sup>81</sup>

In the 105<sup>th</sup> Congress, the Standards Committee considered a complaint that alleged, among other things, that a Member had received improper personal benefits from a political action committee. The Committee determined that there was substantial documentary evidence that a paid consultant to the political action committee —provided a wide array of services pertaining to the development and

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<sup>77</sup> A copy of the letter is contained in the appendices to this Manual.

<sup>78</sup> See House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Fourth Congress*, H. Rep. 104-886, 104<sup>th</sup> Cong., 2d Sess. 13 (*In re Rep. Newt Gingrich*).

<sup>79</sup> See *id.*

<sup>80</sup> *Id.* at 16.

<sup>81</sup> See *id.*

implementation of [the Member's] legislative agenda, and that he did so at [the Member's] request.<sup>82</sup>

Another matter considered during the 105<sup>th</sup> Congress concerned a Member's use of a paid employee of an outside organization. An investigative subcommittee determined that the individual, who had unusual access to the Member's official schedule, served as an unofficial policy advisor to the Member, and the Member solicited the individual's views and assistance concerning official matters. Specifically, the individual was found to have provided ongoing advice to the Member and his staff to assist him in conducting duties related to urban issues, frequently attending official meetings with Members of Congress, other government officials, and staff.<sup>83</sup> The investigative subcommittee, in its report, advised that —Members must exercise caution to limit the use of outside resources to ensure that the duties of official staff are not improperly supplanted or supplemented.<sup>84</sup>

In the 106<sup>th</sup> Congress, a Member admitted to a Statement of Alleged Violation charging, among other things, that the Member had authorized and accepted the scheduling and advisory services of his former chief of staff on exclusively official matters over an eighteen-month period after the individual had resigned her position.<sup>85</sup> The Standards Committee determined that the repeated and prolonged nature of the conduct, supplanting the duties normally performed by congressional employees, represented a significant violation that lasted beyond a reasonable period of transition.<sup>86</sup> The activities in question involved the day-to-day management of the Member's schedule, such as screening appointments, arranging meetings (including those for clients of the former employee), and directing congressional employees to attend designated events. The activities also involved

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<sup>82</sup> House Comm. on Standards of Official Conduct, *Summary of Activities, One Hundred Fifth Congress*, H. Rep. 105-848, 105<sup>th</sup> Cong., 2d Sess. 15 (*In re Rep. Newt Gingrich*). In this matter, the Committee dismissed the count of the complaint involving the inappropriate use of volunteer services because the violation had alleged occurred approximately five years before the filing of the complaint and there was no evidence of an ongoing violation involving the prohibition against unofficial House office accounts. *See id.*

<sup>83</sup> House Comm. on Standards of Official Conduct, *In the Matter of Rep. Newt Gingrich*, H. Rep. 105-1, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 96-97 (1997).

<sup>84</sup> While the subcommittee determined that the —regular, routine, and ongoing assistance provided by the individual to the Member and his staff —could create the appearance of improper commingling of official and unofficial resources,<sup>85</sup> the subcommittee found that the action did not warrant inclusion as a count in the Statement of Alleged Violation because the activities had ceased before the issuance of two earlier letters of reproof to the Member regarding the use of outside resources in two unrelated matters. *Id.* at 97.

<sup>85</sup> *See* H. Rep. 106-979, at 44, *supra* note 52.

<sup>86</sup> *See id.*

routine service as a political advisor to the Member.<sup>87</sup> The Committee concluded that such conduct violated the prohibition on unofficial accounts,

under which House offices are generally prohibited from accepting private support for official activities. Former Rule 45 [now Rule 24] provided that —no Member may maintain or have maintained for his use an unofficial office account.¶ The prohibition extends not only to private monetary contributions, but also to in-kind support from private sources. As a general matter, the official activities of each Member and Committee office are to be supported by official monies appropriated for those activities. The Committee on Standards has interpreted former Rule 45 to support its finding that the regular involvement of a volunteer/political advisor is a congressional office who performs tasks properly associated with the official responsibilities of House Members and employees is inappropriate.

The concerns regarding the acceptance of voluntary services of individuals include the fact that at times, quite obviously, an individual offering to perform such services for a Member of Congress may have his or her own agenda. Thus, even with regard to individual participation in established intern or fellowship programs, whose services may be accepted by a House office, the Committee on Standards has cautioned that those individuals —should not be assigned duties that will result in any direct or indirect benefit to the sponsoring organization, other than the broadening the individual's knowledge.¶<sup>88</sup>

### *Detailees*

The above guidelines do not prohibit a Member or other House office from accepting services, including detailed staff, provided on an official basis by a unit of federal, state, or local government. House staff and resources may not, however, be similarly used to perform the work of other governmental units, or of any private organization.

A committee may request or accept detailed staff from executive branch departments or agencies. The Select Committee on Ethics ruled that —in-kind services and functions provided by federal, state, and local government agencies do not fall in the same category as private donations of money or in-kind services.¶<sup>89</sup>

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<sup>87</sup> See generally *id.* at 44-51.

<sup>88</sup> *Id.* at 44-45 (quoting *Inquiry into Various Complaints Filed Against Rep. Newt Gingrich*, H. Rep. 104-401, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4 (1995); and *House Ethics Manual*, 102d Cong., 2d Sess. 197 (1992)).

<sup>89</sup> *Advisory Opinion No. 6*, *supra* note 72.

While federal law specifically authorizes the detailing of executive branch personnel to **committee staffs**, there is no comparable provision allowing detailees to serve on the **personal staffs** of Members.<sup>90</sup>

Regulations of the Committee on House Administration provide that the detailee remains, for most purposes, an employee of the source department or agency, rather than becoming a House employee during the assignment period.<sup>91</sup> For the purposes of post-employment restrictions, however, federal law mandates that detailees be considered employees both of the entity from which they come and that to which they are sent.<sup>92</sup>

The Committee on House Administration's guidelines provide that Committees are not required to reimburse the sending organization for detailees, except for detailees from the Government Printing Office (—GPO||). Detailees assigned from GPO require reimbursement from committee funds. According to House Administration guidance, the number of non-reimbursable detailees, at one time, most remain at or below 10% of the committee's staffing ceiling.

## Consultants

Amendments to the House rules that were approved at the start of the 106<sup>th</sup> Congress and the 107<sup>th</sup> Congress subject consultants to the House, including consultants to House committees, to certain ethics rules.<sup>93</sup> Under the Code of Official Conduct (House Rule 23), any individual whose services are paid for by the House pursuant to a consultant contract are considered —an employee of the House<sup>94</sup> subject to clauses 1-4, 8, 9, and 13 of House Rule 23, under which such individual:

- Must at all times conduct him or herself in a manner that reflects creditably on the House;
- Must adhere to the spirit as well as the letter of the rules of the House and its committees;

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<sup>90</sup> See 2 U.S.C. § 72a(f); *Members' Handbook and Committees' Handbook*, *supra* note 6.

<sup>91</sup> See *Members' Handbook and Committees' Handbook*, *supra* note 6. However, regulations of the Office of Government Ethics provide: —An employee on detail, including a uniformed officer on assignment, from his employing agency to the legislative or judicial branch for a period in excess of 30 calendar days shall be subject to the ethical standards of the branch or entity to which detailed. . . .|| 5 C.F.R. § 2635.104(b).

<sup>92</sup> 18 U.S.C. § 207(g). Post-employment restrictions are discussed in Chapter 5.

<sup>93</sup> See H. Res. 5, 106<sup>th</sup> Cong., 1<sup>st</sup> Sess. (145 *Cong. Rec.* H6-10, H31 (Jan. 6, 1999)); H. Res. 5, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess. (147 *Cong. Rec.* H6-10, H8 (Jan. 3, 2001)).

<sup>94</sup> House Rule 23, cl. 18(b).

- May not receive compensation and may not permit compensation to accrue to his or her beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from the consultant's position with the House;
- May not accept any gift, except as provided in the House gift rule (House Rule 25, clause 5);
- Must perform duties for the contracting committee that are commensurate with the compensation received by the consultant;
- May not discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of race, color, religion, gender, disability, age, or national origin; and
- Must execute a confidentiality oath before receiving access to classified information.

### *Lobbying*

In addition to these limitations and restrictions, consultants are also prohibited from engaging in certain lobbying activity. In the 110<sup>th</sup> Congress this lobbying provision was extended to include lobbying restrictions for the other members of firms whose employees are consultants for House committees. Specifically, House Rule 23, clause 18(b) provides:

An individual whose services are compensated by the House pursuant to a consultant contract may not lobby the contracting committee or the members of staff of the contracting committee on any matter. Such an individual may lobby other Members, Delegates, or the Resident Commissioner or staff of the House on matters outside the jurisdiction of the contracting committee. In the case of such individual who is a member or employee of a firm, partnership, or other business organization, the *other* members and employees of the firm, partnership, or other business organization shall be subject to the *same* restrictions on lobbying that apply to the individual under this paragraph. (Emphasis added.)

Accordingly, the Standards Committee considers the following restrictions to be appropriate:

- Each such consultant should establish an —ethics wall— to isolate his or her work on behalf of the contracting committee from any lobbying activity of the other members of his or her firm before the House;



- During the period of the consultant's service to the House, other members of the firm may not lobby the contracting committee, including its Members or staff during the term of the contract on any matter;
- Regardless of the subject matter, the other members of the firm should not refer to or otherwise use the fact of the consultant's position in the House in any contacts they may have with any House Member, officer, or employee in official matters; and
- In conducting any permissible lobbying activity, consultants are subject to the provision of the Code of Official Conduct discussed above.

### *Acceptable Gifts*

Consultants are also subject to the House gift rule, which is set forth in clause 5 of House Rule 25, and which is described in detail in Chapter 2 on gifts. Under the gift rule, a consultant – like any House Member or regular staff person – may not accept any gift except as specifically provided in the rule. The rule governs the acceptance of virtually anything having monetary value, including services, travel, meals, and tickets to sporting events and shows (House Rule 25, clause 5(a)(2)(A)). Thus, prior to commencing service under a consultant contract, an individual should carefully review the provisions of the gift rule and should contact the Standards Committee staff as any questions arise.

Practically speaking, the major effect of the gift rule on consultants is to limit their ability to accept gifts that are motivated by their position with the House. The Standards Committee anticipates that consultants will have relatively little difficulty in distinguishing such gifts. The gift rule includes a number of provisions allowing the acceptance of gifts that are motivated by some factor other than one's position with the government.

For example, one provision that consultants may find particularly relevant allows the acceptance of benefits that result from one's outside business, employment or other activities and are not offered or enhanced because of one's position with the House (*Id.*, clause 5(a)(3)(G)(i)). Another provision allows the acceptance of gifts offered by an individual on the basis of personal friendship, and that provision includes criteria to be used in determining whether a gift can validly be considered a personal friendship gift (*Id.*, clause 5(a)(3)(D)). Other provisions allow the acceptance of gifts from one's relatives, gifts from Members, officers, and employees of the House or Senate, and anything paid for by a federal, state, or local governmental entity (*Id.*, clauses 5(a)(3)(C), (F) and (O)).

The gift rule also includes a general provision allowing the acceptance of any gift (other than cash or cash equivalent) having a value of less than \$50 provided that the donor is not a registered lobbyist, an agent of a foreign principal, or an entity that retains or employs such individuals (*Id.*, clause 5(a)(1)(A)-(B)). Under

this provision, an individual may not accept, from any one source in a calendar year, gifts having a cumulative value of \$100 or more, but gifts having a value of less than \$10 do not count toward this annual limitation. Gifts that may be motivated by one's position with the House may be accepted under this provision, although in no event may any government official accept a gift that is linked to any official action that the official has taken or is being asked to take.

### *Confidential Financial Disclosure*

House rules do **not** require consultants to file public financial disclosure statements. In the Committee's view, such a requirement would be inappropriate for consultants, who serve the House on a relatively short-term basis and hence are expected to maintain their outside business activities.<sup>95</sup>

It is equally clear, however, that a contracting committee would not be in a position to evaluate a prospective consultant's compliance with conflict-of-interest rules without having certain basic information on his or her financial interests. Similarly, when the Standards Committee is asked for an advisory opinion on a committee's proposed arrangements with a contractor, it will be unable to render a complete opinion without having access to such information. But such information need not be as extensive as that required by the House of Representatives Financial Disclosure Statement, and the purposes here can be served by submission of the information on a confidential, rather than a public basis.

Accordingly, the Standards Committee strongly recommends that each committee, prior to entering into a consulting contract, obtain, at a minimum, the following information from the prospective consultant(s):

- Each of the individual's current sources of earned income, the type of income (*e.g.*, salary, partnership income, director's fee), and the rate at which he or she is compensated;
- The identity of each client for whom the individual is currently providing services, and of each client for whom he or she anticipates providing services during the term of the committee contract; and
- The nature and value of any investment or liability held by the consultant that could be affected by or is in any way related to the duties that the individual would perform for the committee.

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<sup>95</sup> The Committee understands that in the Senate, consultants are technically subject to the requirement to file a public financial disclosure statement, but that the Senate Select Ethics Committee will routinely waive the requirement. However, the grant of the waiver is subject to the condition that the consultant agrees to make confidential submissions to the Senate Ethics Committee regarding, among other things, his or her clients and the clients of the firm with which the consultant is affiliated.

The contracting committee should also obtain the commitment of a prospective consultant to inform the committee promptly regarding any such source of earned income, client or investment that he or she obtains during the term of the contract.

House committees are urged to contact the Standards Committee before entering into any proposed arrangement with a consultant.



# CASEWORK

## Overview

An important aspect of a House Member's representative function is to act as a —go-between— or conduit between the Member's constituents and administrative agencies of the federal government. Whether promoting projects that will benefit constituents or assisting in the resolution of the problems that are an inevitable by-product of government regulation, the Member is serving as a facilitator, or ombudsman. Such activity, in the opinion expressed by the late Senator Paul H. Douglas, plays a useful role in the governmental process by helping legislators and administrators perform their respective jobs adequately through the interest of the former in the work of the latter.<sup>1</sup>

In a committee print entitled *Ethical Standards in Government*, a subcommittee headed by Senator Douglas stated that legislators performing casework functions can —legitimately serve as an informal board of inspectors— over administrators, and —can prevent the administrators from flagging in their zeal and can detect and check abuses in the conduct of public business.—<sup>2</sup> Douglas concluded in his own study of ethics in government that there is a —sound ethical basis for legislators to represent the interests of constituents and other citizens in their dealings with administrative officials and bodies.—<sup>3</sup>

The Constitution guarantees all citizens the right to petition the government for redress of grievances.<sup>4</sup> A logical point of contact is one's elected representative. Furthermore, Members of Congress continually must monitor government programs and the administration of public laws. As the Supreme Court has recognized, —[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.—<sup>5</sup>

This chapter includes a discussion on the rules in making contacts in aid of constituents with governmental agencies, the courts, and nongovernmental parties. Pursuant to long-standing guidance, it is generally permissible for Members (and staff acting on their behalf) to:

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<sup>1</sup> Paul H. Douglas, *Ethics in Government* 87 (1952).

<sup>2</sup> Special Subcomm. on the Establishment of a Comm'n on Ethics in Gov't, Senate Comm. on Labor and Public Welfare, *Ethical Standards in Government*, 82d Cong., 1<sup>st</sup> Sess. 28 (Comm. Print 1951).

<sup>3</sup> Douglas, *supra* note 1, at 87.

<sup>4</sup> U.S. Const., amend. I.

<sup>5</sup> *McCormick v. United States*, 500 U.S. 257, 272 (1991).

- Request information or status reports;
- Urge prompt consideration of a matter based on the merits of the case;
- Arrange appointments;
- Express judgment on a matter – subject to the *ex parte* communication rules; and
- Ask for reconsideration, based on law and regulation, or administrative and other decisions.

In taking any such action, a Member or staff person must observe certain ethical principals. Of particular importance is the principle that a Member's obligations are to all constituents equally, and considerations such as political support, party affiliation, or one's status as a campaign contributor should not affect either the decision of a Member to provide assistance or the quality of help that is given to a constituent.

Also discussed in this chapter is the prohibition against the acceptance of gifts offered in connection with or in return for taking official actions (a matter also discussed at length in Chapter 2), and the guidelines for employment recommendations.

### **Off-the-Record (*Ex parte*) Communications**

Even though performing casework is an important congressional duty, it is not totally unrestricted. Federal law specifically prohibits certain off-the-record comments, known as *ex parte* communications, directed to executive or independent agency officials on the merits of matters under their formal consideration.<sup>6</sup> Whenever parties to a dispute come before a formal tribunal, they are entitled to a fair, impartial hearing and to equal access to the fact-finder. The *ex parte* rule is designed to preserve the due process rights of all parties to administrative proceedings.

An *ex parte* communication is an oral or written communication made without proper notice to all parties and not on the public record, from an interested person outside the agency to a member of the agency, an administrative law judge, or an employee involved in the decision-making process.<sup>7</sup> Since 1976, the

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<sup>6</sup> 5 U.S.C. § 557(d).

<sup>7</sup> 5 U.S.C. § 551(14).

—Government in the Sunshine Act<sup>8</sup> has prohibited anyone from making an *ex parte* communication to an administrative agency decision-maker concerning the merits of an issue that is subject to formal agency proceedings.<sup>8</sup> This broad prohibition encompasses the statements of Members and employees of Congress acting on behalf of constituents.

Formal agency proceedings generally include those of a quasi-adjudicatory (or trial-type) nature and those rulemaking proceedings that must include formal hearings and a decision on the record. The legislative history of the Government in the Sunshine Act shows that —[t]he prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.<sup>9</sup> Thus, a House Member or employee may undertake communications to an agency on behalf of a constituent concerning those matters not subject to formal agency proceedings. Development of agency policy and establishment of budgetary priorities are examples of areas in which Members of Congress are generally free to voice their own views or to forward those of their constituents. Agencies often ask for public comment on proposed regulations. Representatives, like other members of the public, may clearly contribute their opinions.<sup>10</sup> It should be noted that some communications, even if related to a matter not then in a formal agency proceeding, may become part of the public record concerning that matter if the communication forms the basis of subsequent formal action, particularly one involving competing claims to a valuable privilege.<sup>11</sup>

The proscription against *ex parte* communications does not extend to —general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole.<sup>12</sup> The statute specifically exempts

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<sup>8</sup> See 5 U.S.C. § 557(a), (d).

<sup>9</sup> Senate Comm. on Gov't Operations, *Government in the Sunshine Act, Report to Accompany S. 5*, S. Rep. 94-354, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1975); see also *Government in the Sunshine Act*, S. Conf. Rep. 94-1178, 94<sup>th</sup> Cong., 2d Sess. 29 (1976).

<sup>10</sup> In addition, the —Congressional Review Act<sup>10</sup> requires formal congressional review of agency rules. Under the Act, agencies are required to submit proposed rules to the House and Senate for review by each Committee with appropriate oversight jurisdiction. Agency rules may be disapproved by joint resolution. 5 U.S.C. § 801 *et seq.*

<sup>11</sup> See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.) (—information gathered *ex parte* from the public which becomes relevant to a rulemaking will have to be disclosed at some time<sup>11</sup>), *cert. denied*, 434 U.S. 829 (1977); see also *Action for Children's Television v. FCC*, 564 F.2d 458, 474-77 (D.C. Cir. 1977).

<sup>12</sup> House Comm. on Gov't Operations, *Government in the Sunshine Act*, H. Rep. 94-880, 94<sup>th</sup> Cong., 2d Sess., pt. I, at 20 (1976).

congressional status requests.<sup>13</sup> As stated in a House report on the Government in the Sunshine Act: —While the prohibitions on *ex parte* communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence.¶<sup>14</sup>

Both the House and Senate reports recognized the possibility that a request for background information or a status report —may in effect be an indirect or subtle effort to influence the substantive outcome of the proceedings.¶ Thus in doubtful cases, agency personnel may treat these requests as *ex parte* communications —to protect the integrity of the decision-making process.¶<sup>15</sup> One way to avoid violating the statutory prohibition is to put all communications with agencies in writing and to request that they be made a part of the record, available to all interested parties.

**Example 1.** After taking testimony in a formal, contested proceeding under Federal Acquisition Regulations, an agency official is about to decide which of two competing bidders will be awarded a contract. It would be an improper, *ex parte* communication for Member A to call up the official and suggest that one of the two competitors receive the award.

**Example 2.** In the same circumstances as Example 1, it would be proper for Member A to put his views in writing, as part of the formal record, under established agency procedures.

**Example 3.** A constituent company in Member B’s district has been awaiting a decision for some time in a formal agency proceeding. Member B may contact the agency seeking information regarding the status of the proceeding and urging prompt consideration of the company’s claim.

**Example 4.** A constituent company in Member C’s district has been awaiting a decision for some time in a formal agency proceeding. Member C has received information on the status of the proceeding from the agency’s congressional liaison officer. A call later that day from Member C to the head of the agency, asking for the same information, could be viewed as an attempt to influence the outcome. C should refrain.

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<sup>13</sup> 5 U.S.C. § 551(14); see S. Conf. Rep. 94-1178, *supra* note 9, at 29.

<sup>14</sup> H. Rep. 94-880, *supra* note 12, pt. I, at 21-22.

<sup>15</sup> *Id.* at 21; see also S. Rep. 94-354, *supra* note 9, at 37.



## Judicially Imposed Limits

No other statute or rule restrains Members of Congress from communicating with agency decision-makers. However, certain federal court opinions discourage inordinate pressure on officials charged by law with responsibility for making administrative decisions. While such pressure may not violate any standard of conduct overseen by this Committee, Members should be aware that a *court's* perception that a Member has overstepped may lead it to invalidate the very determination that the Member was seeking. Judicial reaction varies, depending on the degree of formality of the administrative proceeding, the goal of the congressional intervention, and the impact that the intervention had on the agency's determination.

Senator Douglas pointed out with respect to proceedings conducted by administrative personnel that a legislator —should make it clear that the final decision is in their hands.<sup>16</sup> Federal courts have nullified administrative decisions on grounds of due process and fairness towards all of the parties when congressional interference with ongoing administrative proceedings may have unduly influenced the outcome. In a seminal case, the court set aside a decision of the Federal Trade Commission because of aggressive questioning of agency officials by a Senate committee regarding their rationale for deciding an issue still pending before the officials in a formal setting.<sup>17</sup> The court's concern had nothing to do with undisclosed communications; the questioning occurred during public hearings. Nonetheless, the court held that —common justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the U.S. Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach.<sup>18</sup>

When congressional action is directed at less formal, non-adjudicatory administrative proceedings, courts are loathe to interject themselves between the legislative and the executive branches. As one court explained:

Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws.

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<sup>16</sup> Douglas, *supra* note 1, at 90.

<sup>17</sup> *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966); *see also Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.) (letter from Congressman to Secretary of Interior suggesting regulatory interpretation arrived at by the Secretary two days later —compromised the appearance of the Secretary's impartiality and warranted setting aside of Secretary's determination), *cert. denied*, 439 U.S. 1052 (1978). *Cf. ATX Inc. v. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994) (agency decision upheld despite 60 letters to agency head from various Congressmen, and —particularly troubling testimony of one congressman at quasi-judicial hearing).

<sup>18</sup> *Id.* at 963.

**We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure.** Where Congressmen keep their comments focused on the substance of the proposed rule . . . administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.<sup>19</sup>

The court focused here on —the intent of Congress . . . as expressed in statute. In another case, a court set aside an administrative determination that appeared to have been influenced, at least in part, by —irrelevant or extraneous political considerations.<sup>20</sup> There, a subcommittee chairman had stated that funding for unrelated aspects of the agency’s budget would be withheld until the department’s Secretary approved a particular project. The court emphasized that it was not finding that the Member had acted improperly, but it nonetheless remanded the case, directing the Secretary to —make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes.<sup>21</sup>

Agency investigations occupy a middle ground between formal adjudications and informal rulemaking. An administrative decision in this context need not be

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<sup>19</sup> *Sierra Club v. Costle*, 657 F.2d 298, 409-10 (D.C. Cir. 1981) (emphasis added); *see also DCP Farms v. Yeutter*, 957 F.2d 1183 (5th Cir.) (Department of Agriculture action upheld when, prior to the time the matter had reached adjudicative stage, congressman advocated to the agency a certain interpretation of regulations), *reh’g denied*, 962 F.2d 9 (5th Cir.), *cert. denied*, 506 U.S. 953 (1992); *U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325 (E.D. Cal. 1995) (congressional contact with the Department of Agriculture did not constitute undue influence when contacts concerned proper subject matter and did not contain threats of adverse action against the Department), *aff’d*, 151 F.3d 1139 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999); *Sokaogon Chippewa Community v. Babbitt*, 929 F. Supp. 1165 (W.D. Wis. 1996) (congressional contacts not improper in administrative decision-making by Department of the Interior under Indian Gaming Regulatory Act when there was no indication that Department was asked to consider factors other than those enumerated under that Act), *reconsidered in part*, 961 F. Supp. 1276 (W.D. Wis. 1997); *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 662-63 (D.D.C. 1978) (in informal rulemaking, congressmen —properly brought to the agency’s attention the concerns of their respective constituencies which were —directly relevant to the agency’s proceeding).

<sup>20</sup> *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1248 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

<sup>21</sup> *Id.* at 1246, 1249.

completely immune from congressional pressure, provided that the agency has an independent basis for its conclusion. Thus, for example, one corporation tried to resist a Securities and Exchange Commission subpoena on the ground that it had resulted from political pressure instigated by a corporate competitor. The court ruled: —That the SEC commenced these proceedings as a result of the importunings of [a Senator and his constituent, the competitor], even with malice on their part, is not a sufficient basis to deny enforcement of the subpoena [But t]he SEC order must be supported by an independent agency determination, not one dictated or pressured by external forces.¶<sup>22</sup>

Courts have historically refused to intervene when Members attempted to expedite an administrative process rather than urging a particular outcome. In the words of one court, —where the Congressional involvement is directed not at the agency’s decision on the merits but at accelerating the disposition and enforcement of the pertinent regulations, it has been held that such legislative conduct does not affect the fairness of the agency’s proceedings and does not warrant setting aside its order.¶<sup>23</sup>

## Congressional Standards

Congress has adopted standards that recognize the legitimate role of Members in assisting constituents, while protecting both the due process rights of parties potentially affected by government actions and the ability of agency officials to exercise their responsibilities. The Committee on Standards of Official Conduct has observed:

It is clear that under our constitutional form of government there is a constant tension between the legislative and executive branches regarding the desires of legislators on the one hand and the actions of agencies on the other in carrying out their respective responsibilities. The assertion that the exercise of undue influence can arise based upon a legislator’s expressions of interest jeopardizes the ability of Members effectively to represent persons and organizations having concern with the activities of executive agencies.

. . . In sum, . . . a finding [of undue influence] cannot rest on pure inference or circumstance or, for that matter, on the technique and

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<sup>22</sup> *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 130 (3d Cir. 1981); see also *U.S. v. American Target Advertising*, 257 F.3d 348 (4th Cir. 2001) (Postal Service subpoena, allegedly issued as the result of pressure by a U.S. Senator, upheld in the absence of a showing of bad faith on the part of the Postal Service).

<sup>23</sup> *United States v. Armada Petroleum Corp.*, 562 F. Supp. 43, 51 (S.D. Tex. 1982) (citing *Gulf Oil Corp. v. Fed. Power Comm’n*, 563 F.2d 588, 611 (3d Cir. 1977)).

personality of the legislator, but, instead, must be based on probative evidence that a reprisal or threat to agency officials was made.<sup>24</sup>

This Committee's longstanding guidance on communicating with executive and independent agencies of the federal government is expressed in *Advisory Opinion No. 1*.<sup>25</sup> This opinion states that it is appropriate for a Member to introduce an individual to an agency, to arrange interviews and meetings for the individual, to provide a character reference, and to urge prompt and fair consideration of a matter on the merits of the case. Inquiries as to the status of a proceeding or ruling may be directed to any agency or department. A Member may urge reconsideration of a decision on the ground that it is unsupported by federal law, regulation, or legislative intent. If a Member has strong feelings about a particular case, judgment on the merits of the case may be expressed, subject, of course, to the prohibition on *ex parte* communications in formal agency proceedings. A Member should **not** directly or indirectly threaten reprisal or promise favoritism or benefit to any administrative official. Written communications are preferred to ensure compliance with these principles.

The Committee set forth the following standards in *Advisory Opinion No. 1*:

#### REPRESENTATIONS

This Committee is of the opinion that a Member of the House of Representatives, either on his own initiative or at the request of a petitioner, may properly communicate with an Executive or Independent Agency on any matter to:

request information or a status report;

urge prompt consideration;

arrange for interviews or appointments;

express judgment;

call for reconsideration of an administrative response which he believes is not supported by established law, federal regulation or legislative intent;

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<sup>24</sup> House Comm. on Standards of Official Conduct, *Statement in the Matter of James C. Wright, Jr.*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 84 (1989).

<sup>25</sup> House Comm. on Standards of Official Conduct, *Advisory Opinion No. 1*, reprinted in the appendices to this Manual.

perform any other service of a similar nature in this area compatible with the criteria hereinafter expressed in this Advisory Opinion.

### PRINCIPLES TO BE OBSERVED

The overall public interest, naturally, is primary to any individual matter and should be so considered. There are also self-evident standards of official conduct which Members should uphold with regard to these communications. The Committee believes the following to be basic:

1. A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.
2. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.
3. A Member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.

When communicating with an agency, Members and staff should only assert as fact that which they know to be true. In seeking relief, a constituent will naturally state his or her case in the most favorable terms. Moreover, the constituent may not be familiar with the intricacies of the controlling administrative regulations. Thus, a Member should exercise care before adopting a constituent's factual assertions. A prudent approach in any communication would be to attribute factual assertions to the constituent.

In order to avoid any inference on the part of agency personnel that a Member is asking for action in a particular matter that is inappropriate under agency guidelines, the Member should consider expressly assuring administrators that no effort is being made to exert improper influence. For example, a letter could ask for —full and fair consideration consistent with applicable law, rules, and regulations.¶

The staff of the Committee's Office of Advice and Education is available to review, on an informal basis, drafts of letters to administrative agencies. Formal written advisory opinions may also be requested from the Committee regarding the propriety of particular communications.

**Example 5.** Company Z in Member A's district faces bankruptcy during the pendency of an unrelated administrative appeal. A may inform the agency of Z's financial difficulties and ask that Z's claim be expedited if agency procedures allow it.

**Example 6.** Member B sits on the Veterans' Affairs Committee. B, like any other Member, may inquire as to the status of constituents' pending appeals to the Department of Veterans' Affairs. Obviously, in making these inquiries, B should not suggest that the agency's budget will be cut if B's constituents do not receive favorable determinations.

**Example 7.** A constituent asks Member C for help with a pending administrative claim. If the Member cannot substantiate that the facts presented by the constituent are correct and complete, the Member should state in any communications to the agency that the information is —according to my constituent.¶

**Example 8.** A constituent business asks Member D for help getting relief from agency regulations. Member D served on the committee that drafted the legislation under which the regulations were promulgated. Member D may tell agency officials of her view that the way in which the legislation is being implemented is inconsistent with the legislative language or intent.

### ***Assisting Supporters***

Because a Member's obligations are to all constituents equally, considerations such as political support, party affiliation, or campaign contributions should not affect either the decision of a Member to provide assistance or the quality of help that is given. While a Member should not discriminate in favor of political supporters, neither need he or she discriminate against them. As this Committee has stated:

The fact that a constituent is a campaign donor does not mean that a Member is precluded from providing any official assistance. As long as there is no *quid pro quo*, a Member is free to assist all persons equally.<sup>26</sup>

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<sup>26</sup> House Comm. on Standards of Official Conduct, *Statement Regarding Complaints Against Representative Newt Gingrich*, 101<sup>st</sup> Cong., 2d Sess. 66 (1990).

An individual's status as a donor may, however, raise an appearance of impropriety. The Senate Select Committee on Ethics has expressed the issue as follows:

The cardinal principle governing Senators' conduct in this area is that a Senator and a Senator's office should make decisions about whether to intervene with the executive branch or independent agencies on behalf of an individual without regard to whether the individual has contributed, or promised to contribute, to the Senator's campaigns or other causes in which he or she has a financial, political or personal interest. . . .

Because Senators occupy a position of public trust, every Senator always must endeavor to avoid the appearance that the Senator, the Senate, or the governmental process may be influenced by campaign contributions or other benefits provided by those with significant legislative or governmental interests. Nonetheless, if an individual or organization has contributed to a Senator's campaigns or causes, but has a case which the Senator reasonably believes he or she is obliged to press because it is in the public interest or the cause of justice or equity to do so, then the Senator's obligation is to pursue that case. In such instances, the Senator must be mindful of the appearance that may be created and take special care to try to prevent harm to the public's trust in the Senator and the Senate. This does not mean, however, that a Member or employee is required to determine if one is a contributor before providing assistance.<sup>27</sup>

The Senate Committee concluded that —established norms of Senate behavior do not permit linkage between . . . official actions and . . . fund raising activities.¶<sup>28</sup> House Members, too, should be aware of the appearance of impropriety that could arise from championing the causes of contributors and take care not to show favoritism to them over other constituents.

### ***Assisting Non-Constituents***

On occasion a Member's publicized involvement in legislation or an issue of national concern will generate correspondence from individuals outside the district. A private citizen may communicate with any Member he or she desires. However, the Member's ability to provide assistance to such individuals is limited.

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<sup>27</sup> Senate Select Comm. on Ethics, *Investigation of Senator Alan Cranston*, S. Rep. 102-223, 102d Cong., 1<sup>st</sup> Sess. 11-12 (1991).

<sup>28</sup> *Id.* at 29.

The statute that establishes the Members' Representational Allowance provides that the purpose of the allowance is —to support the conduct of the official and representational duties of a Member of the House of Representatives **with respect to the district from which the Member is elected.**<sup>29</sup> This statute does not prohibit a Member from ever responding to a non-constituent. In some instances, working for non-constituents on matters that are similar to those facing constituents may enable the Member better to serve his or her district. Other times, the Member may serve on a House committee that has the expertise and ability to provide the requested help. Of course, if a Member has personal knowledge regarding a matter or an individual, he or she may always communicate that knowledge to agency officials. As a general matter, however, a Member should not devote official resources to casework for individuals who live outside the district. When a Member is unable to assist such a person, the Member may refer the person to his or her own Representative or Senator.

### *Government Procurement and Grants*

Constituents frequently request congressional assistance with government contracts or grants. These matters are subject to the same guidelines as other casework. Thus, Members may generally forward introductory information to an agency from a constituent firm or request information for a constituent on available opportunities. On the other hand, an attempt to influence the outcome of a quasi-judicial proceeding such as a formal contract dispute or a bid protest pending before a board of contract appeals could trigger complaints from third parties that the fairness and impartiality of the tribunal has been compromised.<sup>30</sup> Moreover, experience has shown that contacts like these may be resented by the decision-makers. Consequently, such efforts may do more harm than good to the constituent's cause.

In assisting a private enterprise, a Member should be mindful that congressional allowances, including those for staff, are available only for conducting official business.<sup>31</sup> Assistance should not extend so far that the congressional office is actually doing the work of the private business, rather than of the Congress. Again, Members and employees should take care not to discriminate unfairly among constituents, *e.g.*, on political grounds.

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<sup>29</sup> 2 U.S.C. § 57b (emphasis added); *see also* Comm. on House Admin., U.S. House of Representatives, *Members' Congressional Handbook*, Regulations Governing the Members' Representational Allowance (2001) (hereinafter —*Members' Handbook*).

<sup>30</sup> *See Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983).

<sup>31</sup> 31 U.S.C. § 1301(a); *see also* *Members' Handbook*, *supra* note 29.



**Example 9.** Member A may contact agency officials and request that they meet with a constituent seeking a grant. Employee B on Member A's congressional staff may accompany the constituent, but B should make clear that he is not there as the constituent's agent. Care should also be taken to avoid any inference of a threat to agency officials.

**Example 10.** Constituent Z requests Member B's assistance with a grant. Z is unfamiliar with the governing regulations and asks B if her staff, being experienced in such matters, would prepare the application on Z's behalf. It would not be appropriate for congressional staff to be doing the work of a private party in this fashion.

**Example 11.** Member C is approached by a constituent business for help in getting a government agency to purchase its product. The Member may provide assistance, but C should either (a) be personally familiar with the company, product, and government requirements, or (b) be willing to provide the same type of assistance to other, similarly situated constituent businesses.

### ***Communicating With Courts***

Just as they are asked to intervene with agency officials responsible for making on-the-record decisions, Members may also be asked to communicate with judges in pending court cases. Most courts are subject to limits on *ex parte* communications which are at least as restrictive as those applicable to executive agencies. Judges, whether serving at the federal, state, or municipal level, are charged with performing their duties in an impartial manner. They are guided in their actions by standards such as the following:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding <sup>32</sup>

When a Member believes it necessary to attempt to affect the outcome in a pending case, the Member has a variety of options. A Member who has relevant information could provide it to a party's counsel, who could then file it with the court and notify all parties. Alternatively, the Member could seek to file an *amicus curiae*, or friend of the court, brief. Yet another option, in an appropriate case, might be to seek to intervene as a formal party to the proceeding. A Member could

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<sup>32</sup> ABA Model Code of Judicial Conduct Canon 3B(7) (2000).

also make a speech on the House floor or place a statement in the *Congressional Record* as to the legislative intent behind the law. A Member should refrain, however, from making an off-the-record communication to the presiding judge, as it could cause the judge to recuse from further consideration of the case.

When a Member does have personal knowledge about a matter or a party to a proceeding, the Member may convey that information to the court through regular channels in the proceeding (e.g., by submitting answers to interrogatories, being deposed, or testifying in court). Members and employees should also be aware that special procedures are to be followed whenever they receive a subpoena seeking information relating to official congressional business.<sup>33</sup> The House Office of General Counsel should be consulted for further guidance.

### *Contacting Other Governments*

Besides intervening with federal agencies and personnel, Members may also be asked to assist constituents in their dealings with state, local, and foreign governments. Members may do so. Their communications should adhere to the same general principles described above that guide their contacts with federal agencies.<sup>34</sup>

**Example 12.** Constituent Z has a claim pending before the state Workers' Compensation Board. If Member A would do the same for any similarly situated constituent, A may write to the state board inquiring as to the status of Z's claim and asking for expedited review if such would be consistent with the board's governing law and regulations. A may not imply that the state will receive increased federal aid in return for a disposition favorable to Z.

**Example 13.** General Widget, Inc., an old and respected manufacturer in Member B's district, would like to take advantage of the opening of potential Eastern European markets for its products. GW asks B for a letter of introduction to a certain foreign Minister of Finance. B writes:

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<sup>33</sup> See House Rule 8.

<sup>34</sup> An eighteenth century law, the Logan Act (18 U.S.C. § 953), restricts private correspondence with foreign governments. This statute, which appears to have been a reaction to the attempts of one citizen to engage in private diplomacy, has never been the basis of a prosecution, and this Committee has publicly questioned its constitutionality. House Comm. on Standards of Official Conduct, *Manual of Offenses and Procedures, Korean Influence Investigation*, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18-19 (Comm. Print 1977). Members should be aware, however, that the law remains on the books.

Dear Minister:

General Widget, Inc. has been doing business in my congressional district for 70 years. Now it seeks the opportunity to do business in your country as well. GW's executives would be happy to describe to you its wide range of products. I would appreciate any consideration you could show to GW and its representatives.

Sincerely,  
*B*  
Member of Congress

B's letter is appropriate. If B writes this letter on GW's behalf, B should be willing to write such a letter for any similarly situated constituent company.

### ***Intervening With Nongovernmental Parties***

Members are often asked to assist constituents in their dealings with government agencies. In some circumstances, however, the Member may be asked to assist one private party in dealings with another private individual or organization. For example, a constituent company seeking subcontracts may ask a Member for a letter of introduction to another company which has been awarded federal funds. As another example, two businesses may ask a Member to act as a mediator in a private dispute.

Although a Member may take actions that the Member believes will assist the congressional district, intervening in private matters requires the exercise of particular caution. Unlike agency personnel, many private businesses are not used to dealing with Members of Congress on a regular basis. Thus, a communication from a Member's office may be viewed as an official endorsement of a private enterprise, or as pressure to take action in order to please the Member, rather than based on the merits. In this context, again, Members and employees should bear in mind that official resources should not be devoted to doing the work of private businesses.<sup>35</sup>

### ***Confidentiality of Records***

The —Privacy Act<sup>35</sup> protects the records maintained by government agencies from disclosure, except for specified purposes or with the permission of the person to whom the record pertains.<sup>36</sup> Although the statute does permit disclosure —to either

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<sup>35</sup> See 31 U.S.C. § 1301(a); see generally *Members' Handbook*, *supra* note 29.

<sup>36</sup> 5 U.S.C. § 552a(b).

House of Congress,<sup>37</sup> some agencies require Members to show written consent from their constituents before they will release the constituents' records to the Members. The Privacy Act does not apply to congressional documents. Historically, however, communications between Members and constituents have been considered confidential and should generally not be made public without the constituent's consent.

### ***Personal Financial Interests***

Just as Representatives may vote on legislation that affects them as members of a class rather than as individuals, Members and employees may generally contact federal agencies on issues in which they, along with their constituents, have interests.<sup>38</sup> A constituent need not be denied congressional intercession merely because a Member or the staff assistant assigned to a particular issue may stand to derive some incidental benefit along with others in the same class. Thus, Members who happen to be farmers may nonetheless represent their constituents in communicating views on farm policy to the Department of Agriculture. Only when Members' actions would serve their own narrow, financial interests as distinct from those of their constituents should the Members refrain. See Chapter 5 on —Member Voting and Other Official Activities on Matters of Personal Interest.<sup>39</sup>

As always, Members and employees must guide their actions in this regard by the Code of Official Conduct, House Rule 23. The Code prohibits Members and staff from allowing compensation to accrue to their benefit —by virtue of influence improperly exerted<sup>40</sup> from a position in Congress. Moreover, an employee who files a Financial Disclosure Statement may not contact a court or executive branch agency with respect to non-legislative matters affecting any entity in which the individual has a significant financial interest, unless the employing Member grants a written waiver and files it with the Committee on Standards of Official Conduct.<sup>40</sup>

### **Gifts and Compensation for Casework**

When assisting constituents, Members and staff should be aware that the federal criminal code prohibits the receipt of anything of value in return for or

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<sup>37</sup> *Id.* § 552a(b)(9).

<sup>38</sup> Conflict of interest issues that arise in connection with a Member's financial interests and official activities are discussed in Chapter 5 of this Manual.

<sup>39</sup> House Rule 23, cl. 3; *see also* Code of Ethics for Government Service ¶ 5, H. Con. Res. 175, 85<sup>th</sup> Cong., 2d Sess., 72 Stat., pt. 2, B12 (1958), reprinted in the appendices.

<sup>40</sup> House Rule 23, cl. 12. See Chapter 5 for further details on staff conflicts of interest.

because of official actions.<sup>41</sup> Gifts offered as a thank you for casework assistance should generally be declined.

Members and employees also may not ask for or receive compensation for —services rendered in relation to matters or proceedings in which the United States is a party or has an interest.<sup>42</sup> No funds or things of value, other than one's official salary, may be accepted for dealing with an administrative agency on behalf of a constituent.

Caution should always be exercised to avoid the appearance that solicitations of campaign contributions from constituents are connected in any way with a legislator's official advocacy. A discussion of this problem was offered by Senator Douglas:

It is probably not wrong for the campaign managers of a legislator to request contributions from those for whom the legislator has done appreciable favors, but this should never be presented as a payment for the services rendered. Moreover, the possibility of such a contribution should never be suggested by the legislator or his staff at the time the favor is done. Furthermore, a decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts. Finally, not the slightest pressure should be put upon the recipients of the favors in regard to the campaign. It should be clearly understood that any gift they make is voluntary and there will be no question of reprisals or lack of future help by the legislator if the gift is withheld. In other words, any contribution should be not a *quid pro quo* but rather a wholly voluntary offering based upon personal friendship and a belief in the effectiveness of the legislator sharpened perhaps by individual experience.<sup>43</sup>

If a Member were to ask for political support as a *quid pro quo* for official action, the Member could be subject to extortion charges. In overturning the conviction of a state legislator, the Supreme Court observed that soliciting campaign contributions from constituents with legislative business could be extortion, —but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.<sup>44</sup> The Court held in that case that, given the realities of financing campaigns, —[w]hatever

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<sup>41</sup> 18 U.S.C. § 201. See Chapter 2 for a discussion of the bribery and illegal gratuities laws.

<sup>42</sup> 18 U.S.C. § 203; *see also* House Rule 25, cl. 6.

<sup>43</sup> Douglas, *supra* note 1, at 89-90.

<sup>44</sup> *McCormick v. United States*, *supra* note 5, 500 U.S. at 273.

ethical considerations and appearances may indicate, it is generally not a federal crime for legislators to —act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries. 45

Other limitations may affect assistance to private individuals, even when no compensation is involved. Under House Rules and federal law, employees usually may not represent individuals or organizations before the government other than in the performance of official duties. 46 Although Members are not subject to the same statutory limitations, representing a private entity before the government outside of official duties may be inconsistent with a representative’s obligations to serve the public interest. 47

### **Recommendations for Government Employment**

Members of the House are frequently asked to provide letters of recommendation on behalf of persons seeking employment or appointment to positions in the federal government, state or local governments, or in the private sector. 48 Writing letters of recommendation for constituents is consistent with the representational duties of Members of Congress. However, when writing letters of recommendation, Members should adhere to the Code of Ethics for Government Service, which requires Members to —never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not. 49 Requests from similarly situated constituents should therefore be handled in comparable fashion, without regard to party affiliation, campaign support, or other such factors.

This section summarizes the laws and rules governing the ability of Members to provide employment recommendations for positions with federal, state, or local governments and the private sector, and also addresses the use of official letterhead and other miscellaneous issues related to preparing letters of recommendation.

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<sup>45</sup> *Id.*

<sup>46</sup> 18 U.S.C. § 205; House Rule 25, cl. 6. See Chapter 5 of this Manual for a discussion of these provisions.

<sup>47</sup> See, e.g., Code of Ethics for Government Service ¶¶ 5 and 7, *supra* note 39.

<sup>48</sup> The provisions governing written recommendations apply equally to oral recommendations; therefore, when a —letter of recommendation is used, the guidance provided above also applies to oral recommendations.

<sup>49</sup> Code of Ethics for Government Service ¶ 5, *supra* note 39.

### —Competitive Servicell Positions With the Federal Government

Under amendments to the Hatch Act that were enacted in 1996,<sup>50</sup> Members may make recommendations, either orally or in writing, on behalf of applicants for competitive service<sup>51</sup> positions in the executive branch of the federal government.<sup>52</sup> However, as detailed below, there are significant limitations on the content of such recommendations. The statutes governing recommendations for the competitive service apply equally to administrative law judge positions, career positions in the Senior Executive Service, and any position in the —excepted servicell<sup>53</sup> that is not confidential or policy-related in nature.<sup>54</sup>

Federal hiring officials may consider a recommendation for a competitive service position only if the content of the recommendation complies with established guidelines. Federal hiring officials may never consider a recommendation for a competitive service position that contains direct or indirect references to the job applicant's political affiliation or membership.<sup>55</sup> The permissible contents of recommendations for a competitive service position depend on whether the Member has personal knowledge of the applicant's work ability or performance.

If the Member does not have personal knowledge of the applicant's work ability or performance, the letter of recommendation may address **only** the applicant's character or residence.<sup>56</sup> In that circumstance, the hiring official may not consider any portion of a recommendation that discusses the specific qualifications of an applicant or that assesses the applicant's suitability for employment with a particular agency or for a particular job.<sup>57</sup>

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<sup>50</sup> Pub. L. 104-197, § 315, 110 Stat. 2416 (1996).

<sup>51</sup> The competitive service is defined at 5 U.S.C. § 2102. Essentially, the competitive service includes all civil services positions other than statutorily excepted positions, non-career Senior Executive Service positions, and political positions. Certain positions, such as agency fellowships, do not fall within the definition of the competitive service, but agencies sometimes require compliance with the competitive service provisions when considering recommendations for such positions. The Committee recommends consulting with individual agencies if there is any question whether a position falls within the competitive service or is governed by the same guidelines.

<sup>52</sup> Prior to the 1996 amendments, Members could provide only a statement related to the character and residence of the applicant unless the agency requested an evaluation of the applicant's qualifications. *See* Pub. L. 103-94, 107 Stat. 1001, 1006 (1993) (codified at 5 U.S.C. § 3303).

<sup>53</sup> The excepted service is defined at 5 U.S.C. § 2103.

<sup>54</sup> Memorandum from James B. King, Director, Office of Personnel Management, to Heads of Executive Departments and Agencies, at 3 (Apr. 7, 1997) (hereafter *-OPM Memorandum*).

<sup>55</sup> 5 U.S.C. § 3303 and 5 U.S.C. § 2302(b)(2).

<sup>56</sup> 5 U.S.C. § 3303. A recommendation under this statute based on the character and residence of the applicant may be offered only by a Representative or a Senator.

<sup>57</sup> *OPM Memorandum*, *supra* note 54, at 2.

**Example 14.** Constituent Z asks Member A to provide a letter of recommendation to Federal Agency in connection with Z's application for a competitive service position. A may provide a letter of recommendation concerning Z's character and residence. Hiring Official at Federal Agency may consider a recommendation similar to the following: —I have known Z, a resident of my state, for many years. Z is a fine person and has always been reliable, has shown good judgment and integrity, and is highly regarded in the community. Hiring Official could not consider any portion of the letter if it also referred to Z's political affiliation or suitability for employment in a particular agency or a particular job (e.g., —I would like you to consider Z for the currently vacant position of policy analyst in your office. ).

If the Member has personal knowledge of the applicant's work ability or performance, the federal hiring official may consider a recommendation based on the Member's personal knowledge or records that contains an evaluation of the job applicant's work performance, ability, aptitude, general qualifications, character, loyalty, or suitability.<sup>58</sup> Such personal knowledge of applicant's work can be the result of any working association of the Member and the applicant, whether or not related to the Member's official responsibilities.

**Example 15.** A former staff member asks his former employing Member, B, to provide a letter of recommendation to Federal Agency in support of his application for a competitive service position. Member B may prepare a letter of recommendation based on the former employee's prior work performance, ability, aptitude, and character. A hiring official at Federal Agency may consider the letter of recommendation.

### **—Political Positions With the Federal Government**

With respect to applications for —political positions, such as Schedule C or non-career Senior Executive Service positions, federal hiring officials may consider any information a Member includes in a recommendation, even if the recommendation is not based on the Member's personal knowledge or records. The information permitted to be considered includes, but is not limited to, statements about character and residence, evaluations of work qualifications, statements about political affiliation, and statements about the suitability for employment with a particular agency or a particular job. (The matter of whether such a letter may be sent on official letterhead is discussed below.)

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<sup>58</sup> 5 U.S.C. § 2302(b)(2). A recommendation under this statute based on personal knowledge or records may be offered by anyone and is not limited to Representatives and Senators.



**Example 16.** Employee asks Member C to provide a letter of recommendation to Federal Agency in connection with employee's interest in a Schedule C (*i.e.*, political) position. Member C may prepare a letter to Federal Agency that endorses employee for the position based on various factors, including prior work performance, ability, aptitude, character, and political considerations. A hiring official at Federal Agency may consider the letter of recommendation in its totality.

### ***Postal Service***

Under federal law, Members of Congress are prohibited from making or transmitting to the Postal Service —any recommendation or statement, oral or written— on behalf of a person under consideration for a position with the Postal Service except for a —statement— relating solely to the character and residence of such person; however, if the Postal Service so requests, a Member may provide a statement regarding the applicant's qualifications.<sup>59</sup>

### ***Military Services and Academies***

Under federal law, military services or academies may consider any relevant information a Member chooses to provide in a letter of recommendation. With respect to letters to military promotion boards, congressional offices should consult with the particular promotion board or the constituent service member to ensure compliance with applicable regulations. For example, although officer promotion boards may consider letters of recommendation authored by third parties, such letters should be submitted directly by the officer concerned, and they cannot be accepted from the third party.<sup>60</sup>

### ***State Governments and the Private Sector***

Unless otherwise prohibited by state law or by corporate policy, a hiring official may consider any information the Member chooses to provide in a letter of recommendation for appointments or positions in state and local governments or the private sector. Members may provide statements about character and residence, evaluations of work qualifications, statements about political affiliation, and statements about the suitability for employment with a particular agency or a particular job.

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<sup>59</sup> 39 U.S.C. § 1002(b), (e)(2).

<sup>60</sup> Under 10 U.S.C. §§ 615 and 14107, active and reserve officer promotion boards may consider —information communicated to the board **by the officer.** (Emphasis added). *See also* Department of Defense Instruction 1320.14, Commissioned Officer Promotion Program Procedures, September 24, 1996.

**Example 17.** Constituent Z, who is a personal friend of Member D, asks D for a letter of recommendation concerning Z's interest in a position with a corporation in Member D's district. Many private parties are not used to dealing with Members of Congress on a regular basis. Accordingly, Members should exercise caution when submitting a letter of recommendation to a private company or individual to avoid even the appearance of improper or undue influence on the private party. In this case, D may be able to provide the requested recommendation, but she should proceed cautiously and should consult with the Standards Committee.

### ***Letterhead***

When writing letters of recommendation, Members must carefully assess whether the letter may be sent on official congressional stationery. Official stationery, like other official resources, may be used only for official purposes.<sup>61</sup> Whether a particular letter of recommendation may be considered official business, and may therefore be written on official letterhead, depends on whether the proposed letter may be mailed using the frank under the regulations of the Franking Commission.<sup>62</sup>

According to Franking Commission regulations, Members may use the frank to mail letters of recommendation for the following:

- An applicant seeking admission to a military academy;
- An applicant seeking a political appointment to a federal or state government position; or
- An applicant who is a current employee, was a former employee, or has worked with the Member in an official capacity and the letter relates to the duties performed by the applicant.<sup>63</sup>

The Franking Commission broadly interprets the authority to write letters of recommendation on behalf of a person—who has worked with the Member in an

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<sup>61</sup> 31 U.S.C. § 1301(a); *Members' Handbook*, *supra* note 29.

<sup>62</sup> Any question regarding whether a particular letter may be mailed under the frank should be addressed to the Franking Commission, formally known as the Commission on Congressional Mailing Standards of the House of Representatives.

<sup>63</sup> Commission on Congressional Mailing Standards, U.S. House of Representatives, *Regulations on the Use of the Frank by Members of the House of Representatives*, at 13 (June 1998). Members may also send under the frank general letters of introduction that are not endorsements or recommendations. *Id.*

official capacity.<sup>64</sup> Such persons may include, among others, persons employed (or formerly employed) by a federal, state, or local government agency who worked with the Member or the Member's staff on matters relating to the Member's official duties, as well as persons working in the private sector (such as attorneys, university professors, or persons affiliated with —think tanks<sup>65</sup> ) who have assisted the Member's office on legislative matters.

If the criteria specified above are met, letters of recommendation may be prepared on official stationery for persons seeking jobs in the private sector as well as federal, state, or local governments; otherwise, the letter of recommendation must be prepared on the Member's personal stationery.

**Example 18.** A social acquaintance of Member E, who has not previously worked with E in any official capacity, asks E to write a letter of recommendation to Federal Agency in support of his application for a competitive service position. E may prepare a letter of recommendation but must do so on personal stationery.

**Example 19.** An Executive Director of a nonprofit organization, who assisted Member F with a legislative initiative, asks F to provide a letter of recommendation to a corporation in Member F's district in support of Executive Director's application for a position with the corporation. F may provide a letter of recommendation on official letterhead and mail it by means of the congressional frank.

### ***Miscellaneous Considerations***

In addition to the standards and requirements discussed above, Members should be mindful of the following restrictions set forth in federal criminal statutes:

- A candidate, including a Member of Congress, may not promise to appoint, or to use influence or support in appointing, any person to any public or private position for the purpose of procuring support for his or her candidacy.<sup>64</sup>
- No one may promise any employment, position, compensation, contract, appointment, or other benefit provided for or made possible by any Act of Congress, to any person in return for political activity or support in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office.<sup>65</sup>

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<sup>64</sup> 18 U.S.C. § 599.

<sup>65</sup> 18 U.S.C. § 600.

- The knowing denial or deprivation, or the threat of denial or deprivation, of any federal or state employment, or any employment, compensation, or benefit made possible by an Act of Congress, for the purpose of securing political contributions, services, or any other thing of value, is prohibited.<sup>66</sup>
- No one may solicit or receive any money or other thing of value in return for the promise of support or the use of influence in obtaining an appointive federal post on behalf of another person.<sup>67</sup>

Violations of these statutory provisions are criminal offenses and are all punishable by fines, imprisonment for up to one year, or both. If a Member willfully violates the prohibition against promising employment in exchange for political support under 18 U.S.C. § 599, the imprisonment may be for up to two years.

**Example 20.** Constituent Z who made a financial contribution to Member G's election campaign sends G a letter requesting a recommendation in support of Z's application for a political position at Federal Agency. In the letter, Z refers to his contribution to Member G's campaign; however, he does not expressly ask G to provide the job recommendation in return for his past financial support. The Committee cautions Members against providing such a letter because, under these facts, the Member G's letter of recommendation might be construed as an improper *quid pro quo*.

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<sup>66</sup> 18 U.S.C. § 601.

<sup>67</sup> 18 U.S.C. § 211.

# OFFICIAL ALLOWANCES

## Overview

Members of Congress receive a Members' Representational Allowance (—MRA), which is available to support the conduct of official and representational duties to the district from which they are elected. Statutory authorizations often note that such allowances are for expenses of an —official purposes or a —strictly official nature.<sup>1</sup> Legal and ethical problems arise when these allowances are used for other than official expenses, such as when they are converted to personal or campaign use. This chapter discusses the official expense allowance and the franking privilege. Members and staff seeking guidance on matters relating to the MRA or the franking privilege should first review the *Members' Handbook* or the *Franking Manual* before consulting this chapter.

## Members' Representational Allowance

During each session of Congress, each Member has a single MRA available to support the conduct of official and representational duties to the district from which elected. Committee on House Administration regulations state that the MRA is to be used to pay —ordinary and necessary expenses incurred by the Member or the Member's employees within the United States, its territories, and possessions in support of the conduct of the Member's official and representational duties to the district from which elected.<sup>2</sup> The MRA may only be used for official and representational expenses. The MRA may not be used to pay for any expenses related to activities or events that are primarily social in nature, personal expenses, campaign or political expenses, or House committee expenses.<sup>3</sup> Members may be personally liable for misspent funds or expenditures exceeding the MRA.<sup>4</sup>

The rules governing the MRA include the following restrictions:

- The MRA may be used only for official expenses;
- The MRA may **not** be converted to personal or campaign use or applied toward any unofficial activity;
- As a general matter, only the MRA and Members' personal funds may be used to defray official expenses;

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<sup>1</sup> See, e.g., 2 U.S.C §§ 42c, 43b, 46g, 46g-1, 56, 122a.

<sup>2</sup> Comm. on House Admin., *Members' Congressional Handbook* (hereinafter —*Members' Handbook*).

<sup>3</sup> *Id.*: Members' Representational Account, General.

<sup>4</sup> *Id.*

- House Rule 24, which sets forth the prohibition on unofficial office accounts, bars the use of private funds or in-kind support from outside sources for official activities;
- In addition to possibly violating House rules, the misuse of the MRA may also subject a Member or employee to criminal prosecution and actions to recover the misspent funds; and
- The Committee on House Administration governs certifications, documentation, and other standards for reimbursement from the MRA; that Committee's regulations are set forth in the *Members' Handbook*.

**Example 1.** Member A's wife is a travel agent. A may not make official travel arrangements through his wife's agency because she, and thus A, would then be benefiting monetarily from the expenditure of official funds.

**Example 2.** Member B's district manager is part owner of a building in the district. B may **not** rent space in the employee's building for the congressional district office.

**Example 3.** Member C is very interested in the matter of childhood literacy and would like to have her congressional staff, during official hours, work with a local literacy group in enlisting volunteer tutors, locating children who need help, and making arrangements for the volunteers to work with these children. It is not permissible for the office to undertake such a project because congressional staff may not engage in such a charitable undertaking while on official congressional time and using any official House resources.

In the 100<sup>th</sup> Congress, the Committee on Standards of Official Conduct investigated charges that a Member had allowed his former law firm to use official resources.<sup>5</sup> The Standards Committee found that over a nine-year period, the firm had been permitted access to government photocopy services, furniture, supplies, long distance telephone lines, and a receptionist's services. For this and other violations, the House reprimanded the Member.

A Member is responsible for assuring that resources provided for support of official duties are applied to the proper purposes.<sup>6</sup> In the 101<sup>st</sup> Congress, the Standards Committee determined that a Member was —remiss in his oversight and

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<sup>5</sup> House Comm. on Standards of Official Conduct, *In the Matter of Representative Austin J. Murphy*, H. Rep. 100-485, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4 (1987).

<sup>6</sup> *Id.*

administration of his congressional office<sup>7</sup> regarding a mailing sent out by staff over his signature on his official letterhead.<sup>7</sup> The mailing did not comport with House Rule 23, clause 11, in that it promoted a cruise sponsored by a private organization and requested that follow-up contacts go to the Member's congressional office.

The *Members' Handbook* provides examples of items for which reimbursement with the official allowances may be permitted, as well as a list of prohibited expenditures. Included among the permissible uses are expenditures for certain travel, office equipment leases, district office leases, stationery, telecommunications, printing and product services, costs of audio and video recordings produced in the House Recording studio, postage, computer services, and other expenses related to a Member's official business. Included among impermissible uses are expenditures for greeting cards, social events or activities, consultants, vendor security deposits, dues and membership fees, educational expenses to obtain any level of educational degree, expenses associated with acquiring or maintaining professional certification or licensing, and employment relocation expenses.

Anything supported with official funds is an official resource, including congressional offices. The House Office Building Commission, comprised of the Speaker, the Majority Leader, and the Minority Leader, has issued regulations governing the use of House facilities.<sup>8</sup> These regulations generally ban solicitation and commercial activity, limit photography, restrict use of meeting rooms to congressionally related purposes, and impose various health and safety restraints. In addition, as is true of all official resources, congressional offices may not be used for the conduct of campaign or political activities.

**Example 4.** Member D is planning to film a campaign commercial. D may **not** film in her congressional office because that would be using an official resource for a campaign purpose. She may film her commercial outside the Capitol in the areas designated by the Sergeant-at-Arms as part of the public space.

Other entities may have jurisdiction over the use of particular official resources. The Joint Committee on Printing, for example, publishes *Government Printing and Binding Regulations* pertaining to government documents. These regulations caution:

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<sup>7</sup> House Comm. on Standards of Official Conduct, *Statement Regarding Complaints Against Representative Newt Gingrich*, 101<sup>st</sup> Cong., 2d Sess. 60 (1990).

<sup>8</sup> House Office Building Comm'n, *Rules and Regulations Governing the House Office Buildings, House Garages and the Capitol Power Plant* (February 1999) (available from the Speaker's Office).

No Government publication . . . shall contain . . . material which implies in any manner that the Government endorses or favors any specific commercial product, commodity, or service.

The Joint Committee on Printing has advised that commercial advertising is not a proper or authorized function of the government. Such advertisements are unfair to those who do not so advertise in that, whether intentionally or not, they are frequently made to appear to have the sanction of the government. Furthermore, the publication of such advertisements is unjust to the public in that the advertisers profit thereby at the expense of the government, particularly as a considerable number of the publications are circulated free, at least in part, under government frank.

Members should also bear these regulations in mind in the context of the common practice of inserting an Extension of Remarks in the *Congressional Record*, noting the accomplishments of a district business. While it is usually appropriate publicly to congratulate a local business for achieving an award or celebrating a significant anniversary, Members should refrain from overtly commercial promotions. See Chapter 10 on official and outside organizations for further information.

### Unofficial Office Accounts

House Rule 24 prohibits —unofficial office accounts.¶ Accordingly, outside private donations, funds, or in-kind goods or services may not be used to support the activities of, or pay the expenses of, a congressional office. Only appropriated funds or Members' personal funds may be used for this purpose.<sup>9</sup> House Rule 24 has been in effect since 1977. Congress codified this rule into law governing both Chambers as part of the Legislative Branch Appropriations Act, 1991.<sup>10</sup> Under federal law and House rules, however, funds from a Member's principal campaign committee may be used to pay for certain congressional office expenses. See Chapter 4 on campaign activity for further information.

The House Commission on Administrative Review (95<sup>th</sup> Congress) proposed House Rule 24 as a —wall¶ between private funds and official allowances. The House adopted most of the Commission's recommendations on March 2, 1977, as revisions to the House Rules of Conduct.<sup>11</sup> The Commission explained the requirement that official expenses of a Member be paid exclusively from official, appropriated funds as follows:

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<sup>9</sup> See also 31 U.S.C. § 1342 (prohibiting acceptance of voluntary services without specific authorization (augmentation of appropriations)).

<sup>10</sup> See 2 U.S.C. § 59e(d).

<sup>11</sup> H. Res. 287, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977).



The Commission strongly believes that private funds should be used only for politically related purposes. Official allowances should reflect the necessary cost of official expenses. Increasing official allowances . . . to eliminate reliance on private sources represents a small cost to the public for the benefits to be derived. To suggest otherwise would be to accept or condone the continuation of the present system which, at the very least, allows for the appearance of impropriety, and, at worst, creates a climate for potential —influence peddling— through private financing of the official expenses of Members of Congress.<sup>12</sup>

Several rules in addition to House Rule 24 implement the Commission's recommendation that private financing of official expenses be eliminated. House Rule 23, clause 7, requires that a Member treat all all proceeds from testimonial dinners or other fund-raising events as campaign contributions.<sup>13</sup> House Rule 23, clause 6(c), provides that campaign funds may be used only for —bona fide campaign or political purposes.— As a general matter, these provisions mandate that private funds be used only to support private or political, and not official, activities.

No specific definition of bona fide campaign or political purposes exists in the rules or legislative history of the provision. What would be an official, as opposed to a campaign, expense depends on the particular facts of the situation.<sup>14</sup> During floor debate on adoption of the rule, it was noted, for example, that travel to a Member's home district might be considered a political expense for which private campaign funds could be used if the purpose of the trip was political.<sup>15</sup> Similarly, the expense of taking certain individuals to dinner, if it is determined to be a political meeting rather than one relating to official duties, could be paid from campaign accounts.<sup>16</sup>

Members often have discretion in determining whether an event will be —political— or —official,— with the following caveat: —[The] committee is of the opinion that once the Member makes his determination, he is bound by it. A single event

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<sup>12</sup> House Comm. on Admin. Review, *Financial Ethics*, H. Doc. 95-73, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18 (1977).

<sup>13</sup> Members often assist charities in their fundraising efforts. This rule does not, of course, mean that funds that a Member helps to raise for charity are deemed campaign contributions. Solicitations for charity are discussed in Chapter 10 on official and outside organizations.

<sup>14</sup> See 123 *Cong. Rec.* 5900 (Mar. 2, 1977) (Statement of Rep. Frenzel).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 5908 (colloquy between Reps. Evans and Bauman).

cannot, for the purpose of the House rules, be treated as *both* political and official.<sup>17</sup> Therefore, in *Advisory Opinion No. 6* the Standards Committee permitted a Member to designate a town meeting in areas newly added to his district as either a political (campaign) event or official (representational) one. But, by sending announcements of the meeting under the frank (which can be used only in the conduct of official business), the Member defined the event as official and, thus, could not use campaign or other private funds to conduct, promote, or advertise it without violating House Rule 24 or House Rule 23, clause 6(c).<sup>18</sup> See Chapter 10 on official and outside organizations for the rules on hosting conferences and town hall meetings.

The legislative history of the unofficial office account rule indicates that the prohibition applies to accounts maintained by third parties for a Member's benefit, even if they are not maintained for the Member's direct use. The prohibition extends to any —process whereby funds are received or expended— regardless of whether an actual account or repository is maintained.<sup>19</sup> In an interpretation of the unofficial office account prohibition, the House Select Committee on Ethics of the 95<sup>th</sup> Congress found the private, in-kind contribution of goods or services for official purposes to be banned under House Rule 24.<sup>20</sup> The Select Committee found, however, that the following would **not** violate House Rule 24:

- Services provided by units of federal, state, or local government;
- The occasional use of privately owned space to meet with constituents, when no public accommodations are reasonably available; and
- Intern or volunteer programs in a Member's office that are primarily of educational benefit to the intern, as opposed to primarily benefiting the Member or office, and that do not give undue advantage to special interest groups. However, Members and their staffs may not personally raise, receive, or disburse any private contributions for intern programs associated with their office.<sup>21</sup>

Note that while Members may accept the services of other units of government for official events without violating House Rule 24, they may not

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<sup>17</sup> House Comm. on Standards of Official Conduct, *Advisory Opinion No. 6* (Sept. 14, 1982) (emphasis in original), reprinted in 128 *Cong. Rec.* H7294 (Sept. 21, 1982) and in the appendices to this Manual.

<sup>18</sup> *Id.*

<sup>19</sup> 123 *Cong. Rec.* 5941 (colloquy between Reps. Panetta and Obey).

<sup>20</sup> House Select Comm. on Ethics, *Advisory Opinion No. 6* (May 9, 1977), reprinted in *Final Report of the Select Committee on Ethics*, H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess. app. at 64-66 (1979) (hereinafter —*Final Report*—), and in the appendices to this Manual.

<sup>21</sup> Intern programs are discussed in Chapter 7 on staff rights and duties.

conversely use official congressional resources to do the work of other entities, **even other public entities**.

Members and staffers are sometimes offered scholarships to participate in study programs that will assist them in the performance of their official duties. The Standards Committee has determined that accepting tuition, room, and board expenses to attend such a program does **not** violate House Rule 24, provided that the following criteria are met:

- The scholarship payments must be made from a sponsoring accredited educational institution of higher learning;
- The program must be primarily of educational benefit to the participants;
- Scholarship assistance may not be limited to congressional participants, but must be available to other, similarly situated individuals;
- The House employee's participation may not in any way give undue advantage to special interest groups or others with a direct interest in legislation; and
- Members and employees may not personally raise, receive, or disburse contributions to support the program.

The *Final Report* of the Select Committee also notes that House Rule 24 —is not intended in any way to restrict the Member's use of his personal funds.|| <sup>22</sup> This principle was reiterated in the statutory codification of House Rule 24.<sup>23</sup> Thus, for example, Members may establish petty cash funds out of their personal funds to pay for miscellaneous office expenses.<sup>24</sup>

**Example 5.** Member E would like to decorate his House office in a modern style of furniture not available from Office Furnishings. E may **not** accept the offer of a furniture store to supply his office with free furniture. E may purchase the furniture of his choice with his own money.

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<sup>22</sup> *Final Report*, *supra* note 20, at 25.

<sup>23</sup> See 2 U.S.C. § 59e(i).

<sup>24</sup> *Final Report*, *supra* note 20, at 25.

**Example 6.** The local cable television company in Member F's district offers her free cable service in her office so that her district staff may monitor events on the House floor. F may **not** accept the offer.

### Official Travel

Official travel is not subject to the time limits imposed by the House gift rule (House Rule 25, clause 5).<sup>25</sup> To receive reimbursement, however, a House traveler must follow the usually traveled routes. A traveler who chooses an indirect route or stops along the way for nonofficial purposes will be personally responsible for any added expense.<sup>26</sup>

The Committee on House Administration's regulations encourage the official use of travel awards acquired while on official business. The *Members' Handbook* states:

Free travel, mileage, discounts, upgrades, coupons, etc., awarded at the sole discretion of a company as a promotional award may be used at the discretion of the Member or the Member's employee. The [Committee on House Administration] encourages the official use of these travel promotional awards wherever practicable.

The Ethics Reform Act of 1989 clarified one point regarding the use of official and campaign vehicles.<sup>27</sup> The Bipartisan Task Force wished to approve the incidental use of these vehicles for nonofficial or nonpolitical purposes, respectively, to reflect the reality that a Member may attend numerous events in the course of a single day, some of which may be official in nature while others are political.<sup>28</sup> It would be impractical under such circumstances to require the Member to keep switching cars as the Member travels from one function to the next. Members should, however, maintain records of the mileage attributable to official, political, and personal trips to ensure that no account is subsidizing another and that any crossover use of a vehicle is indeed incidental. Thus, with respect to nonofficial use of official vehicles, the Task Force recommended—that such incidental use should be during the course of and along the route of a day's official itinerary, incidental to the day's official business, *de minimis* in nature, frequency and time consumed, and

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<sup>25</sup> The matter of privately-sponsored, officially-connected travel is discussed in Chapter 3.

<sup>26</sup> *Members' Handbook*, Travel: Combined Travel.

<sup>27</sup> Pub. L. 101-194, § 503, 802(d)-(e), 103 Stat. 1716, 1773 (1989) (codified at 31 U.S.C. § 1344 note and 2 U.S.C. § 29d note).

<sup>28</sup> House Bipartisan Task Force on Ethics, *Report on H.R. 3660*, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 34-36, 60 (Comm. Print, Comm. on Rules 1989), reprinted in 135 *Cong. Rec.* H9253, H9263, H9270 (daily ed. Nov. 21, 1989) (hereinafter *-Bipartisan Task Force Report*).

otherwise not constitute a significant activity or event.<sup>29</sup> During the 109<sup>th</sup> Congress, the House Rules were amended to permit a Member to lease or purchase a motor vehicle with campaign funds and to use that vehicle on an unlimited basis for travel for both campaign and official House purposes. See Chapter 4 on campaign activity for further guidance.

**Example 7.** Member G has four official events to attend in his district one day. He will be traveling between events in the car leased for the use of his congressional district office and paid for out of official expenses allowance. As he drives from the second to the third event, he will pass by the dry cleaner. He may stop to pick up his dry cleaning, as it would be a permissible incidental nonofficial use of the car.

The Committee on House Administration should be consulted before seeking reimbursement from official allowances for official mileage. The Federal Election Commission should be consulted for guidance on reimbursement to the campaign for any personal mileage.

### False Claims and Fraud

Federal law provides that official funds may be used only for the purposes for which they are appropriated.<sup>30</sup> When funds are used other than for their intended purposes, the misused funds may be recovered by the government for repayment to the United States Treasury.

The use of the MRA for other than official purposes, including double billing and claims for nonexistent expenses, could subject a Member, officer, or employee to civil penalties under the False Claims Act.<sup>31</sup> Any citizen may initiate such a suit, in the name of the United States, by alleging that false, fraudulent, or fictitious claims have been made. The Department of Justice may then take over the suit.<sup>32</sup> The government has also initiated civil suits against Members subsequent to their criminal prosecution for the same or related conduct. In one such suit, for example, the government contended that a former Member had used, and permitted his family and friends to use, his official telephone credit card to charge personal calls.<sup>33</sup>

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<sup>29</sup> *Id.* at 35, 135 *Cong. Rec.* H9263.

<sup>30</sup> 31 U.S.C. § 1301(a).

<sup>31</sup> 31 U.S.C. § 3729. A civil penalty of \$5,000 to \$10,000, plus 3 times the amount of damages that the government sustains, may be imposed for knowing violations.

<sup>32</sup> 31 U.S.C. § 3730.

<sup>33</sup> *United States v. Eilberg*, 507 F. Supp. 267, 272-73 (E.D. Pa. 1980); see also *United States v. Eilberg*, 536 F. Supp. 514 (E.D. Pa. 1982).

Committee on House Administration regulations require Members to certify and document all expenses before funds may be disbursed from the MRA.<sup>34</sup> The use of money received by submitting such a voucher for other than official expenses may involve a fraud against the government, in violation of 18 U.S.C. § 1001 (prohibiting making any false, fictitious, or fraudulent statements or using false writings, documents, or entries, concerning any matter within the jurisdiction of any agency or department of the United States). The Supreme Court has ruled that 18 U.S.C. § 1001 applies to false statements, writings, or other representations made to a disbursing officer of the U.S. House of Representatives in furtherance of a fraudulent scheme.<sup>35</sup> In another case, the U.S. Court of Appeals for the District of Columbia Circuit affirmed a Member's conviction of fraud for having used an official allowance—for purposes other than those intended by the appropriation and duly certified by the congressman.<sup>36</sup>

Other criminal provisions of the United States Code prohibit:

- Making false or fictitious claims upon the United States;<sup>37</sup>
- Conspiring to defraud the government by obtaining or aiding in obtaining the payment of false claims;<sup>38</sup>
- Knowingly stealing or —convert[ing] to [one's] use or the use of another . . . any money or thing of value of the United States.<sup>39</sup>

## The Frank

The term —frank<sup>40</sup> refers to the autograph or facsimile signature of a person authorized to transmit matter through the domestic mails without prepayment of postage.<sup>40</sup> Members of Congress and certain officers of the House are authorized to send, as franked mail, material relating to the official business, duties, and activities of their offices.<sup>41</sup> Use of the franking privilege is governed by federal law at 39 U.S.C. § 3210 *et seq.*

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<sup>34</sup> *Members' Handbook: Seeking Reimbursement: Vouchers.*

<sup>35</sup> *United States v. Bramblett*, 348 U.S. 503 (1955).

<sup>36</sup> *United States v. Diggs*, 613 F.2d 988, 997 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980).

<sup>37</sup> 2 U.S.C. § 287.

<sup>38</sup> 2 U.S.C. § 286; *see also* 18 U.S.C. § 371.

<sup>39</sup> 18 U.S.C. § 641.

<sup>40</sup> 39 U.S.C. § 3201.

<sup>41</sup> 39 U.S.C. § 3210(b)(1).

### ***Commission on Congressional Mailing Standards (The Franking Commission)***

The bipartisan Commission on Congressional Mailing Standards, or the —Franking Commission,<sup>42</sup> was established under Public Law 93-191 with a three-fold mandate: (1) To issue regulations governing the proper use of the franking privilege; (2) to provide guidance in connection with mailings; and (3) to act as a quasi-judicial body for the disposition of formal complaints against Members of Congress who have allegedly violated franking laws or regulations. The Franking Commission is under the jurisdiction of the Committee on House Administration. Regulations issued by the Commission, set forth in the *Franking Manual* (or —*Red Book*), should be consulted for authoritative guidance.

The Franking Commission<sup>42</sup> provides guidance and gives advisory opinions on the frankability of mail matter.<sup>43</sup> The Franking Commission is authorized to hear complaints of abuses of the frank, subject to judicial review.<sup>44</sup>

The Commission's regulations are provided in the *Franking Manual*, which is available from the Committee on House Administration. The *Franking Manual* should be consulted by congressional employees involved in mailing material under the franking privilege. In addition to providing guidelines and requirements for franked mail, the *Franking Manual* includes examples of permissible and impermissible items or mailings.

#### ***—Dear Colleague Letters***

House-wide —Dear Colleague letters may be transmitted by inside mail without frank or stamp. These —Dear Colleague letters must be prepared on official letterhead, signed by the Member, and related to official business. They may include as attachments material prepared by other individuals or organizations, provided that each such item to be distributed is accompanied by a Member-signed cover letter, on official letterhead, endorsing the material.<sup>45</sup>

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<sup>42</sup> See 2 U.S.C. § 501(a).

<sup>43</sup> 2 U.S.C. § 501(d).

<sup>44</sup> 2 U.S.C. § 501(e).

<sup>45</sup> *Members' Handbook*: Inside Mail.





# OFFICIAL AND OUTSIDE ORGANIZATIONS

## Overview

Members and employees of the House of Representatives are frequently presented with opportunities to interact with various groups and organizations. In addition, Members are often asked to lend their names to outside undertakings or otherwise to assist in advancing private endeavors.

This chapter discusses the standards Members and employees must observe regarding the activities of organizations they establish to support their official functions. The chapter also addresses restrictions on working cooperatively with private, or —outside, entities. A primary consideration in any contemplated arrangement with a private entity is the need to distinguish clearly between official congressional actions and outside activities in which the Member engages.

House Rule 24 prohibits the use of outside funds or in-kind support to supplement congressional allowances. And the reverse is also true: Members and employees of the House are prohibited from using official resources for any private purpose.<sup>1</sup>

The decision whether to define an event as official (or not) generally lies within the discretion of the Member. This decision controls who can pay and how both Members and outside organizations can participate. If a Member determines that an activity is official, no private funds or in-kind support except a limited use of campaign funds, as described below, may be used to support the activity under House Rule 24. Conversely, if an event is deemed to be other than an official function, official resources may not be used. An activity may not be treated as both official and unofficial.<sup>2</sup> Thus, joint endeavors, which would be supported with a combination of private resources and official funds, are generally prohibited. This restriction precludes joint activities even with charitable or educational organizations, although not with governmental entities. These considerations do not prevent the personal involvement of Members in various functions, including by lending their names to support specific causes, provided no appearance of official sponsorship is created.

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<sup>1</sup> See 31 U.S.C. § 1301(a).

<sup>2</sup> See House Comm. on Standards of Official Conduct, *Advisory Opinion No. 6* (Sept. 14, 1982), reprinted in the appendices.

## Official Support Organizations

Official support organizations generally take one of two forms, either as a registered Congressional Member Organization (—CMO|| ) or a Congressional Staff Organization (—CSO|| ).

### *Congressional Member Organizations*

The term —CMO|| refers to a particular category of working group<sup>3</sup> of Members organized to pursue common legislative objectives. Such entities must register with the Committee on House Administration. In addition to the House rules applicable to all Members, officers, and employees, CMOs are subject to specific Committee on House Administration regulations.<sup>4</sup>

Restrictions on CMOs flow from the principle that Members should not be allowed to do collectively – through a working group – what the Rules of the House prohibit Members from doing individually. Thus, like any other congressional organization, a CMO must comply with House Rule 24, which prohibits unofficial office accounts. As a general rule, no private resources (except the personal funds of Members), whether monetary or in-kind, may be used for the operation of a CMO.<sup>5</sup> Conversely, any group that is supported by private resources may not receive support from official allowances and may not provide legislative services to Members. Thus, a CMO may not use official resources to support the operations of a private organization. Like other congressional offices, however, a CMO may distribute to Members reports, analyses, or research material prepared by private parties, as long as the real source of the material is disclosed.<sup>6</sup>

Because CMOs are considered extensions of the individual offices of participating Members, a member of a CMO may use employees and official resources under the control of the Member to assist the CMO in carrying out its

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<sup>3</sup> A CMO often may be referred to as a —caucus,|| —task force,|| —delegation,|| —coalition,|| or similar term. For purposes of this chapter, the term —CMO|| refers to all Member organizations that are supported by official resources.

<sup>4</sup> See Comm. on House Admin., *Members' Congressional Handbook* (hereinafter —*Members' Handbook*|| ). The Committee on House Administration has also issued regulations concerning expenditures from committee funds. See Comm. on House Admin., *Committees' Congressional Handbook* (hereinafter —*Committees' Handbook*|| ). Both handbooks are available on the Committee on House Administration's website.

<sup>5</sup> *Members' Handbook*, *supra* note 4.

<sup>6</sup> See *id.*

legislative objectives, but no employees may be appointed in the name of a CMO. A CMO may not be assigned separate office space.<sup>7</sup>

### ***Congressional Staff Organizations***

CSOs exist for the purpose of facilitating interaction among congressional staff. A CSO may only make incidental use of official resources in connection with its activities. Furthermore, the members of a CSO should contact the Committee on Standards of Official Conduct before accepting anything of monetary value from a private source. A CSO must register with the Committee on House Administration in each Congress in order to use official resources.

### ***Informal Member and Staff Organizations***

Members and employees may also associate with caucuses and other informal groups not registered as CMOs or CSOs. Informal Member caucuses are distinguishable from CMOs in that the former are dependent on the support of individual Members for their existence, while CMOs are recognized by the Committee on House Administration and may be supported directly by disbursements from official allowances (and by the House itself in the form of office space and facilities). House Rule 24 applies to both registered and informal organizations, however, because each plays a direct role in assisting individual Members in the conduct of their official responsibilities. Thus, an informal caucus organized by a group of Members to assist them in official matters may not invite an individual not in Congress to be a member of the caucus, nor may any private individual or organization contribute funds or other resources to support the caucus.

Staff may also associate with informal groups not registered with the Committee on House Administration. While an informal staff group may receive some *limited* private assistance notwithstanding House Rule 24, other considerations limit the amount of such assistance that may be accepted. As discussed in Chapter 2 concerning gifts, the House gift rule prohibits Members, officers, and employees from accepting gifts except as permitted by the rule. The receipt of anything of value by a group of employees primarily for their *own* benefit (as opposed to the benefit of the group as a whole) would be a gift subject to the rule, although its value would be apportioned among all the recipients. Additionally, the Code of Ethics for Government Service prohibits federal officials, including House Members and staff, from accepting —benefits which might be construed by reasonable persons as influencing the performance of official duties.¶<sup>8</sup> House staff involved with an informal group should exercise caution in accepting

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<sup>7</sup> See *id.*

<sup>8</sup> Code of Ethics for Government Service ¶ 5, H. Con. Res. 175, 85<sup>th</sup> Cong., 2d Sess., 72 Stat., Part 2, B12 (1958) (reprinted in the appendices).

anything of value from a private source, including by contacting the Committee as necessary.

### **Private Entities With Shared Goals**

The House organizations described above often share goals with outside entities. Sometimes Members who have formed a CMO are affiliated with a private foundation or institute with similar objectives. Members may cooperate with these private entities, subject to all the generally applicable restrictions on involvement with outside entities, as described in this chapter.

No outside entity may imply official House sponsorship. The letterheads of a CMO and any outside organization with related goals should be sufficiently distinct as to avoid any confusion of identities. No outside organization may use any official funds or resources, including House office space, the frank, and staff time. Public and private funds must be kept absolutely separate. While outside entities may raise private funds, these funds may not be used to support any official functions. Official and unofficial organizations may not co-sponsor events or jointly undertake any activities. As to any event or activity that is sponsored by a CMO or outside organization, the identity of the sponsoring entity should be made clear. No House resources, including staff time, may be used to support any event or activity of the outside organization, and the Members of the CMO may not accept any resources of the outside organization (or any other private individual or entity) in furtherance of the CMO's events or activities.

**Example 1.** Several Members organize an informal caucus to assist them in foreign trade matters. An academic who has written extensively on foreign trade issues offers his assistance. While he may address the group and provide them with a copy of a report he had previously prepared, he may *not* be a regular member of the informal caucus.

**Example 2.** A group of private individuals has formed a coalition to promote environmental legislation. Member A may join the coalition, but she may not permit the coalition to suggest that it has any official standing within the House, nor may she permit the coalition to use any congressional resources, including staff time, in connection with the coalition's work.

**Example 3.** A trade association is interested in issues being considered by a CMO. The association offers to —sponsor the CMO by providing staff support and hosting weekly breakfast meetings on the CMO's behalf. The Members may **not** accept the offer. However, the association may host its own reception for the CMO, provided that the

event is not characterized as a CMO function and the invitations for the event are issued by the association, not the CMO.

**Example 4.** An informal staff group is planning an open house to encourage new employees to join. The reception may be held in House facilities. A supermarket chain that does not retain or employ a federal registered lobbyist offers to provide sodas for the event. The offer may be accepted, provided that the acceptance would not give rise to an appearance of improper influence.

### Member Advisory Groups

Members may also form advisory groups to receive advice and counsel from private individuals and organizations, subject to the following limitations. House Rule 24 applies to both CMOs and Member advisory groups because each plays a direct role in assisting individual Members in the conduct of their official responsibilities. Nevertheless, the giving of advice by informal advisory groups to a Member does not constitute the type of private contribution of funds, goods, or in-kind services to the support of congressional operations that is prohibited by House Rule 24, clauses 1 and 3.<sup>9</sup> While the rule prohibits private activities in support of the operations of a House office that could be deemed an improper subsidy of official allowances, the rule was not intended to interfere with a Member's ability to communicate with and gain input from constituents, to consult with knowledgeable persons, or generally to gather any information that the Member deems relevant to the representational or legislative role. Thus, it is entirely appropriate for a Member (or group of Members) to constitute a group to advise them on any topic. Such groups do not register with the Committee on House Administration.

In forming an advisory group, however, a Member should exercise care to ensure that the —walll between public and private activities and resources is not breached. Like volunteers, members of advisory groups, and any individuals associated with those members, should not be assigned work that supplants the regular duties of paid congressional staff. It would be a violation of House Rule 24 for Members or staff to assign members of the advisory panel to draft legislation, congressional statements, or other legislative materials. In addition, consistent with the House gift rule (House Rule 25, clause 5), Members and staff should not solicit the preparation of any such materials from the members of the advisory panel. Members and staff, however, are free to accept from advisory panel members any such materials that they prepare of their own volition, without any prompting.

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<sup>9</sup> See House Select Comm. on Ethics, *Advisory Opinion No. 6* (May 9, 1977), reprinted in the appendices.

Also relevant are the regulations of the Committee on House Administration applicable to CMOs. The main provision states that —[n]either CMOs nor individual Members may accept goods, funds, or services from private organizations or individuals to support the CMO. Members may use personal funds to support the CMO.<sup>10</sup>

Because an advisory group is not itself an official House entity, and since the individual members of the group are not House employees, neither the advisory group itself nor any of its members individually are entitled to the use of the frank, official letterhead, congressional office equipment (including computers, telephones, and facsimile machines), office supplies (including official stationery and envelopes), work stations in congressional office space, congressional staff time, the services of the Congressional Research Service, or any other official resources. Members of the advisory group may not use the congressional office address or telephone number as a point of contact. Underlying the requirement for separation is 31 U.S.C. § 1301(a), which provides that official House resources may be used only for the purposes appropriated. Other statutory provisions and regulations of the Committee on House Administration further emphasize that official House allowances may be used only for official House business.

In addition, a Member should not authorize the members of the advisory group to represent themselves as having any official status or as acting on the Member's behalf. They should not be issued congressional business cards or other forms of official identification. Furthermore, members of the advisory group may not contact federal agencies or any other entity on a Member's behalf, even if they are seeking information that they believe will be helpful to the member. These individuals may contact agencies or persons on their own behalf, however, to gather such information.

## Conferences and Town Hall Meetings

Members may participate in conferences and town hall meetings in a variety of ways. They may plan official conferences or town hall meetings that are arranged, promoted, and put on entirely or almost entirely using official allowances.<sup>11</sup> Alternatively, they may hold town hall meetings as political events, organized and funded by their campaigns. No official resources, including the frank and official staff time, may be used in support of such political gatherings. Generally, it is up to the Member arranging the event to determine whether a particular meeting is official or political in nature.<sup>12</sup> With regard to Member-

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<sup>10</sup> *Members' Handbook*, *supra* note 4.

<sup>11</sup>The use of funds from a Member's principal campaign in support of an official event is discussed in Chapter 4.

<sup>12</sup> *See Advisory Opinion No. 6*, *supra* note 2.

sponsored events, as a general rule no outside assistance may be accepted. Underlying this guidance is House Rule 24, which as previously discussed prohibits the acceptance of a private subsidy for official House business. This provision applies to all official House business, including events sponsored – that is, organized and conducted – by any House office. Further elaboration on House Rule 24 is provided below and in Chapter 9 on official allowances.

While Members may not —co-sponsor<sup>ll</sup> or hold joint events with private entities, they may cooperate in private events by, for example, speaking, serving as honorary chairs, and even signing letters of invitation on behalf of private groups, provided the identity of the actual host is made clear. The rules concerning Member involvement in events sponsored by outside organizations are discussed in the next section.

### ***Applicability of House Rule 24 to Events Sponsored by a House Office***

With regard to events sponsored by a House office, the effect of House Rule 24 is generally to prohibit House Members and staff from accepting, in connection with any such event, any financial support, goods, or in-kind services having monetary value from any private individual or organization. Accordingly, an event sponsored by a House office:

- May not include a meal or any other refreshments that are paid for by a private organization or individual;
- May not be planned or organized, in whole or in part, by a private organization or individual; and
- May not take place on private property unless the sponsoring office pays fair value for its use, or unless one of the limited exceptions described below applies.

The rule applies to House office-sponsored events that take place in Washington, D.C., as well as those that take place in a Member's congressional district or elsewhere. The intent of the rule is that events sponsored by a House office will be scheduled, organized, and conducted by House Members and staff, using House funds and resources (with limited exceptions that are described in this section). Of course, the funds and resources of Member offices and of committees must be used consistent with the rules set forth in, respectively, the *Members' Handbook* and the *Committees' Handbook* issued by the Committee on House Administration. When any question arises as to whether a proposed use of Member or committee allowances would be permissible, the Committee on House Administration should be contacted for guidance. There are several additional points Members and staff should bear in mind regarding House Rule 24 as they consider holding conferences, meetings, briefings, or other events, as follows.

**In-Kind Support From Federal, State, or Local Governmental Entities.** The rule prohibits only the **private** subsidy of official House business. Accordingly, as a general matter, Members and staff may accept any kind of in-kind support for office-sponsored events that a federal, state, or local governmental entity offers to provide.<sup>13</sup> This includes support from public colleges and universities.

For example, if a community college in a Member's district offers to provide use of its auditorium for the Member's town hall meeting without charge, the offer may be accepted. In addition, when a House office is sponsoring an event on a particular subject – such as paying for college costs, retirement planning, or public health issues – government agencies with responsibilities in that area may offer to provide various kinds of assistance. Such assistance may also be accepted.

**Appearance of Private Organizations and Individuals as Guests at an Official Event.** House offices sometimes plan to have a representative of a private organization or other individual appear and make a presentation at an official event. For example, at a town hall meeting on home buying, the sponsoring House office may wish to have presentations from government officials whose agencies provide assistance for home purchasing and representatives of private businesses in that field. Such presentations at an event sponsored by a House office, as well as the distribution of appropriate informational materials by such private organizations, do not violate House Rule 24. Indeed, events such as a government procurement fair sponsored by a Member's office inherently involve private businesses setting up booths and providing information to participants.

However, when a private organization will be making a presentation at an official event, it should be clearly understood that the organization is merely a guest of the sponsoring office, and the office retains full control over the program for the event. **It should also be clearly understood that the purpose of that organization's presence is limited to providing information on a congressionally-related subject.** Thus, private businesses that appear at an official event are not authorized to enter into any commercial transactions or sign up clients while there, and membership organizations are not authorized to sign up new members or solicit funds. Any printed materials that a private organization distributes at an official event must comply with these same limitations. In addition, any reference to such an organization that is made in materials that the congressional office prints to promote the event (such as a mailing or a leaflet) must comply with the rules of the Committee on House Administration and the Franking Commission.

A private organization or individual may incur travel expenses in attending an event sponsored by a House office. Consistent with the above guidance, there is

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<sup>13</sup> See *Advisory Opinion No. 6*, *supra* note 9.



no violation of House Rule 24 if the invited organizations or individuals pay their own travel expenses to the event, or arrange – without any involvement of House Members or staff – for others to pay their travel expenses. In addition, a Member may use campaign funds to pay such travel expenses. See Chapter 4 on campaign activity.

**Benefits That a Private Organization Routinely Offers Without Charge.** A Member does not violate House Rule 24 by accepting from a private organization, for an official event, a benefit that the organization routinely offers without charge to similarly situated persons. For example, if a private organization that owns a meeting room routinely makes that room available without charge to any nonprofit or governmental entity that wants to use it, a House office does not violate the rule in using that room without charge.<sup>14</sup> Before accepting a benefit under this exception, a House office should carefully verify (if possible, in writing) that the policy of the particular private organization is indeed routinely to offer that benefit without charge.

As another example, Members sometimes wish to sponsor a —health fair<sup>11</sup> or similar event in their congressional district where they offer, for example, blood pressure, cholesterol, or diabetes screening tests. In some communities, hospitals or other organizations may routinely offer such tests without charge at a range of community events. A Member may, consistent with the rule, allow such an organization to provide such free tests at a health fair sponsored by the Member's congressional office. However, this is the **only** circumstance in which a private organization may provide a health test or screening at such an event. If an organization does not have a clearly established policy of routinely offering free tests at community events – including events sponsored by persons other than a Member – then a Member may not accept the organization's offer to provide free testing at the Member's event.

**Charging a Registration Fee to Event Participants.** A House office may, consistent with House Rule 24, charge a registration fee to attendees at an event it is sponsoring for the purpose of defraying the costs of food, beverages, and printed materials that are provided to the attendees.<sup>15</sup> These are the **only** expenses that may be covered by the registration fee. The Committee's guidance should be sought before charging a registration fee to cover other types of expenses.

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<sup>14</sup> The policy underlying this principle is that —the occasional use of privately owned meeting space where no other appropriate public accommodations are reasonably available for meeting constituents does not fall within the proscriptions of [House Rule 24].<sup>11</sup> *Advisory Opinion No. 6*, *supra* note 9. This policy applies primarily when a Member wishes to have an event for constituents who live in a remote and lightly populated area of the congressional district.

<sup>15</sup> House Select Comm. on Ethics, *Final Report*, H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess., at 25 (1979).

When an office wishes to defray those costs in this manner, the registration fee must be calculated to cover those costs without generating a surplus, and the Member should establish a temporary, non-interest-bearing account to hold the fees collected. If a surplus is generated inadvertently, the excess funds must be either refunded on a prorata basis to the participants, or donated to charity. Instead of establishing an account, a Member may direct the participants to send the fee directly to the entity that will be providing the food and beverages, but the fees should not be collected by any private third party.

If a Member holds such an event on a regular basis, the Member may maintain a bank account with just enough funds from any surplus to cover bank charges and fees. Doing so would avoid the multiple costs that would be incurred in closing and re-opening accounts. However, maintenance of such an account at more than a minimum level would be impermissible. Thus, any surplus from an event beyond that necessary to keep the account open should be promptly refunded or donated to charity.

With the availability of these alternatives for the sponsorship of events, it is **very** important that Members decide early in the planning process what the nature of the event will be, and that they and their staff follow the rules applicable to the chosen alternative. The Standards Committee's staff is available to consult with Members and staff from the start of their planning process for the purpose of advising on permissible activities under the rules.

### **Involvement With Outside Activities and Entities**

In working with outside entities, the distinction between activities that may be considered official and those that may not is not always readily apparent. Some guidance may be found in regulations issued by the Committee on House Administration. A House rule<sup>16</sup> and various federal statutes<sup>17</sup> give that committee responsibility for determining how official funds will be applied. Pursuant to this authority, regulations and accounting procedures for allowances and expenses of Members, committees, and employees of the House have been promulgated.<sup>18</sup> These regulations identify a wide range of activities and specific expenses that may be supported from official allowances, and thus are reimbursable, as well as expenses that may not be reimbursed. The regulations specifically preclude reimbursement for some expenses that might otherwise appear to support official and representational duties (*e.g.*, certain travel outside of the district, holiday greeting cards, *etc.*).

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<sup>16</sup> House Rule 10, cl. 1(j)(1).

<sup>17</sup> *See, e.g.*, 2 U.S.C. §§ 57, 57a, and 72b.

<sup>18</sup> *See Members' Handbook and Committees' Handbook, supra* note 4.

In addition, when debating the prohibition of House Rule 23, clause 6, against the use of campaign funds for other than bona fide campaign purposes, the Members recognized that adopting a precise definition of what constitutes an —officialll expenditure is difficult, if not impossible, to do.<sup>19</sup> The conclusion reached in that debate was that the individual Member must determine if an activity, and the concomitant expense, is more properly characterized as official or campaign-related. In its *Final Report* to the 95<sup>th</sup> Congress, the Select Committee on Ethics concurred in this position.<sup>20</sup>

### *Events With Outside Entities*

Members may not co-sponsor or hold joint events with outside entities, but they may participate or cooperate in such events. This prohibition derives from rules discussed above that generally prohibit Members from accepting private financial or in-kind support for official activities, and require that official House resources be expended for official business of the House, and not for the business of any other entity, **public or private**.

A private entity may wish to involve a Member or group of Members in an event that it is hosting. A Member could be publicly identified as —cooperatingll in the undertaking, and could appear at the event. Members may cooperate by, for example, speaking, serving as honorary chairs, or signing letters of invitation on behalf of (and on the stationery of) private groups, provided that the identity of the actual host is made clear. In such an instance, private resources would not be expended to subsidize legislative services or the Members' performance of official duties. Moreover, the Member may not use any congressional resources for the event, including assigning employees to assist in organizing the event, using official letterhead or other expressions or symbols of official sponsorship, or using the frank or inside mail for sending invitations. The separate identity of the sponsor should be made clear to all participants, and no Member should take personal credit for an activity actually sponsored or hosted by another organization or individual. Instead, invitations and other literature should make clear that the private source is conducting the activity —in cooperation withll or—in conjunction withll the Member.

**Example 5.** Advocacy group Z was active in lobbying for Pub. L. 007, which was sponsored by Member C. After its enactment, Z plans to host a conference for its members and other interested parties explaining the impact of the new law. Because of C's prominent role in the law's passage, Z invites C to be the keynote speaker at the conference and wishes to list C's name on the invitations. Z may, with

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<sup>19</sup> 123 *Cong. Rec.* 5900 (Mar. 2, 1977).

<sup>20</sup> H. Rep. 95-1837, *supra* note 15, at 16.

C's permission, send out the following invitations (on Z's letterhead and at Z's expense):

Advocacy Group Z  
in cooperation with  
Representative C  
invites you to a conference  
on Public Law 007

No official resources may be used for the conference.

While Members are not permitted to send an official —Dear Colleague letter to invite guests to an event being sponsored by an outside entity, as a general matter a Member may send a —Dear Colleague letter to follow up on an invitation to an event that was previously sent to House offices by the sponsoring organization, or to alert Members that they will be receiving such an invitation, provided the event is taking place in a congressional room or office.

### ***Congressional Art Competition***

One instance when cooperation with private groups has been explicitly recognized is the annual competition among high school students in each congressional district to select a work of art to hang in the Capitol, referred to as the Congressional Art Competition.<sup>21</sup> Members may announce their support for the competition in official letters and news releases, staff may provide administrative assistance, a local arts organization or *ad hoc* committee may select the winner, and a corporation may underwrite costs such as prizes and flying the winner to Washington, D.C. Private involvement with the Congressional Art Competition in this manner is not viewed as a subsidy of normal operations of the congressional office. Members may not solicit on behalf of the arts competition in their district without Standards Committee permission unless the organization to which the donation will be directed is qualified under § 170(c) of the Internal Revenue Code. The guidelines concerning Member solicitations are discussed below.

### ***Expressions or Symbols of Official Sponsorship***

Members of Congress communicate with the public in various capacities. However, communications of a private (or political) nature, whether sent by a Member or by organizations outside the House, may not be prepared or mailed at official expense. In addition, such communications should not carry expressions or symbols that might improperly indicate official sponsorship or endorsement.

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<sup>21</sup> See H. Res. 201, 102d Cong., 1<sup>st</sup> Sess. (1991).

These restrictions are based on a provision of the Code of Official Conduct (House Rule 23, clause 11), which provides:

A Member, Delegate, or Resident Commissioner may not authorize or otherwise allow an individual, group, or organization not under the direction or control of the House to use the words —Congress of the United States,|| —House of Representatives,|| or —Official Business,|| or any combination of words thereof, on any letterhead or envelope.

The rule is designed to prevent private organizations from using facsimiles of congressional stationery to solicit support or contributions, thereby implying that the message is endorsed by the Congress or is related to the official business of a Member. In providing a general interpretation of the rule, this Committee found that —the use of congressional letterhead facsimiles by private organizations is a deliberate misrepresentation which reflects discredit upon the House of Representatives.||<sup>22</sup>

The rule encompasses reproduction of an official communication in another publication, as well as direct use of official-appearing documents. Even if the specific words mentioned in the rule are not used, authorizing a non-House individual or group to use letterhead, expressions, or symbols conveying the impression of an official communication from the Congress would violate the spirit of House rules,<sup>23</sup> as well as other statutory provisions, as discussed below.

Clause 11 of House Rule 23 is not intended to restrict a Member's official communications or the ability to lend one's name in support of a private group. Thus, a Member's name and title may appear in the letterhead of an organization with which the Member holds an actual or honorary position, provided the letterhead does not indicate an official communication from the Congress.

### ***Solicitation of Funds From or on Behalf of Outside Organizations***

The Ethics Reform Act of 1989<sup>24</sup> enacted a government-wide restriction with respect to the solicitation of funds or other items of value by Members, officers, and employees. This provision, codified at 5 U.S.C. § 7353, bars Members, officers, and employees from asking for or accepting anything of value from anyone who seeks official action from the House, does business with the House, or has interests that

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<sup>22</sup> House Comm. on Standards of Official Conduct, *Advisory Opinion No. 5*, reprinted in the appendices.

<sup>23</sup> See House Rule 23, cl. 2.

<sup>24</sup> Pub. L. 101-194, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. § 303, 103 Stat. 1716, 1746-47 (Nov. 30, 1989), as amended by Pub. L. 101-280, 101<sup>st</sup> Cong., 2d Sess., 104 Stat. 149 (May 4, 1990).

may be substantially affected by the performance of official duties. The only exceptions are those expressly permitted by the Standards Committee, as discussed below, as the supervising ethics office for the House. These statutory restrictions cover the solicitation of —anything of value,‖ regardless of whether the official personally benefits from it.

As a general matter, the Committee permits (without the need to seek prior Committee approval) Members and staff to solicit on behalf of organizations qualified under § 170(c) of the Internal Revenue Code — including, for example, § 501(c)(3) charitable organizations — subject to certain restrictions. Solicitations on behalf of non-qualified entities or individuals are decided on a case-by-case basis through the submission to the Standards Committee of a written request for permission to make such solicitations.<sup>25</sup> The general permission granted by the Committee does **not** extend to activities on behalf of an organization, regardless of tax status, that was established or is controlled by Members (or staff). In such circumstances the Member must seek and be granted written permission by the Standards Committee before making any solicitations on the organization’s behalf. Such permission will only be granted for organizations that exist for the primary purpose of conducting activities that are unrelated to the individual’s official duties. The Committee has determined that the only exceptions under the statute are for solicitations on behalf of the campaign and other political entities.<sup>26</sup> All permissible solicitations are subject to the following restrictions:

- No official resources may be used. Such official resources include House staff while working on official time, telephones, office equipment and supplies, and official mailing lists.
- No official endorsement by the House of Representatives may be implied. Thus, no letterhead or envelope used in a solicitation may bear the words —Congress of the United States,‖ —House of Representatives,‖ or —Official Business,‖ nor may the letterhead or envelope bear the Seal of the United States, the Congress, or the House.<sup>27</sup> It is permissible for Members to identify themselves as a Member of Congress, Congressman, Congresswoman, Representative, or by using their leadership title.
- No direct personal benefits may result to the soliciting official.

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<sup>25</sup> For example, solicitations on behalf of persons who are in need of assistance because of a catastrophic injury or natural disaster, most tax-exempt organizations that are not § 501(c)(3) charitable organizations, and the Congressional Art Competition require prior, written approval of the Standards Committee.

<sup>26</sup> See Chapter 4 on campaign activity for a discussion of the laws and rules applicable to solicitations on behalf of a Member’s own campaign.

<sup>27</sup> See House Rule 23, clause 11; 18 U.S.C. § 713.

- Regulations of the House Office Building Commission generally prohibit soliciting and other nongovernmental activities in facilities of the House of Representatives.<sup>28</sup>
- No suggestion may be made either that donors will be assisting the individual in the performance of official duties or that they will receive favorable consideration from the individual in official matters.
- Under a provision of the House gift rule, registered lobbyists or agents of foreign principals may not be targeted in any solicitation. Thus, *no* employee of a lobbying firm should be targeted in a solicitation. However, it is permissible to solicit a company, association, or other entity that employs registered lobbyists to lobby only for itself or its members, provided that the solicitation is directed to an officer or employee who is not a lobbyist.<sup>29</sup>

Another provision of the gift rule sets out certain kinds of gifts that are expressly prohibited by the rule, including —[a]nything provided by a registered lobbyist or an agent of a foreign principal to an entity that is maintained or controlled by a Member ||<sup>30</sup>

**Example 6.** Member A is an honorary, unpaid board member of a § 501(c)(3) charitable organization. Member A may sign a fundraising letter for the charity, as a Member of Congress, on the organization's own letterhead, in a mailing paid for at private expense, provided that registered lobbyists or foreign agents are not targeted in the mailing.

### ***Support for Commercial Enterprises***

Members and employees of the House are frequently approached by individuals or organizations seeking assistance for business undertakings. Obtaining information for constituents regarding government contracts and services, as well as helping them deal with government regulations, is an important

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<sup>28</sup> House Office Building Comm'n, *Rules and Regulations Governing the House Office Buildings, House Garages and the Capitol Power Plant* ¶ 4 (February 1999) (hereinafter *-House Building Comm'n Regs.*) (available from the Speaker's Office).

<sup>29</sup> The provision of the gift rule noted above, clause 5(e)(2) of House Rule 25, states that among the kinds of gifts that are prohibited by the gift rule is —

A charitable contribution (as defined in section 170(c) of the Internal Revenue Code of 1986) made by a registered lobbyist or an agent of a foreign principal on the basis of a designation, recommendation, or other specification of a Member . . . or employee of the House (not including a mass mailing or other solicitation directed to a broad category of persons or entities), other than a charitable contribution permitted by paragraph (f) [*i.e.*, a charitable contribution in lieu of honoraria].

<sup>30</sup> House Rule 25, cl. 5(e)(1).

aspect of a Member's representational duties. In providing such services, care should be exercised never to —discriminate unfairly by the dispensing of special favors.<sup>31</sup> Thus, Members and employees should undertake for one individual or business no more than they would be willing to do for others similarly situated. Members and staff should also avoid becoming too closely affiliated with a particular enterprise, to prevent any appearance that they are accruing benefits —by virtue of influence improperly exerted from [their] position in Congress.<sup>32</sup> These and other related issues are addressed in Chapter 8 on casework. Several main points are discussed below.

The prohibition against use of House resources to support unofficial undertakings clearly applies to support of business endeavors. Thus, an outside entity should never be permitted to use congressional stationery to promote a commercial or other unofficial endeavor. When responding to requests for support, Members and staff should draft communications so that they do not lend themselves to misinterpretation as an official endorsement from the Congress, consistent with clause 11 of House Rule 23. Various House regulations restrict the mailing of commercial materials under the frank and limit the display or distribution of commercial materials in House office buildings.<sup>33</sup>

When a House office wishes to have a representative of a private organization or other individual appear and make a presentation at an event the House office is sponsoring, it should be clearly understood that the organization is merely a guest of the sponsoring office, and the office retains full control over the program for the event. It should also be clearly understood that the purpose of that organization's presence is limited to providing information on a congressionally related subject. Thus, private businesses that appear at an official event are not to enter into any commercial transactions or sign up clients while there, and membership organizations are not to sign up new members or solicit funds.

Conversely, a Member may be asked to participate personally in an event that is sponsored by an outside organization, such as privately-sponsored Medicare prescription card events. In participating in such an event, Members and staff must avoid becoming too closely affiliated with any commercial entity, in order to avoid any appearance that they are accruing benefits by virtue of improper influence exerted from their position in Congress, or are dispensing special favors.<sup>34</sup> Thus, in participating in a privately-sponsored event a Member must take care to avoid any action that may be perceived as an endorsement of the private sponsor.

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<sup>31</sup> Code of Ethics for Government Service, ¶ 5, *supra* note 8.

<sup>32</sup> House Rule 23, cl. 3.

<sup>33</sup> See ¶ 4 *House Building Comm'n Regs.*, *supra* note 28.

<sup>34</sup> See Code of Ethics for Government Service, ¶ 5 *supra* note 8.



### ***Unofficial Representational Activities***

Several provisions of the federal criminal code and House rules restrict the ability of Members and staff to become involved with outside organizations in ways that require interaction with the federal government. An in-depth discussion of these provisions is found in Chapter 5 on outside employment. The following is an overview of several main considerations.

Members, officers, and employees are prohibited by 18 U.S.C. § 203 from asking for or receiving compensation for —representational services rendered in relation to a matter or proceeding in which the United States is a party or has a direct and substantial interest. Included are proceedings before any government department or agency. Additionally, House Rule 23, clause 3, prohibits Members and their staffs from receiving compensation by virtue of influence improperly exerted from a position in Congress.

Even absent compensation, employees are restricted by law and rule from private representation of others before the United States government or the pursuit of others' federal claims when not in the proper discharge of official duties. Section 205 of title 18 prohibits employees from acting as agent or attorney for another person or organization in prosecuting a claim against the United States or in connection with —any covered matter. A covered matter includes —any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter.<sup>35</sup>

These provisions have generally been enforced in instances when an official's public duties have conflicted with private interests. Enforcement of the criminal code is the responsibility of the Department of Justice.

Another provision that would apply to an employee seeking to represent others in federal matters is House Rule 25, clause 6. That rule states:

A person may not be an officer or employee of the House, or continue in its employment, if he acts as an agent for the prosecution of any claim against the Government or if he is interested in such claim, except as an original claimant or in the proper discharge of official duties.

As with 18 U.S.C. § 205, there is no requirement in the rule that the representation involve any compensation.

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<sup>35</sup> 18 U.S.C. § 205(h).

General ethical standards and rules restrict the ability of both Members and employees to engage in undertakings inconsistent with congressional responsibilities. Even the appearance of a conflict may adversely affect public perceptions and confidence. No special advantage should be provided to an outside organization with which a Member is affiliated. Thus, the Committee has consistently advised Members not to take an active role in lobbying Congress on behalf of a private organization since that would conflict with a Member's general obligation to the public.

**Example 7.** Employee A has developed expertise in a subject. Whether or not that knowledge was gained through her congressional employment, she may not represent others in the area of her expertise before a federal government agency, with or without compensation.

**Example 8.** Employee B may not help a private, not-for-profit organization in his spare time by lobbying Congress or executive agencies.

**Example 9.** Member C may sit on the board of an organization which, among other things, lobbies Congress, but the Member should not personally supervise the organization's lobbying activities since such action on behalf of a single private group would appear inconsistent with her responsibilities to the public at large.

### ***Mailing Lists and Outside Organizations***

A Member's publicized involvement in legislation or an issue of national concern may generate significant correspondence from outside the district. The names gathered comprise a mailing list that would be potentially valuable to organizations outside the Congress. However, either permitting a private organization to respond to letters received by a Member in an official capacity or providing outside groups access to an official mailing list would violate House rules and Committee on House Administration regulations.<sup>36</sup>

A Member may purchase a mailing list from an outside organization or unofficial entity (including his or her own campaign committee), at fair market value, provided the list is available on the same terms to any other organization that wants to purchase it (including the campaign of the Member's opponent).<sup>37</sup> For the purchase to be reimbursable from official allowances, it must meet the criteria ordinarily attendant to such expenses. In addition, the contents of any list must be purged of any campaign or politically related data before it may be used officially.

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<sup>36</sup> See House Rule 24; *Members' Handbook*, *supra* note 4.

<sup>37</sup> See *Members' Handbook*, *supra* note 4.

These rules should not be interpreted technically so as to infringe upon a Member's ability to communicate with constituents. Members may receive membership lists, sets of labels, or names from organizations operating in their districts if the information either forms the basis for an official mailing or is added to the Member's database with the organization's permission. In either instance, a Member may not accept a mailing list unless the source makes it generally available on similar terms to others.

***Example 10.*** Member A may not share with an outside organization the names of individuals who have written to him on a particular issue.

***Example 11.*** Member B may use official funds to purchase from her campaign committee a list of constituents, as long as any other person could also purchase the list for the same price, and political identifiers are deleted from the list. However, before entering into such a transaction, B's congressional staff should consult with the Committee on House Administration for guidance.

***Example 12.*** The local chamber of commerce maintains a mailing list of businesses in Member C's district. The chamber may provide Member C with a set of labels for use on an official mailing on the same terms as it would give the list to others. The office may not use the mailing to help the chamber update or correct its list.



**APPENDICES**

**Code of Ethics for Government Service**

72 Stat., Part 2, B12 (1958), H. Con. Res. 175, 85<sup>th</sup> Cong.

*Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the following Code of Ethics should be adhered to by all Government employees, including officeholders:*

**CODE OF ETHICS FOR GOVERNMENT SERVICE**

Any person in Government service should:

1. Put loyalty to the highest moral principals and to country above loyalty to Government persons, party, or department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly which is inconsistent with the conscientious performance of his governmental duties.
8. Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.

(Passed July 11, 1958.)

## Committee on Standards of Official Conduct Advisory Opinion No. 1<sup>1</sup>

### SUBJECT

On the Rule of a Member of the House of Representatives in Communicating With Executive and Independent Federal Agencies.

### REASON FOR ISSUANCE

A number of requests have come to the Committee for its advice in connection with actions a Member of Congress may properly take in discharging his representative function with respect to communications on constituent matters. This advisory opinion is written to provide some guidelines in this area in the hope they will be of assistance to Members.

### BACKGROUND

The first Article in our Bill of Rights provides that "Congress shall make no law . . . abridging the . . . right of the people . . . to petition the government for a redress of grievances." The exercise of this Right involves not only petition by groups of citizens with common objectives, but increasingly by individuals with problems or complaints involving their personal relationships with the Federal Government. As the population has grown and as the Government has enlarged in scope and complexity, an increasing number of citizens find it more difficult to obtain redress by direct communication with administrative agencies. As a result, the individual turns increasingly to his most proximate connection with his Government, his representative in the Congress, as evidenced by the fact that congressional offices devote more time to constituent requests than to any other single duty.

The reasons individuals sometimes fail to find satisfaction from their petitions are varied. At the extremes, some grievances are simply imaginary rather than real, and some with merit are denied for lack of thorough administrative consideration.

Sheer numbers impose requirements to standardize responses. Even if mechanical systems function properly and timely, the stereotyped responses they produce suggest indifference. At best, responses to grievances in form letter or by other automated means leave much to be desired.

Another factor which may lead to petitioner dissatisfaction is the occasional failure of legislative language, or the administrative interpretation of it, to cover adequately all the merits the legislation intended. Specific cases arising under these conditions test the legislation and provide a valuable oversight disclosure to the

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<sup>1</sup> Issued January 26, 1970. The Opinion should be read in conjunction with subsequent legislation, regulations, and rules, such as 5 U.S.C. § 557(d), relating to prohibited *ex parte* communications to administrative agencies.

Congress.

Further, because of the complexity of our vast federal structure, often a citizen simply does not know the appropriate office to petition.

For these or similar reasons, it is logical and proper that the petitioner seek the assistance of his Congressman for an early and equitable resolution of the problem.

### **REPRESENTATIONS**

This Committee is of the opinion that a Member of the House of Representatives, either on his own initiative or at the request of a petitioner, may properly communicate with an Executive or Independent Agency on any matter to:

- request information or a status report;
- urge prompt consideration;
- arrange for interviews or appointments;
- express judgments;
- call for reconsideration of an administrative response which he believes is not supported by established law, Federal Regulation, or legislative intent;
- perform any other service of a similar nature in this area compatible with the criteria hereinafter expressed in this Advisory Opinion.

### **PRINCIPLES TO BE OBSERVED**

The overall public interest, naturally, is primary to any individual matter and should be so considered. There are also other self-evident standards of official conduct which Members should uphold with regard to these communications. The Committee believes the following to be basic:

- 1 A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.
- 2 Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.
- 3 A Member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.

### **CLEAR LIMITATIONS**

Attention is invited to United States Code, Title, 18, Sec. 203(a) which provides in part:

Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept any compensation

for any representational services, as agent or attorney or otherwise, rendered or to be rendered either receives or agrees to receive, either personally or by another

(A) at a time when such person is a Member of Congress . . . ; or

(B) at a time when such person is an officer or employee of the United States in the . . . legislative . . . branch of the Government . . . in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission . . .

shall be subject to the penalties set forth in section 216 of this title.<sup>2</sup>

Section 216 provides for imprisonment for up to one year for engaging in the conduct, and for imprisonment for up to five years knowingly engaging in the conduct, plus fines.

The Committee emphasizes that it is not herein interpreting this statute but notes that the law does refer to any compensation, directly or indirectly, for services by himself or another. In this connection, the Committee suggests the need for caution to prevent the accrual to a Member of any compensation of any such services which may be performed by a law firm in which the Member retains a residual interest.

It should be noted that the above statute applies to officers and employees of the House of Representatives as well as to Members.

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<sup>2</sup> As amended by the Ethics Reform Act of 1989, P.L. 101-194.



**Committee on Standards of Official Conduct  
Advisory Opinion No. 2<sup>1</sup>**

**SUBJECT**

On the subject of a Members' Representational Allowance.<sup>2</sup>

**REASON FOR ISSUANCE**

A number of requests have come to the Committee for advice on specific situations which to some degree, involve consideration of whether monies appropriated for Members' Representational Allowance are being properly utilized.

A summary of the responses to these requests forms the basis for this Advisory Opinion which, it is hoped, will provide some guidelines and assistance to all Members.

**BACKGROUND**

The Committee requested the Congressional Research Service to examine in depth the full scope of the laws and the legislative history surrounding Members' clerk hire. The search produced little in the way of specific parameters in either case law or congressional intent, concluding that “. . . no definitive definition was found . . .” It is out of this absence of other guidance the Committee feels constrained to express its views.

The clerk hire allowance [now included in the Members' Representational Allowance (MRA)]<sup>3</sup> for Representatives was initiated in 1893 (27 Stat. 757). The law providing it spoke of providing clerical assistance to a Representative “in the discharge of his official and representative duties . . .” The same phraseology is used today in each Legislative Appropriations bill and by the Clerk of the House in his testimony before the Subcommittee on Legislative Appropriations. An exact definition of “official and representative duties” was not found in the extensive materials researched. Remarks concerning various bills, however, usually refer to “clerical service” or terms of similar import, thus implying a consistent perception of the term as payment for personal services.

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<sup>1</sup> Issued July 11, 1973.

<sup>2</sup> This memorandum has been updated to reflect current terminology. During each session of Congress, each Member gets a single allowance, known as the Members' Representational Allowance (MRA) to conduct official and representational duties. The Clerk Hire Allowance, the Official Expenses Allowance, and Official Mail Allowance have all been merged into the MRA.

<sup>3</sup> *Id.*

### SUMMARY OPINION

This Committee is of the opinion that the funds appropriated for [Members to hire staff] should result only in payment for personal services of individuals, in accordance with the law relating to the employment of relatives, employed on a regular basis, in places as provided by law, for the purpose of performing the duties a Member requires in carrying out his representational functions.

The Committee emphasizes that this opinion in no way seeks to encourage the establishment of uniform job descriptions or imposition of any rigid work standards on a Member's staff. It does suggest, however, that it is improper to levy, as a condition of employment, any responsibility on any clerk to incur personal expenditures for the primary benefit of the Member or of the Member's congressional office operations, such as subscriptions to publications, or purchase of services, goods or products intended for other than the employee's own personal use.

The opinion clearly would prohibit any Member from retaining any person from his [MRA] under either an express or tacit agreement that the salary to be paid him in lieu of any present or future indebtedness of the Member, any portion of which may be allocable to goods, products, printing costs, campaign obligations, or any other non-representational service.

In a related regard, the Committee feels a statement it made earlier, in responding to a complaint, may be of interest. It states: "As to the allegation regarding campaign activity by an individual on the House [payroll], it should be noted that, due to the irregular time frames in which the Congress operates, it is unrealistic to impose conventional work hours and rules on congressional employees. At some times, these employees may work more than double the usual work week - at others, some less. Thus employees are expected to fulfill the clerical work the Member requires during the hours he requires and generally are free at other periods. If, during the periods employees are free and they voluntarily engage in campaign activity, there is no bar to this. There will, of course, be differing views as to whether the spirit of this principle is violated, but this Committee expects Members of the House to abide by the general proposition."

**Select Committee on Ethics  
Advisory Opinion No. 6<sup>1</sup>**

**SUBJECT**

Acceptance of in-kind services for official purposes.

**REASON FOR ISSUANCE**

House Rule 24 provides that no funds may be paid into any unofficial office account subsequent to March 2, 1977, and that such accounts must be abolished by January 3, 1978. The definition of an unofficial office account included in the new Rule focuses on the most common form, *i.e.*, a privately subsidized account used to supplement official allowances.

The legislative history of Rule 24 refers to an unofficial office account as a fund, repository, or process whereby funds are received or expended. The reasons for adopting new Rule 24, as presented in the Financial Ethics report of the Commission on Administrative Review (H. Doc. 95-73, February 14, 1977), emphasize that eliminating private support of the public's business should be the primary objective of a new Rule.

The Commission strongly believes that private funds should be used only for politically-related purposes. Official allowances should reflect the necessary cost of official expenses. . . . To suggest otherwise would be to accept or condone the continuation of the present system [of unofficial office accounts] which, at the very least, allows for the appearance of impropriety, and at worst, creates a climate for potential "influence pedaling" through private financing of official expenses of Members of Congress.

Although it is clear that acceptance of monetary contributions to sustain such accounts was perceived as conduct to be prohibited by the new Rule, questions have been raised concerning the application of Rule 24 to acceptance of certain in-kind services (*e.g.*, office supplies and equipment, district office space, etc.) and whether such items will be treated differently than monetary contributions for purposes of the Rule 24 prohibition.

The Select Committee finds that no distinction can be made between in-kind and monetary contributions. Whether the private support alluded to in the Commission's report is in the form of a monetary contribution or in the form of an in-

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<sup>1</sup> Issued on May, 9, 1977. This opinion has been updated, *inter alia*, to reflect the renumbering of the House Rules in the 106<sup>th</sup> and 107<sup>th</sup> Congresses.

kind service is not relevant in view of the intended prohibition against the private financing of official business. Moreover, it can hardly be argued that donation of in-kind services is any less an infusion of private support for official business than is the donation of money.

At least two precedents for treating in-kind services as monetary contributions are found in regulations promulgated by the Federal Election Commission (FEC) and the Internal Revenue Service (IRS). Those regulations require the inclusion of in-kind donations as contributions to unofficial office accounts, thus confirming the Select Committee's understanding that money and in-kind contributions should be treated the same.

The FEC defines an "office account" (unofficial office account) as "an account established for the purposes of supporting the activities of a Federal or State officeholder which contains campaign funds and funds donated. . . ." (11 CFR 113.1(b)). A contribution includes a thing of value, including in-kind services. (11 CFR 100.51(a), 100.52 (d)(1)). Therefore, according to the FEC definitions, unofficial office accounts may encompass in-kind services or resources.

Similarly, the IRS considers the donation of in-kind resources as a "contribution," applying the criterion of "anything of value." The IRS treats the contribution of in-kind services or resources used for official purposes as personal income to the Member, just as it treats contributions to unofficial office accounts.

In sum, the Select Committee finds that for the purposes of applying Rule 24, no logical distinction can be drawn between the private contribution of in-kind services and the private contribution of money, and that both perpetuate the very kind of unofficial office accounts and practices that are prohibited by House Rule 24.

Equally clear, however, is that various in-kind services and functions provided by federal, state and local government agencies do not fall in the same category as private donations of money or in-kind services. Thus, the provision of office space or rooms for constituent meetings, etc., by a state or local government would not be prohibited by application of this Rule. Of course, the occasional use of privately owned meeting space where no other appropriate public accommodations are reasonably available for meeting constituents does not fall within the proscriptions of the new Rule.

Additionally, application of the Rule would not prohibit a Member from continued participation with various educational intern, fellowship, or volunteer programs. Members have long recognized that there is an inherent educational and professional benefit in interns, fellows, and volunteers viewing first hand the Legislative Branch of government, and that there are compelling public policy considerations for encouraging such programs. There is nothing in the legislative history that suggests an intent to discontinue these programs, nor has there surfaced

any evidence of abuses resulting from the infusion of private money into public business causing conflict of interest or other situations intended to be prohibited by the New Rule. The Select Committee believes these programs are of primary benefit to the persons involved and notes that interns, fellows, and volunteers are not on the payroll of the House, nor are they considered to be employees of the House of Representatives. Therefore, this interpretation of Rule 24 does not apply to intern programs, provided the internships are primarily for educational purposes and do not give undue advantage to special interest groups or others with a direct interest in legislation.

However, it is clear that a Member would be violating the intent and the spirit of House Rule 24 if he attempted to supplement his official allowance by raising, receiving, or disbursing contributions to hire or support interns in his office. Therefore, it follows that a Member and his staff are prohibited from personally raising, receiving, or disbursing contributions used to support an educational intern, fellowship, or volunteer program. This holding represents the only effective method for restricting the potential to collect and maintain, directly or indirectly, unofficial funds for supplementing staff assistance and the officially provided clerk-hire allowance.

#### SUMMARY OPINION

For purposes of House Rule 24, the private contribution of in-kind services for official purposes is prohibited. However, Rule 24 does not apply to services provided by federal, state and local government agencies, or to the occasional use of privately-owned meeting space where not public accommodations are reasonably available for meeting with constituents. Nor does Rule 24 apply to interns or volunteers in a Member's office, based on the understanding that such intern programs are primarily of educational benefit to the intern and do not give undue advantage to special interest groups. However, Members and their staffs may not personally raise, receive or disburse any private contributions for intern programs associated with their offices.

**Select Committee on Ethics**  
**Advisory Opinion No. 13<sup>1</sup>**

**SUBJECT: GENERAL INTERPRETATION OF HOUSE RULE 25, DEALING  
WITH LIMITATIONS ON MEMBERS' OUTSIDE EARNED INCOME**

*1. General*

(a) *Purpose of the rule.* House Rule 25, was adopted on March 2, 1977 [as Rule 47] as part of the financial ethics code. Originally limited to Members, it was amended by the Ethics Reform Act of 1989 to include officers and senior employees.<sup>2</sup> Besides restricting the type of employment in which covered individuals can engage, the Rule limits the amount of “outside earned income” a Member, officer, or senior employee may have.<sup>3</sup> Two major considerations prompted adoption of the Rule. First, substantial payments to a Member, officer, or senior employee for rendering “personal services” to outside groups presents a significant and avoidable potential for conflict of interest. Second, it is inconsistent with the concept that being a Member, officer, or senior employee of Congress is a full-time job to permit substantial earnings from other employment.

(b) *Annual Limitation generally.* Clause 1 of the Rule prohibits a Member, officer, or senior employee from having outside earned income attributable to a calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule as of January 1 of such calendar year.<sup>4</sup> In order for an item to be counted against this limitation for a particular year: (i) it must be “outside earned income” within the meaning of Rule 25; and (ii) it must be attributable to that year. The Rule defines outside earned income to mean “wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered.”

Outside earned income is attributed to the year in which the Member's, officer's or employee's right to receive it becomes certain (*i.e.*, under the accrual method) rather than to the year of receipt. Therefore, receipt of income earned during a particular year cannot be deferred to a future year in which the Member, officer, or employee has less outside earned income or until after the individual retires from Congress. The

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<sup>1</sup> This Opinion was originally issued in October 1978. It has been updated to reflect changes to applicable rules and laws made by the Ethics Reform Act of 1989, P.L. 101-194, the Federal Employees Pay Comparability Act, P.L. 101-509, and the Legislative Branch Appropriations Act, 1992, P.L. 102-90.

<sup>2</sup> Senior employees are those compensated at or above 120 percent of the GS-15 base salary.

<sup>3</sup> In addition to being a Rule of the House of Representatives, the outside earned income limitations of Rule 25 have been enacted into law. *See* 5 U.S.C. Appendix 4, §§ 501-505. As a result, besides action by the Committee on Standards of Official Conduct and House of Representatives, the limitations may be enforced through civil action by the Attorney General.

<sup>4</sup> The Executive Level II salary is normally the same as that paid to a Member of Congress.

limitation is not applicable to compensation for personal services rendered prior to the effective date of Rule 25, or prior to the effective date of the individual's becoming a Member, officer, or employee, if later. Outside earned income is determined without regard to any community property law. That is, even though under applicable community property law one-half of any personal service income earned by an individual is deemed to belong to the spouse, all of such income is considered earned income of the Member, officer, or employee for purposes of the Rule.

(c) *Real facts controlling.* The limitations imposed by Rule 25 may not be avoided by the characterization or disposition of any payment for services rendered. In all cases, the real facts will control. For example, if a spouse, child, other relative of a Member, officer, or employee, or trust for the benefit of any of them, is paid an amount, however denominated, and the true consideration for the payment is services rendered by the Member, officer, or employee, the amount will be deemed outside earned income by the Member, officer, or employee. Similarly, the label or characterization placed on a transaction, arrangement or payment by the parties may be disregarded for purposes of the Rule. Thus, if amounts received or to be received by a Member, officer, or employee are in fact attributable to any significant extent to services rendered by the Member, officer, or employee, the characterization of such amounts as partnership distributive share, dividends, rent, interest, payment for a capital asset, or the like, will not serve to prevent the application of Rule 25 to such amounts. Moreover, the Rule applies to outside earned income realized in a medium other than money, for example, in property or services or through a bargain purchase or forbearance in consideration of personal services rendered.

In short, income may not be recharacterized in order to circumvent the Rule. Indeed, characterization of income is essentially irrelevant. For purposes of this Opinion, there are two types of income – earned and unearned. If the compensation received is essentially a return on equity, then it would generally not be considered to be earned income. If the income is not a return on equity, then such income would generally be considered to be earned income and subject to the limitation.

When such amounts received or to be received by a Member, officer, or employee are designated as salary, fees, or commissions, the overriding presumption is that such amounts, almost by definition, constitute compensation for personal services rendered. An honorarium from a speaking engagement, for example, is obviously outside earned income.<sup>5</sup> With respect to income from business ventures, the Committee is convinced that in the overwhelming majority of cases, there will be little or no difficulty in determining whether certain income is subject to the Rule. Again, the facts of each individual case will govern applicability of the Rule, but the principles set forth in this Opinion should be followed in making that determination.

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<sup>5</sup> The Ethics Reform Act of 1989 banned receipt of all honoraria by Members, officers, and senior employees, effective January 1, 1991. However, employees paid below the senior staff pay level would be allowed to receive honoraria for speeches, appearances, and articles unrelated to their official duties or status in Congress. See chapter 5 of this volume for more discussion on this point.

## 2. *Outside earned income from business ventures*

This Advisory Opinion differentiates between businesses in which both capital and personal services are material income-producing factors and those in which personal service is the only material income-producing factor.

(a) *Personal service businesses.* Where a Member, officer, or employee owns or participates in a personal service business, such as a professional practice, in which capital is not a material income-producing factor, his entire share of the profits is deemed to be outside earned income for purposes of the Rule, except to the extent he can demonstrate that his income in fact represents a return on investment. In general, capital is not a material income-producing factor where gross income of the business consists principally of fees, commissions or other compensation for personal services performed by an individual. Thus, the practice of one's profession by a doctor,<sup>6</sup> lawyer, insurance broker, or real estate agent will not, as such, be treated as a business in which capital is a material income-producing factor. Even where the practitioner may have a substantial investment in professional equipment or in the physical plant constituting the office from which he conducts his practice, the capital investment would be regarded as only incidental to the professional practice.<sup>7</sup>

Moreover, the fact that the Member, officer, or employee may not personally participate to any substantial extent in the rendering of services to the customers or clients of the business, all such services being performed by assistants or associates, would not serve to justify classification of his or her share of the business income as other than earned income. If a Member, officer, or employee shares in the profits of a personal service organization without being required to perform any significant productive services, absent a strong showing to the contrary, it will be presumed that the Member, officer, or employee is being compensated for attracting or retaining clients, and such income is considered outside earned income.

*Law practices.* Since there are a number of attorneys serving in the House of Representatives, for purposes of example, application of the Rule to the practice of law is specifically addressed in this Opinion. Those Members, officers, and senior employees who previously maintained an active affiliation with a law firm generally find it necessary to enter into a buy-out agreement with their partners in order to liquidate their equity in the firm. This is perfectly appropriate. Amounts received or receivable by a Member, officer, or employee in payment for an interest in a law firm or similar organization upon retirement from it would not constitute outside earned income so long as the amounts payable do not, in effect, represent a continuing

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<sup>6</sup> The House amended Rule 25 during the 108<sup>th</sup> Congress in 2003 to exempt the practice of medicine from this provision. However, as discussed above, this restriction is also codified as part of the Ethics in Government Act of 1978 (5 U.S.C. app. 4 § 502(a)), and no corresponding change has been made to the statute. Thus, while the House rule has removed the fiduciary restriction to allow the practice of medicine for compensation, the statutory ban remains in effect.

<sup>7</sup> Note, however, that Members, officers, and senior employees covered by the earned income limit are also totally precluded from receiving compensation for practicing a profession which involves a fiduciary relationship. See House Rule 25, clause 2; 5 U.S.C. app. 4 § 502.



participation in the law firm and the total amount payable is not in excess of the fair market value of the interest of the Member, officer, or employee. Normally such arrangements call for fixed payments at annual or more frequent intervals over a period of years. In some cases, however, the retiring partner and those continuing the business are unable to agree on a value for one or more assets of the business, such as contingent fee cases or accounts receivable of dubious value, and the buy-out agreement may accordingly provide that the retiring partner will be paid a share of such items, if, as and when they are collected.

Payments to a Member, officer, or employee under a buy-out agreement will not be deemed to be outside earned income where the arrangements are entered into in good faith and agreed to by all the partners, and reflect the usual and customary value of the equity generally accorded to partners in similar law practices in the same geographic area. A buy-out agreement should also be reasonably calculated to avoid the Member's, officer's, or employee's participation in post-withdrawal profits. In general, the proceeds resulting from a buy-out agreement are taxed as capital gains. If such an agreement is not limited to liquidation of the Member's, officer's or employee's equity in the firm, and includes payments which might be taxable as earned income, any such payments under the agreement might be such to the earned income limitation. The Committee notes that Rule 25, clause 2, prohibits a Member, officer, or employee from receiving compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship. Even if no compensation is received, the Member, officer, or employee may not permit his or her name to be used by any such firm, partnership, association, corporation, or other entity. This limitation parallels the American Bar Association Code of Ethics, which states in part: "A lawyer who assumes . . . a legislative post . . . shall not permit his name to remain in the name of a law firm or to be used in the professional notice of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm." (ABA Disciplinary Rule 2-102B).

*(b) Business where capital is a material income-producing factor.* Capital is a material income producing factor if a substantial portion of the gross income of the business is attributable to the employment of capital, as reflected, for example, by a substantial investment in inventories, plant, machinery or other productive equipment. This Opinion discusses the application of the Rule in such cases to income from a fully taxable corporation and income from an unincorporated business or Subchapter S corporation.

*(1) Taxable corporations*

If a Member, officer, or employee renders services to a fully taxable business corporation, he or she will not be deemed to realize outside earned income from such services beyond the amount of salary or other form of extra compensation designated as consideration for the personal service rendered. In those cases where the sole financial interest of the Member, officer, or employee is stock in the corporation, an increase in the net assets of the corporation would not be considered to be subject to the limitation. An increase in the value of stock or other property is not ordinarily

treated as earned income either for tax purposes or under generally accepted accounting principles; and any increase in the corporation's net profits would be subject first to corporate income tax and then to personal income tax before the Member, officer, or employee receives any resulting increment to his or her wealth through a dividend or sale of stock. The foregoing has not application, of course, to income which a Member, officer, or employee earns through personal efforts in dealings with third parties but causes to be paid to a corporation and distributed. For example, if a Member, officer, or employee incorporates for the purpose of conducting a personal service, and all fees are paid to the corporation from which "profits" are then drawn, all such amounts would be considered outside earned income.

In sum, if a Member, officer, or employee renders services to a taxable corporation, only the salary or other compensation received for those services would be subject to the limitation, but not any increase in the corporation's assets or a share of the profits. This ruling is consistent with the intent of the Commission on Administrative Review which recommended the limitation on outside earned income. In its report (House Document No. 95-73), the Commission stated that ". . . Members should be able to render personal services to manage or protect their equity . . . without having to allocate these personal services toward the 15 percent limitation."

*(2) Subchapter S corporations, partnerships, unincorporated businesses*

In those cases where the Member, officer, or employee has an ownership interest in a business for which he or she also performs services, as in a subchapter S corporation or a partnership, some part of the individual's share of the profits of that business may reflect the value of services, and thus would be considered outside earned income. The determining factor is whether the Member's, officer's, or employee's personal services generate significant income for the business. Of course, if the Member, officer, or employee receives formal income from the business, for example, payments designated as salary or fees, such amounts would be considered earned income. Additionally, in those cases where other partners or associates are providing capital and managerial experience, and the principal role of the Member, officer, or employee is to refer clients to the business or to help retain existing customers or clients, the Member, officer, or employee would be deemed to be rendering income-producing services, even though the actual time involved might be minimal. However, if the Member, officer, or employee is engaged primarily in the general oversight and management or protection of his or her investment, such services would not be deemed to generate significant income. Such non-income generating services would include consultation with other management officials, analysis of financial and other reports, participation in formal meetings, and making decisions concerning the general operations and investment strategy of the business. The application of the Rule to the various types of business organizations as discussed in this Opinion applies equally to a business owned or controlled by the Member, officer, or employee or the individual's family. Again, the determining factor is whether or not the personal services of the Member, officer, or employee actually generate any significant income for the business. In those situations where the services rendered by the Members, officers, or employees are incidental and do not

generate significant income, no part of a share of the profits or any increase in the assets of the business would be deemed to be outside earned income.

The Committee emphasizes that the definition of earned income in Rule 25, which excludes amounts received by a Member, officer, or employee from a family controlled business “so long as the personal services actually rendered by the individual . . . do not generate a significant amount of income,” was simply intended to assure Members, officers, and employees that they could continue to make decisions and take actions necessary to manage or protect their equity in a family trade or business, and would not be forced to divest themselves of their family business interests. As with any business, a Member, officer, or employee would not be required to allocate a share of the profits of the business as outside earned income when the facts and circumstances show that the income is in reality a return on investment. For example, if the Member, officer, or employee owns a hardware store and the services rendered are incidental, such as occasionally serving customers, the income received from the business is basically a return on equity, (i.e., profits from the sale of hardware goods) and is not generated by the services of the Member, officer, or employee. Similarly, if the Member, officer, or employee gives overall direction to the management of the business for a family owned farm, the income received from the farming operations is not generated by the personal services of the Member, officer, or employee, but rather is basically a return on equity from the sale of crops or dairy products. These types of businesses are distinguishable from a personal service business where income is essentially produced by the services of the individual affiliated with the organization.<sup>8</sup>

*(3) When income is attributable*

*(a) Income from pre-effective date services.* The Rule excludes from earned income any compensation derived by a Member, officer, or employee for personal services rendered prior to the effective date of the Rule or prior to the effective date becoming a Member, officer, or employee, if later. This provision would serve to exclude from the limitation, for example, most renewal commissions paid to a Member, officer, or employee with respect to life insurance policies sold prior to the effective date, or similar commissions received by a Member, officer, or employee with respect to pre-employment leases in which the individual was the leasing agent. In most such arrangements, payment of the commission is not contingent upon the performance of any future services by the recipient; the only contingency is that the insured or lessee continue to pay premiums or rent, as the case may be. The exclusion would also apply to a fee received by a Member, officer, or employee who was a lawyer where all the work had been done prior to the effective date. However, this exclusion would not apply to income derived from the continuing or future business of clients brought into the firm prior to the effective date of the Rule.

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<sup>8</sup> Note, however, that no compensation could be received for serving as an officer or director of the family owned business. See Rule 25, clause 2; 5 U.S.C. app. 4 § 502.

(b) *Application of the limitation to part years.* Where an individual becomes a Member, officer, or employee during any calendar year, the Rule applies only to outside earned income of the individual attributable to periods after the effective date of becoming a Member, officer, or employee. For the balance of the calendar year, the applicable limitation will be 15% of the Executive Level II salary for that part of the year, and only outside earned income attributable to that part is counted against the limitation.

(4) *Other provisions*

(a) *Payments attributed to deferred compensation plans.* Amounts received by a Member, officer, or employee from a tax-qualified pension, profit sharing or stock bonus plan are not treated as outside earned income, as provided in the Rule, nor are contributions to such a plan counted as outside earned income. Amounts received by a Member, officer, or employee from a non-qualified deferred compensation plan which were earned in a year prior to the effective date of the Rule or the individual coming to Congress are not outside earned income for the year received under the principle explained in section 3(a), provided no part of the consideration for such payments is current services. Amounts set aside for a Member, officer, or employee under a non-qualified deferred compensation plan for services rendered after the Rule's effective date or coming to Congress will generally constitute outside earned income of the Member, officer, or employee for that year, even though they will not be received until a later year, unless receipt is subject to a substantial risk of forfeiture.

(b) *Assignment of income to charities.* Notwithstanding the general holding of this Opinion that a Member, officer, or employee cannot deflect the application of the Rule by assigning to another income which in fact was earned through rendering services, earned income assigned by a Member, officer, or employee to a tax-exempt charity will not be counted as part of the outside earned income of the Member, officer, or employee, provided the individual is not a "disqualified person" with respect to the recipient organization within the meaning of section 4946(a) of the Internal Revenue Code. For the purposes of this portion of the Rule, such income would not be deemed to have been "received" by the Member, officer, or employee provided that he did not personally benefit in any way from such income.<sup>9</sup>

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<sup>9</sup>The Internal Revenue Service has interpreted the definition of "gross income" in section 61 of the Internal Revenue Code as follows:

Where . . . pursuant to an agreement or understanding, services are rendered to a person for the benefit of an organization described in section 170(c) and an amount for such services is paid to such organization by the person to whom the services are rendered, the amount so paid constitutes income to the person performing the services. (See the last sentence of Reg. § 1.61-2(c).)

If an amount paid to charity is treated as constructive income, a Member, officer, or employee could possibly receive an indirect tax benefit. For example, such amounts may be counted as adjusted gross income for the purposes of computer entitlement to make contributions to a tax-favored "Keogh" retirement plan. The Member, officer, or employee would also be allowed to take an itemized deduction for a charitable contribution under section 67 of the Internal Revenue Code. Any tax or other financial benefit on account of payments directed to charity in consideration of personal services may result in the Member, officer, or employee being viewed as receiving income for the purposes of Rule 25 and 5 U.S.C. § 502.

(c) *Honoraria*. Clause 1(a)(1)(B) of Rule 25 provides that a Member, officer, or employee of the House may not receive any honorarium. Clause 3(c) defines “honorarium” to exclude any actual and necessary travel expenses incurred by the Member, officer, or employee in connection with the event. Payment of actual and necessary travel expenses of a relative accompanying the Member, officer, or employee are also excluded from the limitation.

A payment in lieu of an honorarium may be made directly by the sponsor of an event to a qualified charitable organization on behalf of a Member, officer, or employee. No such payment may exceed \$2,000, nor may it be made to a charitable organization from which the Member, officer, or employee or a parent, sibling, spouse, child, or dependent relative of the Member, officer, or employee derives any financial benefit.<sup>10</sup> Section 7701(k) of the Internal Revenue Code provides that an amount so paid to a charitable organization is not deemed income to the Member, officer, or employee for tax purposes, nor is any charitable deduction allowed.

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<sup>10</sup> See Rule 25, clause 1(a)(3); 5 U.S.C. app. 4 § 501(c).

**Committee on Standards of Official Conduct  
Advisory Opinion No. 5<sup>1</sup>**

**SUBJECT**

General interpretation of House Rule 23, Clause 11.

**BACKGROUND AND DISCUSSION**

House Rule 23, clause 11 [originally adopted on January 15, 1979] provides as follows:

A Member . . . may not authorize or otherwise allow an individual, group, or organization not under the direction and control of the House to use the words “Congress of the United States,” “House of Representatives,” or “official business,” or any combination of words thereof, on any letterhead or envelope.

This addition to the Code of Official Conduct took effect upon adoption. The primary purpose of clause 11 is to prohibit Members from authorizing private organizations to use a facsimile of their congressional stationery to solicit contributions or political support in a direct mail appeal. Such use of congressional letterhead by non-House groups is clearly intended to convey the impression that the solicitation is endorsed by the Congress or is related to the official business of the Member who signs the letter. In adopting clause 11, the House has determined that the use of congressional letterhead facsimiles by private organizations is a deliberate misrepresentation which reflects discredit upon the House of Representatives.

Rule 23, clause 11, generally would prohibit a Member from authorizing a non-House individual or group to use that Member's congressional stationery, or any letterhead that purports to be an official communication from the Congress, in any mailing paid for with non-appropriated funds. This prohibition would apply to any letterhead designed in such a manner as to convey the impression that the letter is an official communication. The Committee emphasizes that Rule 23, clause 2, directs Members to “adhere to the spirit and the letter of the Rules of the House.” Therefore, since clause 11 is intended to prohibit solicitations by private interest groups on facsimiles of congressional stationery, it would appear to be a violation of the spirit of that rule if a Member authorized a non-House group to use letterhead that did not contain the words prohibited by clause 11, but which was designed to convey the impression that it is an official communication from the Congress. For

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<sup>1</sup> Issued on April 4, 1979. This opinion has been updated to reflect the renumbering of the House Rules in the 106<sup>th</sup> and 107<sup>th</sup> Congresses.

example, letterhead which purports to be an official communication by containing a Member's committee assignments, office address, and the "congressional seal" would be contrary to the spirit of clause 11. The Committee notes in this regard that title 18 of the United States Code, section 713, specifically prohibits use of the United States seal for the purpose of conveying a false impression of sponsorship by the United States Government.

The clause 11 prohibition is not intended in any way to restrict a Member's communication with the public or his right to lend his name to any organization or interest group. The rule imposes no restriction on a Member's freedom to sign a fund-raising appeal or other solicitation of political support on a non-House group's own letterhead, and be identified as a Member of Congress. Similarly, a Member's name and title may appear in the letterhead of a non-House organization (*e.g.*, if the Member serves in an official capacity or honorary position with that organization), provided that the letterhead does not purport to be an official communication from the Congress.

The terms "non-House individual, group, or organization" as used in the rule would not extend to a Member's principal campaign committee. The Committee understands that the clause 11 prohibition on lending congressional letterhead to private groups was not intended to prohibit a Member from using a facsimile of official stationery in fund-raising activities for his own campaign.<sup>2</sup> This interpretation is based on the debate in the Democratic Caucus which recommended adoption of clause 11 on December 6, 1978, and on the legislative history of a similar amendment that was offered to the Ethics in Government Act during the 95<sup>th</sup> Congress (*see* CONGRESSIONAL RECORD, September 20, 1978, page H10212). It should also be noted that the Senate Select Committee on Ethics issued an advisory opinion imposing comparable prohibitions on use of official stationery by non-Senate groups, and did not apply those prohibitions to a Senator's campaign committee.

The Committee emphasizes again in this regard that the clear intent of clause 11 is to prohibit special interest groups and other private organizations from using congressional letterhead for political solicitations. Such use of congressional stationery facsimiles conveys the false impression that the private group is sponsored or endorsed by the House of Representatives. This is not the case when a Member, strictly on his behalf rather than for a third party, uses a facsimile of his personalized stationery for campaign fund raising appeals or other political mailings. With respect to campaign solicitations, the Committee notes that such letters must include a notice regarding the availability of campaign reports filed with the Federal Election

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<sup>2</sup> Other restrictions, however, including the Deceptive Mailings Prevention Act of 1990, P.L. 101-524, pose difficulties with regard to use of a facsimile of congressional letterhead in a campaign. *See* 39 U.S.C. §§ 3001, 3005.

Commission, as required by title 2 of the United States Code, section 435.<sup>3</sup> Moreover, with respect to other political mailings, the Committee does not believe that it is improper for a Member to use his congressional letterhead to send, for example, thank you notes to contributors or other politically-related letters which may not be mailed under the frank. The Committee is confident that use of a Member's personalized congressional letterhead for political mailings on his own behalf would not be misinterpreted as an official communication from the House of Representatives or an endorsement by the Congress. In sum, the abuse of congressional stationery that clause 11 is designed to correct is not present in the case of a Member's campaign committee, nor was the rule intended to prohibit a Member's use of his congressional letterhead for political mailings.

The prohibitions of clause 11 also would not apply to the Democratic and Republican Congressional Campaign Committees, nor would it apply to the various informal Member organizations or caucuses composed solely of Members of Congress. The ad hoc Member groups, which are quasi-official in nature, and the party campaign committees would not be considered "non-House" organizations for purpose of Rule 23, clause 11.

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<sup>3</sup> This provision was repealed by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, title I, § 105(1), 93 Stat. 1354 (Jan. 8, 1980). Section 441d(a) of Title 2 of the United States Code now requires that campaign fund solicitations and other candidate political communications clearly state that it has been paid for by the candidate's campaign committee.



## Committee on Standards of Official Conduct Advisory Opinion No. 6<sup>1</sup>

### SUBJECT

General Interpretation of House Rule 23, Clause 6, and House Rule 24.

### REASON FOR ISSUANCE

The Committee has received an inquiry concerning the application of House Rule 23, clause 6, and Rule 24, to the use by a Member of campaign funds to advertise or promote a town meeting in his district and in areas newly added to the district by reapportionment after notice of the meeting has been mailed under the frank.

### BACKGROUND

House Rule 23, clause 6, prohibits a Member from expending funds from his campaign account that are not attributable to “bona fide campaign or political purposes.” Rule 24, clause 1, bars a Member from maintaining, or having maintained for his use, “an unofficial office account.” These provisions were included in the amendments to the House Rules made by H. Res. 287, 95<sup>th</sup> Congress, adopted pursuant to the recommendations of the Commission on Administrative Review. The Commission, in explaining the purpose of these rules, observed (*Financial Ethics*, H.R. Doc. No. 95-73, 95<sup>th</sup> Congress, 1st Session 23 (1977)):

The Commission strongly believes that a wall should be built between political expenses and public money, that private money should not be relied upon to pay for the conduct of the House's official business. It regards such a wall as critically important to the integrity of the representative process . . . .

Although federal statutory law (2 U.S.C. § 439a) generally would allow a Member to use excess campaign funds to defray ordinary and necessary expenses incurred in connection with holding office, the amendment to House Rule 23, clause 6, made by H. Res. 287, 95<sup>th</sup> Congress, specifically prohibits this practice. As the Select Committee on Ethics observed in its *Final Report* (H.R. Report No. 95-1837, 95<sup>th</sup> Congress, 2<sup>nd</sup> Session (1979)): “The intent of this rule is to restrict the use of

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<sup>1</sup> Issued on September 14, 1982. This opinion has been updated to reflect changes to applicable rules made by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess., 103 Stat. 1716 (Nov. 30, 1989), as amended by Pub. L. No. 101-280, 101<sup>st</sup> Cong., 2d Sess., 104 Stat. 149 (May 4, 1990). It also reflects the re-numbering of the House Rules in the 106<sup>th</sup> and 107<sup>th</sup> Congresses. The opinion should also be read in light of the amendment to House Rule 24 in the 109<sup>th</sup> Congress to permit the limited use of funds from a Member's principal campaign committee to pay for certain official expenses. See Chapter 4 concerning Campaign Activity for further guidance.

campaign funds to politically related activities and to thus prohibit their conversion to personal use or to supplement official allowances.” Rule 24 has a similar purpose. It was intended to eliminate the “potential for ‘influence peddling’ through private financing of the official expenses of Members of Congress.” See *Financial Ethics, supra*, at 18.

In adopting these rules, the House was aware that “there are gray area expenditures which could be classified (as) either political or official . . . .” See *Final Report of the Select C23committee on Ethics, supra*. The rules do not include any definition of “political” or “official” expenses. As Representative Frenzel observed during the debate on H. Res. 287, 95<sup>th</sup> Congress (123 Cong. Rec. 5900 (March 2, 1977):

What is political is a matter of fact rather than of definition . . .

(W)hat we have tried to do is to confine expenses from political accounts or volunteer committee accounts to expenses that are political. *By and large, that definition will be left up to the Member and to his volunteer committee*, and as it is broadly defined under the election law. (Emphasis added.)

The Select Committee on Ethics, in its *Final Report, supra*, also expressed the view that Members should make the determination as to whether gray area expenditures are to be classified as political or official.

### SUMMARY OPINION

This Committee agrees that the determination as to whether a particular expense is for political or official purposes should be made by the individual Member. A gathering of a Member’s constituents at a “town meeting” could be either a political (campaign) event, or an official (representative) one. In such a case, the Member is free to use his judgment in defining it as political or official. However, this Committee is of the view that once the Member makes his determination, he is bound by it. A single event cannot, for purposes of the House rules, be treated as *both* political and official.

When a Member sends announcements of a town meeting under the frank, he has thereby made the decision that the event is an official one. Under Federal law, the franking privilege may only be used in the conduct of official business. 39 U.S.C. § 3210(a)(1). Having thus defined the event as an official one, he may not then use campaign funds (Rule 23, clause 6) or any other private funds (Rule 24) to conduct, promote, or advertise the event. (It is noted that Rule 24 was intended to prohibit the expenditure of private monies for official purposes even if no particular account or repository as such is maintained. See the colloquy between Representatives Panetta and Obey during the debate on H. Res. 287, 95<sup>th</sup> Congress, 124 Congressional Record 5941 (March 2, 1977).

Because the town meetings that are the subject of this opinion were promoted in the first instance by means of the frank, they thereby become official and representational functions and it is an improper mixture of public and campaign funding to promote such official town meetings as political events. In a case such as this, the wall between public and private funding is easily placed.

### FURTHER CONSIDERATIONS

Having stated the general rule that certain events or activities may be deemed “official” or “political” but not both, and that the Member must exercise his judgment in making such determinations, there are long established practices not offensive to the principle of separation that are not affected by this Advisory Opinion.

One such practice is a campaign committee making use of materials originally generated and used solely in the course of the Member's official and representational duties once the official use of the material is exhausted. For example, a Member may, at official expense and by means of the franking privilege, reproduce and distribute otherwise frankable reprints from the Congressional Record, radio and television programs, correspondence from public officials, etc. The Committee believes that Rule 24, which prohibits outside contributions for official purposes, does not ban a Member from later distributing such items at campaign committee expense provided *all* the expenses associated with reproducing and distributing the material are paid from campaign funds and the material itself or the context in which it is presented clearly establishes its campaign or political purposes and thus its non-official use, so that there would be no appearance that private funds are supplementing official allowances.

Another such practice occurs if an individual or organization *without the Member's consent*, expends funds or donates services to advertise or promote some official or representational activity of the Member. For example, no violation would occur if a radio to television station in a Member's district promoted a Member's previously announced town meeting in public service announcements.

## Policy Regarding Amendments to Financial Disclosure Statements

MEMORANDUM OF APRIL 23, 1986

TO: All Members, Officers, and Employees of the U.S. House of  
Representatives

FROM: Committee on Standards of Official Conduct  
Julian C. Dixon, Chairman  
John T. Myers, Ranking Minority Member

The purpose of this letter is to inform all Members, officers, and employees who are required to file Financial Disclosure (FD) Statements pursuant to the Ethics in Government Act (EIGA) of 1978, 5 U.S.C. app. 4, § 101 *et seq.*,<sup>1</sup> whose filings are under the jurisdiction of this Committee, of a revision to the Committee's policy regarding the submission of amendments to earlier filed disclosure statements. The new policy, discussed below, will be implemented immediately and all future statements as well as the amendments thereto will be handled in accordance therewith.

To date, it has been the general policy of this Committee to accept amended FD Statements from all filers and consider such amendments to have been timely filed without regard to the duration of time between the date of the original filing and the amendment submitted thereto. Over time, this practice has resulted in the Committee having received a significant number of amendments to disclosure statements under circumstances not necessarily reflecting adequate justification or explanation that the amendment was necessary to clarify previously disclosed information or that a disclosure was omitted due either to unavailability of information or inadvertence. Moreover, and particularly in the case of an individual whose conduct (having EIGA implications) is under review, the Committee has been faced with the somewhat inconsistent tasks of identifying the deficiencies in earlier FD Statements while simultaneously accepting amendments to such statements that may well have been intended to have a mitigating or even exculpatory effect. Quite clearly, both time and experience have established the need to make some adjustments to the financial disclosure process in order to alleviate such perceived problems and create a more logical and predictable environment for filers to meet their statutory obligation under EIGA and the parallel responsibility of this Committee to implement that law. It is in this context that a new policy for accepting and considering amended disclosure statements is being implemented.

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<sup>1</sup> Title I of EIGA was recodified following enactment of the Ethics Reform Act of 1989, P.L. 101-194, 103 Stat. 1716. Legislative branch disclosure requirements were previously found at 2 U.S.C. § 701 *et seq.* The 1989 statute combined separate provisions applicable to all three branches into the one title now found at Appendix 4 of title 5, United States Code.

To begin, effective immediately, an amendment to an earlier FD Statement will be considered timely filed if it is submitted by no later than the close of the year in which the original filing so affected was proffered. There will be, however, a further caveat to this “close-of-year” approach. Specifically, an amendment will not be considered to be timely if the submission thereof is clearly intended to “paper over” an earlier mis/non filing or there is no showing that such amendment was occasioned by either the prior unavailability of information or the inadvertent omission thereof. Thus, for example, so long as a filer wishes to amend within the appropriate period of prescribed “timeliness” and such amendments are not submitted as a result of, or in connection with, action by this Committee that may have the effect of discrediting the quality of the initial filing(s), then such amendments will be deemed to be presumptively good faith revisions to the filings. In essence, the amendment, per se, should be submitted only as a result of the need to clarify an earlier filing or to disclose information not known (or inadvertently omitted) at the time the original FD was submitted. In sum, the Committee will adopt a two-pronged test for determining whether an amendment is considered to be filed with a presumption of good faith: First, whether it is submitted within the appropriate amendment period (close-of-year); and second, a “circumstance” text addressing why the amendment is justified. In this latter regard, filers will be expected to submit with the amendment a brief statement on why the earlier FD is being revised. Thus, amendments meeting the two-pronged test will be accorded a rebuttable presumption of good faith and this Committee will have the burden to overcome such a presumption. Conversely, any amendment not satisfying both of the above-stated criteria will not be accorded the rebuttable presumption of good faith. In such a case, the burden will be on the filer to establish such a presumption.

The Committee is well aware that disclosure statements filed in years past may be in need of revision. To this end, the Committee has determined that a grace period ending at the close of calendar year 1986 will be granted during which time all filers may amend any previously submitted FD Statements. Again, while an amendment may be timely from the standpoint of when it is submitted – *i.e.*, within the current year – information regarding the need for and, hence, appropriateness of the amendment will also be considered *vis-à-vis* the rebuttable presumption of good faith.

In sum, the effect of the new policy is to establish a practice of receiving and anticipating that FD Statements and amendment thereto will be submitted within the same calendar year and that departures based on either timeliness or circumstances can be readily identified for scrutiny and possible Committee action. As noted, implementation of the new policy will affect not only statements filed this year but also all statements filed in prior years in light of the grace period being adopted.

Should you have a question regarding this matter, please feel free to contact the Committee staff at 225-7103.

## Gift Rule Provisions Applicable to Loans to Members, Officers, and Employees<sup>1</sup>

May 23, 1997

### MEMORANDUM FOR ALL MEMBERS, OFFICERS, AND EMPLOYEES

**FROM:** Committee on Standards of Official Conduct  
James V. Hansen, Chairman  
Howard L. Berman, Ranking Democratic Member

Questions have arisen as to whether – under the gift rule that took effect on January 1, 1996 [currently clause 5 of House Rule 25] – Members and staff may accept loans from persons other than financial institutions, and if so, on what terms. The purpose of this memorandum is to advise that the Committee interprets the gift rule to allow the acceptance of a loan from a person other than a financial institution, provided that the loan is made in a commercially reasonable manner, including requirements that the loan be repaid, and that a reasonable rate of interest be paid.

**Background.** The reason that loans are a concern under the gift rule is quite obvious: depending on the terms, a transaction labeled as a *loan* may in fact constitute an impermissible *gift* to a Member, officer or employee, in whole or in part.<sup>2</sup> However, at least from the late 1970's through 1995, the standard in effect in the House regarding loans to Members and staff was quite clear: a loan was *not* deemed a gift to the official provided that it was made in a commercially reasonable manner, including requirements for repayment and a reasonable interest rate. This standard, which included no restriction on the source of loans, was stated in an advisory opinion of the House Select Committee on Ethics issued on May 9, 1977, and it is stated as well in the most recent edition of the *House Ethics Manual* (102d Cong., 2d Sess. (April 1992)), on p. 32.

However, the gift rule that took effect on January 1, 1996 has created some uncertainty on this matter, because it does not explicitly incorporate the standard on loans set forth above. Instead, the rule defines the term “gift” to include any

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<sup>1</sup> This memorandum has been updated in several respects, including to reflect the renumbering of the House Rules that occurred at the beginning of the 106<sup>th</sup> Congress and in the 107<sup>th</sup> Congress.

<sup>2</sup> One or more loans or claimed loans were at issue in several Committee proceedings, including *In the Matter of Representative James C. Wright, Jr.* (Committee Statement of April 13, 1989, pp. 82-83), and *In the Matter of Representative Charles H. Wilson of California* (H.R. Rep. No. 930, 96<sup>th</sup> Cong., 2d Sess., p. 4 (1980)).

loan (clause 5(a)(2)(A)), and it provides that Members, officers and employees may accept

[o]pportunities and benefits that are . . . in the form of loans from banks and other financial institutions on terms generally available to the public [clause 5(a)(3)(R)(v)].

The rule also includes a provision which allows the acceptance of “[a]nything for which the Member, . . . officer, or employee of the House pays the market value . . . .” (clause 5(a)(3)(A)). The rule further provides (in clause 5(f)) that this Committee has sole authority to interpret the rule.

**The Committee's Ruling, and the Reasons for It.** As stated above, the Committee is now announcing that it interprets the current gift rule – and specifically the rule's “market value” provision quoted above – to allow the acceptance of loans from persons other than financial institutions, provided that they are on terms which satisfy the requirements which the Committee had previously utilized in evaluating loans: that is, the terms are commercially reasonable, including requirements for repayment and a reasonable rate of interest. Put another way, while the current gift rule clearly allows the acceptance of loans from financial institutions (on terms generally available to the public), the rule does *not* prohibit Members and staff from accepting loans from anyone other than a financial institution. The reasons that the Committee has decided to interpret the rule in this manner are as follows.

The plain meaning of the gift rule provision on loans – clause 5(a)(3)(R)(v), quoted above – is *not* that a loan is acceptable *only if* it is from a financial institution, but rather that a loan from such an institution *is* acceptable if on terms generally available to the public. The provision does *not* define the universe of acceptable loans.

Indeed, there are a number of *other* gift rule provisions under which Members and staff may conceivably accept a loan or other extension of credit, including the provisions allowing acceptance of things of value from relatives and personal friends (clause 5(a)(3)(C), (D)), and the provisions allowing acceptance of benefits offered to the public, or to a group or class in which membership is unrelated to congressional employment, or to members of an organization such as a credit union (clause 5(a)(3)(R)(i)-(iii)). Because the rule does not limit Members and staff to accepting loans from financial institutions, they may likewise accept a loan where they satisfy the requirement of clause 5(a)(3)(A) of the gift rule: that is, they pay “market value” for the funds borrowed.

The Committee also reviewed the legislative history of the current gift rule, and consistent with the above review of the rule's terms, the Committee found



nothing indicating an intent to restrict the source of loans to financial institutions. Furthermore, as noted above, as of the time the current gift rule was approved, the standard allowing acceptance of loans from persons other than financial institutions, on proper terms, had been a longstanding one in the House<sup>3</sup>. Thus to prohibit Members and staff from accepting loans from anyone other than a financial institution would be a major change in the governing standard, and the Committee is reluctant to effect such a significant change absent an indication that the change was intended.

In this regard, the Committee also notes that the provision of the current gift rule on loans from financial institutions – like a number of other provisions of the current rule – was drawn almost verbatim from the Executive Branch gift regulations. Thus it appears that this provision was included in the gift rule as a drafting convenience, and was not the result of a conscious effort to change the prior House practice regarding loans. It is also noteworthy that for the Committee to interpret the gift rule differently, so as to limit the source of loans to financial institutions, could have absurd results, such as that Members and staff could not accept loans from relatives (although, pursuant to the rule, they clearly may accept gifts from relatives), or could not utilize a credit card issued by a department store or gas station.

Finally, in the Committee's view, where a loan to a Member, officer, or employee is made on commercially reasonable terms, and those terms are adhered to, he or she pays "market value" for the funds borrowed, and hence the loan is permissible under clause 5(a)(3)(A) of the gift rule. As the Office of Government Ethics observed recently with regard to the Executive Branch gift standards, "While the term 'gift' is broadly defined in the Standards . . . the term ought not to be understood as encompassing items or services for which the employee 'pays the fair value.' "

**The Need for Caution in Accepting Loans from Persons Other Than Financial Institutions.** Whether a loan proposed to be made to a Member, officer, or employee is on terms that are "commercially reasonable" – and hence acceptable under the interpretation announced here – will depend on a number of facts and circumstances. Thus *before* entering into any loan arrangement with a person other than a financial institution, Members and staff should contact the Committee for a review of the proposed terms, and a determination by the Committee on whether the loan is acceptable under the gift rule. Those who accept such a loan without prior Committee consideration run a risk of being found in violation of the gift rule, and possibly other provisions of law as well.

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<sup>3</sup> The established nature of this standard is also indicated by the fact that according to financial disclosures, a number of Members and staff have loans from individuals or entities that are not financial institutions.

It also bears noting that merely because a proposed loan would be from a financial institution does not necessarily mean that it is acceptable under the gift rule. A loan from a financial institution must be on terms generally available to the public in order to be acceptable under clause 5(a)(3)(R)(v) of the rule. However, loans from relatives (as defined in the Ethics in Government Act), as well as extensions of credit from credit card issuers on terms generally available to the public, are clearly permissible under other provisions of the gift rule and require no Committee review.

Any questions on this matter, as well as questions regarding any other provision of the gift rule, should be directed to the Committee's Office of Advice and Education at 5-7103.

February 23, 1998

**MEMORANDUM FOR ALL MEMBERS, OFFICERS AND EMPLOYEES \***

**FROM:** Committee on Standards of Official Conduct  
James V. Hansen, Chairman  
Howard L. Berman, Ranking Democratic Member

**SUBJECT:** Outside Earned Income Restrictions on Members and Senior Staff

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**Introduction.** The Ethics Reform Act of 1989 imposed a number of restrictions on the outside earned income of Members and senior staff<sup>1</sup> of the House and Senate, as well as senior officials in the other branches of government. One of these restrictions is a prohibition on their receiving “compensation for practicing a profession which involves a fiduciary relationship.” 5 U.S.C. app. 4 § 502(a)(3); House Rule 47, cl. 2(3) [now House Rule 25, cl. 2(a)].<sup>2</sup>

This Committee is responsible for implementing these provisions in the House, and under them, the Committee has generally held that Members and senior staff may *not* receive pay for services rendered in the fields of law, real estate or insurance. Otherwise, however, up to now the Committee has implemented these provisions in a way that *has* allowed compensation for certain professional services, even though they are generally viewed as involving a fiduciary relationship.

After receiving inquiries on whether Members who are doctors may collect fees for providing medical services, the Committee decided to review its policy in this area. With this memorandum, the Committee announces that it will no longer approve the receipt of compensation for *any* professional services that involve a “fiduciary relationship” as that term is generally defined in law. The prohibition, as now implemented by the Committee, extends to the practice of medicine for compensation. In the Committee’s view, the approach previously used – to the extent it allowed receipt of compensation for such professional services – was not consistent with the terms or the legislative history of the Ethics Reform Act.

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\* This memorandum was originally written in 1998. It has been updated solely to reflect current House rule numbers and salary information.

<sup>1</sup> “Senior staff” refers to employees who are paid at or above a particular threshold annual rate for more than 90 days in a calendar year. In 1998, the threshold rate is \$87,030 [In 2008, threshold rate is \$114,468.]

<sup>2</sup> As generally used, the term “fiduciary” refers to an obligation to act in another person’s best interests, or a relationship of trust in which one relies on the integrity, fidelity and judgment of another. *House Ethics Manual*, 102d Cong., 2d Sess. (April 1992), p. 102.

Furthermore, that approach was not consistent with that used in the Senate or the Executive Branch.

Elaboration on the background and the terms of the Committee's action follows.

**Background.** As a result of the Ethics Reform Act of 1989, both statutory law and the House rules include provisions that prohibit Members and senior staff from doing, as here relevant, three things:

- “receiv[ing] compensation for practicing a profession which involves a fiduciary relationship,”
- “receiv[ing] compensation for affiliating with or being employed by a firm, partnership . . . or other entity which provides professional services involving a fiduciary relationship,” and
- permitting one's name to be used by such an entity. 5 U.S.C. app. 4 §502(a); House Rule 47, cl. 2 [now House rule 25, cl. 2].<sup>3</sup>

When the Committee began to implement these provisions in 1990-91, it elected, with regard to the key provision on professional practice, *not* to use a conventional legal definition of the term “fiduciary relationship.” Instead, as reflected on page 103 of the *House Ethics Manual*, 102d Cong., 2d Sess. (April 1992), the Committee elected to “evaluate the nature and circumstances of each individual's particular employment on a case-by-case basis in light of the objectives of the Act.” In this regard, the Committee adopted a three-part test for determining whether any particular employment involved a prohibited fiduciary relationship, *i.e.*, (1) Could the employment result in a conflict of interest between private and public responsibilities? (2) Does the employment create an appearance that an official position is being used for private gain? and (3) Does the compensation appear to be an effort to circumvent the ban on honoraria?

Using this three-part test, the Committee has issued advisory opinions stating that a Member or senior staffer could not earn income from providing legal advice, selling insurance, or acting as a real estate broker (see page 145 of the *Manual*). However, using this test, the Committee has also occasionally allowed compensation for certain professional services, even though the services involved a “fiduciary relationship” as that term is conventionally defined.

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<sup>3</sup> These same provisions also prohibit Members and senior staff from serving for compensation as an officer or member of the board of any corporation or other entity, and from receiving compensation for teaching without the prior approval of this Committee. With regard to outside earned income from permissible activities, Members and senior staff are also subject to an annual limitation. In calendar year 1998, the outside earned income limit is \$20,505. [For 2008, the limit is \$25,830.]

**The Committee Action.** As noted above, last year the Committee was formally asked, for the first time since the 1989 Act took effect, whether Members who are doctors may receive compensation for practicing medicine. Recently the Committee decided, on the basis of essentially three factors, that those Members may *not* receive compensation for practicing medicine. *First*, the statute and rule are straightforward in banning receipt of compensation for practicing a profession involving a fiduciary relationship, and it is undisputed that state laws generally establish a fiduciary relationship between a doctor and his or her patient.

Second, while it has been argued that these provisions were not intended to ban the compensated practice of medicine, the report of the 1989 House Bipartisan Task Force on Ethics, which authored these provisions, states the following with regard to their intended scope:

The task force intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture, or financial.

*Report of the Bipartisan Task Force on Ethics on H.R. 3660*, 101st Cong., 1st Sess. 16 (Nov. 15, 1989).

Finally, both in the Senate and in the Executive Branch, these provisions are interpreted to prohibit the receipt of compensation for practicing medicine. (The regulations issued by the U.S. Office of Government Ethics, which are applicable to Executive Branch officials, are set out at 5 C.F.R. § 2636.305.)

In so deciding the question of compensated medical practice, the Committee also decided that the three-part test set out on p. 103 of the *Manual* will no longer be used to determine whether *any* professional services involve a prohibited fiduciary relationship. Instead, in making that determination, the Committee will henceforth rely on the above-quoted list of professions set forth in the 1989 Task Force report, as well as the admonition in the report (on page 16) that, “[T]he task force intends that the term fiduciary not be applied in a narrow, technical sense and wants to ensure that honoraria not reemerge in various kinds of professional fees from outside interests.” With regard to any particular profession, the Committee will also look to whether any fiduciary relationship is established by the applicable state law, and to the regulations issued by the U.S. Office of Government Ethics.

In responding to the inquiries on medical practice, the Committee also issued advice on how Members who are doctors may, consistent with the “fiduciary relationship” provisions, continue to practice medicine on a limited basis. Specifically, the Committee advised that a Member who is a doctor does *not* violate those provisions when he or she receives, in any calendar year, fees or other payments for medical services that do not exceed the “actual and necessary expenses” incurred by the Member during the year in connection with the practice.

In other words, receipt of fees and other income in that amount is *not* deemed to constitute the practice of medicine for compensation.

The Committee adopted this position on medical practice in response to two points made by Members who are doctors: they need to continue to practice in order to maintain their skills, and perhaps even their license to practice medicine, and medical practice necessarily entails a number of extraordinary expenses, including in particular the cost of malpractice insurance. It is also noteworthy that defining compensation in this manner accords with the definition of that term used by the Office of Government Ethics. 5 C.F.R. § 2636.303(b)(6). This limitation on the receipt of fees and payments for medical services, which is keyed to the *actual* and *necessary* expenses incurred in one's practice, precludes the receipt of compensation from medical practice in any form.

Members and senior staff who receive outside income through the rendering of professional services should consult with the Committee's Office of Advice and Education (extension 5-7103) regarding the possible applicability of the "fiduciary relationship" provisions in their circumstances. Any questions about this memorandum should likewise be directed to the Office of Advice and Education.

## **Regulations for the Acceptance of Decorations and Gifts**

### **Including Travel or Expenses for Travel, by Members, Officers, and Employees of the House of Representatives**

#### **From Foreign Governments**

PROMULGATED BY THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

##### **1. AUTHORITY**

The Committee on Standards of Official Conduct is authorized to issue regulations on this subject by 5 U.S.C. § 7342(a)(6)(A), (g)(1), commonly known as the Foreign Gifts and Decorations Act.

##### **2. PURPOSE**

The purpose of these regulations is to establish standards for the acceptance and disclosure of decorations, gifts of more than minimal value, and gifts of travel or expenses for travel taking place entirely outside the United States tendered by foreign governments to Members, officers, and employees of the House of Representatives.

##### **3. GENERAL STANDARDS**

(a) The United States Constitution (Article I, Section 9, clause 8) prohibits a Federal official from accepting gifts of any kind whatever from a foreign government without the consent of the Congress.

(b) The Foreign Gifts and Decorations Act (5 U.S.C. § 7342) prohibits an officer or employee of the Government from requesting or otherwise encouraging the tender of a gift or decoration from a foreign government, and prohibits the acceptance of such gifts other than in accordance with the provisions of that Act as implemented for Members, officers, and employees of the House by these regulations.

(c) The House gift rule, clause 5 of House Rule 26, prohibits a Member, officer or employee of the House from accepting any gift except as specifically provided in that rule. Under clause 5(a)(3)(N) of the rule, among the gifts that may be accepted is “[a]n item, the receipt of which is authorized by the Foreign Gifts and Decorations Act.”

## 4. DEFINITIONS

As used in these regulations:

(a) “Member, officer, or employee of the House of Representatives” includes the Resident Commissioner of Puerto Rico and the Delegates to the House, and except for section 7 of these regulations, includes the spouse of any such individual (unless such individual and spouse are separated) or a dependent of such individual (as defined in section 152 of the Internal Revenue Code of 1986);

(b) “foreign government” means

- (i) any unit of foreign governmental authority, including any foreign national, State, municipal or local government;
- (ii) any international or multinational organization whose membership is composed of any unit of foreign government described in subparagraph (i); and
- (iii) any agent or representative of any such unit or such organization, while acting as such;

(c) “decoration” means any order, device, medal, badge, insignia, emblem or award tendered by, or received from, a foreign government;

(d) “gift” means a tangible or intangible present (other than a decoration) tendered by, or received from, a foreign government; and

(e) “Committee” means the Committee on Standards of Official Conduct.

## 5. CONSENT OF CONGRESS FOR THE ACCEPTANCE OF DECORATIONS

The Congress has consented (5 U.S.C. § 7342(d)) to the accepting, retaining, and wearing by a Member, officer, or employee of the House of Representatives of a decoration tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance, subject to the approval of the Committee.

(a) *Decorations of minimal intrinsic value.* Decorations presented to Members, officers, or employees of the House tendered by or received from a foreign government may be accepted by such Member, officer, or employee where the intrinsic value of the decoration is of minimal value, without prior approval of the Committee. Pursuant to 5 U.S.C. § 7342(a)(5), “minimal value” is redefined every three years by the General Services Administration to reflect changes in the consumer price index. The current figure, set in 1999, is \$260, and thus a decoration of minimal value is one having a retail value in the United States of \$260 or less. [Minimal value for calendar years 2008 through 2010 is \$335.]



(b) *Decorations of more than minimal intrinsic value.* Unless acceptance is specifically approved by the Committee, decorations of more than minimal value, if not promptly returned, are deemed to have been accepted on behalf of the United States and shall become the property of the United States. Within 60 days after acceptance of such a decoration, the decoration must be turned over to the Clerk of the House of Representatives for disposal; or, with the approval of the Committee, retained for official use. At the time such decoration is turned over to the Clerk or retained for official use by a Member, officer, or employee, such individual must file a disclosure statement concerning such decoration with the Committee as provided in section 7(a) of these regulations.

## 6. CONSENT OF CONGRESS FOR THE ACCEPTANCE OF GIFTS

Congress has consented to the acceptance of certain gifts, or gifts under particular circumstances, from foreign governments by officers or employees of the Government, including Members, officers, and employees of the House.

(a) *Gifts of minimal value.* Members, officers, or employees of the House may accept gifts of minimal value from foreign governments tendered and received as a souvenir or mark of courtesy, including a meal, entertainment or local travel in the United States when such a gift is related to official dates. Pursuant to 5 U.S.C. § 7342(a)(5), “minimal value” is redefined every three years by the General Services Administration to reflect changes in the consumer price index. The current figure, set in 1999, is \$260, and thus a gift of minimal value is one having a retail value in the United States of \$260 or less. [Minimal value for calendar years 2008 through 2010 is \$335.]

(b) *Gifts of more than minimal intrinsic value where refusal may cause offense and embarrassment.* A Member, officer, or employee may accept tangible gifts of more than minimal value when refusal would be deemed likely to cause offense or embarrassment or otherwise adversely affect United States foreign relations. However, any such tangible gift received and not promptly returned is deemed to have been accepted on behalf of the United States, and upon acceptance becomes the property of the United States. Within 60 days after accepting of such a gift, the gift must be turned over to the Clerk of the House of Representatives for disposal, or, with the approval of the Committee, retained for official use. At the time such gift is turned over to the Clerk or retained for official use by a Member, officer, or employee, such individual must file a disclosure statement concerning such gift with the Committee as provided in section 7(a) of these regulations. Intangible gifts of more than minimal value may be accepted only in accordance with section 6(c) and (e) of these regulations.

(c) *Educational scholarship or medical treatment.* Members, officers, or employees of the House may accept a gift of more than minimal value from a foreign government when the gift is in the nature of an educational scholarship or medical treatment.

(d) *Foreign educational or cultural exchange.* Acceptance of assistance from a foreign government for participation in foreign exchange or visitors programs by Federal officers or employees is consented to by Congress in certain instances outlined in 22 U.S.C. § 2458a, the Mutual Educational and Cultural Exchange Act. Assistance or grants received under that Act are not considered “gifts” under these regulations.

(e) *Travel or expenses for travel outside of the United States.* A Member, officer, or employee of the House may accept gifts of travel or expenses for travel taking place entirely outside of the United States offered by a foreign government when such travel or expenses for travel relate directly to the official duties of the Member, officer, or employee. Gifts of travel or expenses for travel include food, lodging, transportation and entertainment relating to the official duties of the Member, officer, or employee. This provision allows a Member, officer, or employee to take advantage of opportunities such as for on-site inspection or fact finding while in a foreign country.

A spouse or dependent of a Member, officer, or employee of the House may accept such travel or expenses for travel when accompanying the Member, officer, or employee of the House. Such travel or expenses for travel may not be accepted merely for the personal benefit, pleasure, enjoyment or financial enrichment of the individual or individuals involved. The acceptance of any such travel or expenses for travel shall be reported within 30 days after acceptance to the Committee on Standards of Official Conduct, providing information required in section 7(b) of these regulations. For the purposes of these regulations, travel or expenses for travel are deemed accepted upon departure from the donor country.

## 7. REPORTS AND DISCLOSURE

Any gift provided to a spouse or dependent should be considered to be a gift provided to the Member, officer, or employee and therefore must be disclosed by such Member, officer, or employee.

For the purposes of these regulations, any decoration presented by a foreign government to the spouse or a dependent of a Member, officer, or employee of the House is considered to be presented to the Member, officer, or employee when it is apparent the decoration would not have been offered but for the recipient's relation to the Member, officer, or employee, and therefore must be disclosed by such Member, officer, or employee.

An appraisal of tangible gifts or decorations, if necessary, may be obtained through the Clerk of the House of Representatives.

(a) *Tangible gifts and decorations.* Within 60 days after acceptance of a tangible gift or decoration of more than minimal value pursuant to section 5(b) or 6(b) of these regulations, a Member, officer, or employee shall file a disclosure statement with the Committee containing the following information:

- (i) the name and position of the reporting individual and the recipient;
- (ii) a brief description of the gift or decoration and the circumstances justifying acceptance;
- (iii) the estimated value in the United States at the time of acceptance;
- (iv) the date of acceptance of the gift or decoration;
- (v) the identity, if known, of the foreign government and the name and position of the individual who presented the gift or decoration;
- (vi) disposition or current location of the gift or decoration.

(b) *Other gifts.* Within 30 days after acceptance of a gift of travel pursuant to section 6(e) of these regulations, a Member, officer, or employee shall file a disclosure statement with the Committee containing the following information:

- (i) the name and position of the reporting individual;
- (ii) a brief description of the gift and the circumstances justifying acceptance; and
- (iii) the identity, if known, of the foreign government and the name and position of the individual who presented the gift.

## 8. PUBLIC INSPECTION

Reports filed under these regulations shall be maintained by the Committee on Standards of Official Conduct and made available for public inspection at reasonable hours. Not later than January 31 of each year, the Committee on Standards of Official Conduct will compile a listing of all statements filed during the preceding year and will transmit such listing to the Secretary of State for publication in the Federal Register.

Reports filed with the Committee under these regulations will be maintained for public inspection for a period of 7 years following transmittal to the Secretary of State.

## Legal Expense Fund Regulations

### MEMORANDUM TO ALL MEMBERS, OFFICERS, AND EMPLOYEES<sup>1</sup>

**From: Committee on Standards of Official Conduct**

Nancy L. Johnson, Chairman

Jim McDermott, Ranking Democratic Member

**Date:** June 10, 1996

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The new gift rule exempts “a contribution or other payment to a legal expense fund established for the benefit of a Member, officer, or employee that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Standards of Official Conduct,” as long as the contribution is not from a registered lobbyist or an agent of a foreign principal (House Rule 25, clause 5(a)(3)(E)). In light of this new rule, and pursuant to its authority there under, the Committee hereby issues regulations explaining its “restrictions and disclosure requirements” for legal expense funds. The regulations set forth below supersede the Committee's prior policies under the old gift rule<sup>2</sup> and take effect as of July 1, 1996. The prior policies remain in effect until that date.

### Legal Expense Fund Regulations

1. A Member, officer, or employee who wishes to solicit and/or receive donations, in cash or in kind, to pay legal expenses shall obtain the prior written permission of the Committee on Standards of Official Conduct.<sup>3</sup>
2. The Committee shall grant permission to establish a Legal Expense Fund only where the legal expenses arise in connection with: the individual's candidacy for or election to federal office; the individual's official duties or position in Congress (including legal expenses incurred in connection with an amicus brief filed in a Member's official capacity, a civil action by a Member challenging the validity of a law or federal regulation, or a matter before the Committee on Standards of Official Conduct); a criminal prosecution; or a civil matter bearing on the individual's reputation or fitness for office.

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<sup>1</sup> These regulations have been updated in several respects, including to reflect certain Committee policies established after the regulations were originally issued, and the renumbering of the House Rules that occurred at the beginning of the 106<sup>th</sup> and 107<sup>th</sup> Congresses.

<sup>2</sup> See *House Ethics Manual*, 102d Cong., 2d Sess. 49-50 (1992).

<sup>3</sup> Permission is not required to solicit and/or receive a donation in any amount from a relative or a donation of up to \$250 from a personal friend.

3. The Committee shall not grant permission to establish a Legal Expense Fund where the legal expenses arise in connection with a matter that is primarily personal in nature (*e.g.*, a matrimonial action).
4. A Member, officer, or employee may accept pro bono legal assistance without limit to file an amicus brief in his or her capacity as a Member of Congress; to bring a civil action challenging the validity of any federal law or regulation; or to bring a civil action challenging the lawfulness of an action of a federal agency, or an action of a federal official taken in an official capacity, provided that the action concerns a matter of public interest, rather than a matter that is personal in nature. Pro bono legal assistance for other purposes shall be deemed a contribution subject to the restrictions of these regulations.
5. A Legal Expense Fund shall be set up as a trust, administered by an independent trustee, who shall oversee fund raising.
6. The trustee shall not have any family, business, or employment relationship with the trust's beneficiary.
7. Trust funds shall be used only for legal expenses (and expenses incurred in soliciting for and administering the trust), except that any excess funds shall be returned to contributors. Under no circumstances may the beneficiary of a Legal Expense Fund convert the funds to any other purpose.
8. A Legal Expense Fund shall not accept more than \$5,000 in a calendar year from any individual or organization.
9. A Legal Expense Fund shall not accept any contribution from a registered lobbyist or an agent of a foreign principal.
10. Other than as specifically barred by law or regulation, a Legal Expense Fund may accept contributions from any individual or organization, including a corporation, labor union, or political action committee (PAC).
11. No contribution shall be solicited for or accepted by a Legal Expense Fund prior to the Committee's written approval of the completed trust document (including the name of the trustee). No amendment of the trust document is effective, and no successor or substitute trustee may be appointed, without the Committee's written approval.
12. Within one week of the Committee's approval of the trust document, the beneficiary shall file a copy of the trust document with the Legislative Resource Center (B-106 Cannon House Office Building) for public disclosure.

13. The beneficiary of a Legal Expense Fund shall report to the Committee on a quarterly basis, with a copy filed for public disclosure at the Legislative Resource Center:
- a) any donation to the Fund from a corporation or labor union;
  - b) any contribution (or group of contributions) exceeding \$250 in a calendar year from any other single source; and
  - c) any expenditure from the Fund exceeding \$250 in a calendar year.

The reports shall state the full name and street address of each donor, contributor or recipient required to be disclosed. Beginning October 30, 1996, these reports shall be due as follows:

<u>Reporting Period</u>	<u>Due Date</u>
January 1 – March 31	April 30
April 1 – June 30	July 30
July 1 – September 30	October 30
October 1 – December 31	January 30

14. Any Member or employee who established a Legal Expense Fund prior to July 1, 1996 shall make any necessary modifications to the trust document to bring it into compliance with these regulations and shall disclose the trust document with his or her first quarterly report of the 105th Congress on January 30, 1997. Reports of receipts and expenditures shall be due beginning October 30, 1996, as stated in paragraph 13, above.

#### **Use of Campaign Funds for Legal Expenses**

This Committee has stated (in Chapter 4 on campaign activity) that Members may use campaign funds to defend legal actions arising out of their campaign, election, or the performance of their official duties. More recently, however, the Federal Election Commission (FEC) issued regulations defining impermissible personal uses of campaign funds, including using campaign funds for certain legal expenses. Any Member contemplating the use of campaign funds for the direct payment of legal expenses or for contribution to a legal expense fund should first contact the FEC.

## Travel Guidelines and Regulations

### MEMORANDUM TO ALL MEMBERS, OFFICERS, AND EMPLOYEES

**From:** Committee on Standards of Official Conduct  
Stephanie Tubbs Jones, Chairwoman  
Doc Hastings, Ranking Republican Member

**Date:** February 20, 2007

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The new travel rules that were passed at the beginning of the 110<sup>th</sup> Congress require the Committee to issue guidelines concerning the reasonableness of travel expenses and the types of information that must be submitted to the Committee in order to obtain prior approval of privately-sponsored, officially-connected travel.<sup>1</sup> The rules also direct the Committee to issue regulations describing when a two-night stay will be permitted in order for a Member, officer, or employee to participate in a one-day event sponsored by a private entity that retains or employs a lobbyist, and the circumstances under which a lobbyist is permitted to have *de minimis* involvement in planning, organizing, requesting, or arranging a trip.<sup>2</sup>

The Committee hereby issues guidelines and regulations concerning the new travel restrictions and requirements. In many significant areas, the regulations and guidelines set forth below are new restrictions and requirements that *supersede* the Committee's policies under the travel rules that existed in previous congresses, and *they take effect on March 1, 2007*.

### Travel Guidelines and Regulations<sup>3</sup>

#### A. Connection between Trip and Official Duties

A Member, officer, or employee seeking approval for travel must demonstrate that the activities on the trip are related to the individual's official responsibilities or matters arising from his or her official duties. In evaluating a request for approval to travel at private expense, the Committee will evaluate the individual's responsibilities, and/or whether the purpose of the trip relates to matters within the general legislative or policy interests of the Congress. Travel will not be approved if

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<sup>1</sup> House Rule 25, cl. 5(i).

<sup>2</sup> House Rule 25, cl. 5(b)(1)(C). For brevity's sake, references in the text to the term "lobbyist" also include agents of a foreign principal.

<sup>3</sup> These provisions address both the acceptance of in-kind transportation, lodging, and meals as well as reimbursement of travel expenses.

it does not include sufficient officially-connected activities, or if it includes excessive amounts of unscheduled time or opportunities for recreational activities during the official itinerary, even if such activities are engaged in at personal expense.

## B. Reasonableness of Travel Expenses

(1) *Transportation to the Event*: Members, officers, and employees may accept up to business-class transportation on commercial air carriers or trains to participate in Committee-approved, privately-sponsored travel. Other transportation (including first-class airfare or train fare, charter travel, or travel on private aircraft) may *only* be accepted if:

(a) it is demonstrated that the cost of such travel does not exceed the cost of available business-class transportation (or if the traveler uses the traveler's own frequent flyer or similar benefits to upgrade to first class);

(b) such travel is necessary to accommodate a disability or other special need as substantiated in writing by a competent medical authority;

(c) genuine security circumstances require such travel;

(d) the scheduled flight time, including stopovers and change of planes, is in excess of 14 hours; or

(e) the Committee permits such travel based on *exceptional* circumstances.

(2) *Local Transportation*: Local area transportation expenses during a trip must be reasonable and unrelated to personal or recreational activities.

### (3) *Lodging*:

(a) For travel to events arranged or organized *without regard* to congressional participation (for example, annual meetings of business or trade associations or other membership organizations), Members, officers, and employees may accept lodging accommodations at a pre-arranged location for event attendees commensurate with those customarily provided to or purchased by other event attendees. The quality or location of the accommodations may not be enhanced because of the official position of the Member, officer, or employee.

(b) For travel to events arranged or organized *specifically with regard* to congressional participation (for example, fact-finding trips, site visits, educational conferences, and other trips designed for congressional attendance), Members, officers, and employees may accept reasonable lodging expenses at an appropriate facility. Among the factors to be considered in judging the reasonableness of expenses for a lodging facility are the cost of the facility, the location of the facility and its proximity to the site(s) being visited, the quality of its



conference facilities, any security concerns, and whether the facility may accommodate the number of attendees at the event.

(4) *Food:*

(a) For travel to events arranged or organized *without regard* to congressional participation (for example, annual meetings of business or trade associations or other membership organizations), Members, officers, and employees may accept meals related to the event that are similar to those provided to or purchased by other event attendees.

(b) For privately-sponsored travel to events arranged or organized *specifically with regard* to congressional participation (for example, fact-finding trips, site visits, educational conferences, and other trips designed for congressional attendance), Members, officers, and employees may accept reasonable meal expenses at an appropriate facility. The factors to be considered in judging the reasonableness of a meal expense include the maximum *per diem* rates for meals for official Government travel published by the General Services Administration or, for international travel, the maximum *per diem* rate for meals published by the State Department.

(5) *Other Travel Expenses:* Members, officers, and employees may accept reasonable miscellaneous travel expenses, such as transportation to and from airports, security costs, interpreter fees, visa application fees, and similar expenses that are necessary for the officially-connected purpose of the trip.

**C. Relationship Between an Event and the Officially-Connected Purpose of the Trip**

The location of events arranged or organized *without regard* to congressional participation (for example, annual meetings of business or trade associations) is presumptively reasonable. The location of *other* events must be necessary to the purpose of the event, or if more than one possible location may be relevant to the event, then the location selected must be a reasonable one in relation to the alternatives. If there is no specific location necessary or relevant to the purpose of the event, the location selected must be a reasonable one in light of the nature of the event and its participants, and should not create the appearance that the Member, officer, or employee attending the event is using his or her public office for personal gain.

**D. Direct and Immediate Relationship between Source of Funding and an Event**

Expenses may only be accepted from an entity or entities that have a significant role in organizing and conducting a trip, and that also have a clear and

defined organizational interest in the purpose of the trip or location being visited. Expenses may not be accepted from a source that has merely donated monetary or in-kind support to the trip but does not have a significant role in organizing and conducting the trip.

**E. One-day Event Trips Sponsored by a Private Entity that Retains or Employs a Lobbyist**

The Committee will authorize a Member, officer, or employee to accept a second night's lodging and meal expenses in order for the individual to participate in a one-day event when it determines that such expenses are necessary due to availability of transportation to or from the event, or in those circumstances when an additional night's stay is practically required in order to facilitate the individual's full participation in the event. The Member, officer, or employee seeking approval for a two-night stay *must request approval from the Committee*.

In determining whether to permit a second night's stay, the Committee will consider the following factors:

- (1) the availability of transportation to and from the location of the one-day event;
- (2) whether the trip is outside the continental United States or involves travel across two or more time zones;
- (3) whether the Member or staff person is participating in a full-day's worth of officially-connected activities (*e.g.*, is the individual giving a speech, taking part in fact-finding, observing presentations, or participating in a panel discussion);  
or
- (4) any other *exceptional* circumstances that are described in detail by the traveler.

**F. De Minimis Lobbyist Involvement in Planning, Organizing, Requesting, or Arranging a Trip**

Member and staff participation in officially-connected travel that is in any way planned, organized, requested, or arranged by a lobbyist is *prohibited*, except as provided below:

- (1) when the travel is sponsored by an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965; or

(2) when the travel is for a one-day event trip *and* the involvement of a lobbyist in planning, organizing, requesting, or arranging the trip is *de minimis*, meaning only negligible or otherwise inconsequential in terms of time and expense to the overall planning and purpose of the trip.

**G. Information that must be Submitted to the Standards Committee for Purposes of Receiving Prior Approval of Privately-Sponsored Travel**

A private sponsor offering officially-connected travel to a Member, officer, or employ must complete and sign a Private Sponsor Certification Form, and provide a copy of that form to the invitee(s). The sponsor should not submit that form directly to the Committee. Private sponsors are strongly urged to submit the form to the invitee(s) at least 30 days before the travel is scheduled to begin.

A Member, officer, or employee must submit to the Committee a completed and signed Privately-sponsored Travel Approval Form that attaches or includes the Private Sponsor Certification Form and, for staff travel, a copy of the Advance Authorization of Employee Travel Form.

## Guidance on Intern, Volunteer, and Fellow Programs

LETTER OF JUNE 29, 1990<sup>[1]</sup>

Dear Colleague:

The Committee on Standards of Official Conduct has received a number of inquiries regarding the propriety of House offices accepting services from volunteers,<sup>2</sup> interns,<sup>3</sup> fellows,<sup>4</sup> and others who receive no salary from the House of Representatives. This is to explain the Committee's policy on this subject for all Members and House offices.

House Rule 24, "Prohibition of Unofficial Office Accounts," was adopted by the House on March 2, 1977, along with other recommendations of the Commission on Administrative Review. H. Res. 287, 95<sup>th</sup> Congress, 123 Congressional Record 5933-53. In recommending the rule, the Commission posed the question: "Is it proper for a private corporation, independent businessman, or anyone else to pay for the conduct of the House's official business?" The Commission concluded that the answer was "no," that a "wall" should exist between official and unofficial funds. H. Doc. No. 95-73, *Financial Ethics*, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 17.

In Advisory Opinion No. 6, interpreting the unofficial office account prohibition, the House Select Committee on Ethics concluded that in addition to money, Rule 24 prohibits the private, in-kind contribution of goods or services for official purposes. The Select Committee found that "no logical distinction can be drawn between the private contribution of, in-kind services and the private contribution of money, and that both perpetuate the very kind of unofficial office accounts and practices that are prohibited" by the rule. H. Rep.

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<sup>1</sup> This letter has since been updated to reflect, among other things, the re-numbering of the House Rules that occurred at the beginning of the 106<sup>th</sup> Congress and in the 107<sup>th</sup> Congress.

<sup>2</sup> A "volunteer" as used in this letter means an individual performing services in a House office without compensation from any source.

<sup>3</sup> An "intern" is an individual performing services in a House office on a temporary basis incidental to the pursuit of the individual's educational objectives. Some interns receive no compensation from any source, while some receive compensation or other assistance from an educational institution or other sponsoring entity. While some interns may receive compensation from House allowances, this letter deals primarily with those who do not receive such House compensation.

<sup>4</sup> A "fellow" is an individual performing services in a House office on a temporary basis as part of an established mid-career education program, while continuing to receive the usual compensation from his or her sponsoring employer.

No. 95-1837, 95<sup>th</sup> Cong., 2d Sess., *Final Report of the Select Committee on Ethics*, p. 65.

However, the Select Committee did recognize several exceptions to the general prohibition against the acceptance of services, including the following:

Services provided by federal, state, or local government agencies;

Intern, fellowship, or similar educational programs that are primarily of educational benefit to the individual, as opposed to primarily benefiting the Member or office, and which do not give undue advantage to special interest groups.

Accordingly, while House Rule 24 generally prohibits Members from accepting either the services of volunteers or of individuals compensated for congressional duties by an outside entity, limited authority exists to accept the services of volunteers, interns, and fellows.

In this regard, the Select Committee expressed the view that the intent and spirit of House Rule 24 would be violated if a congressional office attempted to supplement official allowances by directly or indirectly raising, receiving, or disbursing contributions, if such contributions were to be used to compensate individuals working in a House office, or used to support programs which placed interns, fellows, or volunteers in House offices. The prohibition against engaging in such activities applies to both Members and staff.

Also relevant to this issue is 31 U.S.C. § 1342, as follows:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.

In Opinion B-69907, issued February 11, 1977, the Comptroller General of the United States determined that the statute applies to Members of Congress and other officers and employees of the Legislative Branch. However, because the statute was enacted to prevent funding deficiencies, it was deemed not to prohibit a Member of Congress from utilizing volunteers to assist in the performance of official functions of the Member's office, provided such volunteers agree in advance to serve without compensation, so that there is no basis for a future claim for payment.

The acceptance of services from volunteers not associated with an established program potentially raises other concerns. Individuals who are not

House employees<sup>5</sup> are not subject to rules and statutes governing their conduct. However, such individuals may be in a position to take actions and make representations in the name of a Member, for the *Member* may be responsible. The Member or office may also be subject to a claim of liability for work-related injuries to, or caused by, a volunteer.

In view of the above, the Committee has established the guidelines set forth below to Members and House offices considering acceptance of the services of interns, fellows, or volunteers who will not be paid by the House of Representatives.

#### INTERN AND FELLOWSHIP PROGRAMS

A Member or House office may accept the temporary services of an *intern* participating in a *program*, as discussed below, which is primarily of educational benefit to the participant, irrespective of whether the individual is being compensated by a third-party sponsoring organization.

Similarly, a Member or House office may accept the temporary services of a *fellow* participating in a mid-career education *program*, as discussed below, while the individual receives compensation from his or her employer.

An intern or fellowship *program* should be operated by an entity not affiliated with a congressional office, and the organization should be willing to indicate its sponsorship of the intern or fellow in writing.

House Members and staff may not raise or disburse funds for programs which place interns or fellows in their own offices, nor may congressional offices solicit or recruit volunteers. Members do, however, have the right to select or approve those who will be working in their offices.

While intern and fellowship programs are often sponsored by educational institutions, other public or private organizations may act as sponsors, provided

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<sup>5</sup> An “employee” for the purposes of this letter means a person appointed to a position of employment in the House of Representatives by an authorized employing authority, whether that person is receiving a salary disbursed by the Clerk of the House, or is in a Leave Without Pay status.

the arrangement does not give undue advantage to special interests. In that regard, the Member accepting the services of an intern or fellow should not assign him or her to duties that will result in any direct or indirect benefit to the sponsoring organization.

### VOLUNTEERS

A Member may accept volunteer services from his or her own immediate family, *i.e.*, spouse, children, or parents (although Federal law, at 5 U.S.C. § 3110, prohibits Members from appointing relatives to paid positions); this is consistent with regulations of the Committee on House Administration which allow Members to use their own personal resources to support the activities of their own offices.

A Member or House office may accept the temporary services of a volunteer, provided the Member or office has a clearly defined program to assure that: (1) the voluntary service is of significant educational benefit to the participant; and (2) that such voluntary assistance does not supplant the normal and regular duties of paid employees. In this regard, limitations should be imposed on the number of volunteers who may assist a congressional office at any one time, as well as the duration of services any one volunteer may provide. Voluntary assistance to a congressional office should not be solicited.

A volunteer should be required to agree, in advance and in writing, to serve without compensation and to not make any future claim for payment, and acknowledge that the voluntary service does not constitute House employment.

(Obviously, a Member or House office wishing to use the services of an individual seeking to volunteer may also place the individual in a temporary intern position on the Member's clerk hire payroll or other personnel fund, as authorized by the Committee on House Administration. The individual may also be referred to an organization which sponsors an internship.)

Volunteers, interns, and fellows should be made aware of the implications their activities have for the Member in whose office they work. The Committee recommends that Members and House offices obtain the agreement of such individuals that, although not House employees, they will conduct themselves in a manner which reflects creditably on the House. Members are also encouraged to obtain the Committee's approval for any volunteer, intern, or fellowship program in which they wish to participate.

The above guidelines do not prohibit a Member or other House office from accepting services, including detailed staff, provided on an official basis by a unit of Federal, state, or local government. (House staff and resources may not, however, be similarly used to perform the work of other governmental units, or of any private organization.)

As a related matter, House Rule 23, clause 11, part of the Code of Official Conduct, provides that a Member of the House of Representatives shall not authorize or otherwise allow a non-House individual or organization to use the words "Congress of the United States," "House of Representatives," or "official business" on any letterhead or envelope. The intent of this provision is to prevent persons who are not Members, officers, or employees of the House from represent that their activities are officially sponsored or sanctioned. This prohibition also extends to other printed matter, such as business cards. Accordingly, individuals not paid by the House of Representatives may *not* use or obtain business cards or other materials suggesting an employment relationship with the House.

Any questions concerning these matters should be directed to the Committee's Office of Advice and Education at 225-7103.

Sincerely,

JULIAN C. DIXON  
*Chairman*

JOHN T. MYERS  
*Ranking Minority Member*



**House Administration Committee-House Standards Committee Joint  
Letter on Redistricting of May 24, 2001**

Dear Colleague:

Since the start of the redistricting process resulting from the 2000 Census, the Committees on House Administration and Standards of Official Conduct have been receiving questions on whether redistricting activities can be conducted with official resources.

We have reexamined our past policy statements, and we believe that constituents have a right to inquire about, and Members have a responsibility to respond to questions regarding the consequences of redistricting. We also recognize that Members, to stay current and fully informed, may wish to meet and communicate with other Members about redistricting, and be briefed from time to time by outside individuals or organizations.

While responding to constituent inquiries is a continuing official activity, redistricting is usually a relatively brief "once a decade" activity affecting congressional districts. As such, redistricting activities in congressional offices should be merely incidental to each day's official business, and should be minimal in nature, frequency, time consumed, and use of resources.

We would have no reservations about redistricting activities conducted in accordance with the above criteria in congressional offices or using official resources.

Sincerely,

Bob Ney, Chairman

House Administration

Steny Hoyer, Ranking Minority Member

House Administration

Joel Hefley, Chairman

Standards of Official Conduct

Howard L. Berman, Ranking Minority Member

Standards of Official Conduct



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For: State and County Offices

**Coronavirus Food Assistance Program (CFAP)**

Approved by: Acting Deputy Administrator, Farm Programs



**1 Overview**

**A Background**

The Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136) was signed into law on March 27, 2020, to provide relief for individuals and businesses that have been negatively impacted by the COVID-19 pandemic.

CFAP:

- provides direct support to eligible farmers, ranchers, and dairy operations with eligible agricultural commodities and/or livestock that have suffered losses due to price and market declines and supply chains impacted by COVID-19
- assists producers with additional adjustment and marketing costs resulting from lost demand and short-term oversupply caused by COVID-19
- is authorized under the CARES Act and Commodity Credit Corporation Charter Act
- is being administered by FSA.

Disposal Date	Distribution
January 1, 2021 5-20-20	State Offices; State Offices relay to County Offices

## Notice CFAP-4

### 1 Overview (Continued)

#### B Purpose

This notice provides State and County Offices with the following for CFAP:

- general policies and provisions
- eligibility requirements
- eligible commodities and payment rates
- producer reporting requirements
- payment calculations.

#### C Contact Information

State Offices that require additional information may contact the following.

IF the question is about CFAP...	THEN contact...
non-specialty crop and wool policy	Brent Orr by either of the following: <ul style="list-style-type: none"> <li>• email to <a href="mailto:brent.orr@usda.gov">brent.orr@usda.gov</a></li> <li>• telephone at 202-720-0809.</li> </ul>
specialty crop policy	either of the following: <ul style="list-style-type: none"> <li>• Jenaé Prescott by the following:                             <ul style="list-style-type: none"> <li>• email to <a href="mailto:jenaé.prescott@usda.gov">jenaé.prescott@usda.gov</a></li> <li>• telephone at 202-720-7641</li> </ul> </li> <li>• Tona Huggins by either of the following:                             <ul style="list-style-type: none"> <li>• email to <a href="mailto:tona.hugginsx@usda.gov">tona.hugginsx@usda.gov</a></li> <li>• telephone at 202-205-9847.</li> </ul> </li> </ul>
livestock policy	Kelly Breinig by either of the following: <ul style="list-style-type: none"> <li>• email to <a href="mailto:kelly.breinig@usda.gov">kelly.breinig@usda.gov</a></li> <li>• telephone at 202-720-1603.</li> </ul>
dairy policy	Doug Kilgore by either of the following: <ul style="list-style-type: none"> <li>• email to <a href="mailto:douglas.e.kilgore@usda.gov">douglas.e.kilgore@usda.gov</a></li> <li>• telephone at 202-720-9011.</li> </ul>
value loss crop policy	Tona Huggins by either of the following: <ul style="list-style-type: none"> <li>• email to <a href="mailto:tona.huggins@usda.gov">tona.huggins@usda.gov</a></li> <li>• telephone at 202-205-9847.</li> </ul>
application	Brittany Ramsburg by either of the following: <ul style="list-style-type: none"> <li>• email to <a href="mailto:brittany.ramsburg@usda.gov">brittany.ramsburg@usda.gov</a></li> <li>• telephone at 202-260-9303.</li> </ul>



## Notice CFAP-4

### 1 Overview (Continued)

#### C Contact Information (Continued)

IF the question is about CFAP...	THEN contact...
automation	Mario Plummer by either of the following: <ul style="list-style-type: none"><li>• email to <a href="mailto:mario.plummer@usda.gov">mario.plummer@usda.gov</a></li><li>• telephone at 816-823-1027.</li></ul>
payments	Tina Nemecek by either of the following: <ul style="list-style-type: none"><li>• email to <a href="mailto:tina.nemec@usda.gov">tina.nemec@usda.gov</a></li><li>• telephone at 202-690-4027.</li></ul>
producer eligibility and conservation compliance	<ul style="list-style-type: none"><li>• Paul Hanson (producer eligibility policy) by either of the following:<ul style="list-style-type: none"><li>• email to <a href="mailto:paul.hanson@usda.gov">paul.hanson@usda.gov</a></li><li>• telephone at 202-720-4189</li></ul></li><li>• Michele Davidson (automated Subsidiary system) by either of the following:<ul style="list-style-type: none"><li>• email to <a href="mailto:michele.davidson@usda.gov">michele.davidson@usda.gov</a></li><li>• telephone at 816-823-1466</li></ul></li><li>• Joe Fuchtman (conservation compliance) by either of the following:<ul style="list-style-type: none"><li>• email to <a href="mailto:joseph.fuchtman@usda.gov">joseph.fuchtman@usda.gov</a></li><li>• telephone at 202-260-9146.</li></ul></li></ul>

### 2 CFAP General Program Information and Eligibility

#### A CFAP Signup Period

Eligible producers who had an ownership share interest in 1 or more of the eligible CFAP commodities can file a CFAP application for all their farming and ranching interests nationwide by submitting a completed AD-3114, CFAP Application, to any USDA Service Center from May 26, 2020, through August 28, 2020. The producer's recording county will be responsible for acting on AD-3114. See Exhibit 1 for an example of AD-3114.

## Notice CFAP-4

### 2 CFAP General Program Information and Eligibility (Continued)

#### B Application

Producers will submit 1 application for their entire operation nationwide using any of the following methods:

- in person, when available
- by mail
- electronically by:
  - FAX
  - e-mail with a scanned or photocopy of signed AD-3114 attached
  - other authorized method (provided by supplemental notice or other guidance) online through [www.farmers.gov](http://www.farmers.gov)
- online, when available.

**Notes:** Submitting AD-3114 online requires an active Level 2 eAuthentication account. Individual producers can register for a Level 2 eAuthentication account at [www.eauth.usda.gov](http://www.eauth.usda.gov).

A fillable version of AD-3114 will also be available for applicants to sign and submit by one of the above methods.

#### C Producer Eligibility

An eligible producer is a person or legal entity who shares in the risk of producing a crop or livestock and who is entitled to a share in the crop or livestock available for marketing or would have shared had the crop or livestock been produced and marketed.

The CFAP is available to persons and legal entities who had a share in the eligible commodity:

- on January 15, 2020, and/or between April 16 and May 14, 2020, for all commodities other than dairy
- for the months of January, February, and March 2020 for dairy.

## Notice CFAP-4

### 2 CFAP General Program Information and Eligibility (Continued)

#### C Producer Eligibility (Continued)

To be eligible for a CFAP payment, a person or legal entity must be a:

- citizen of the United States
- resident alien (possessing a Resident Alien Card (I-551))
- partnership of citizens of the United States
- corporation, limited liability company (LLC), or other organizational structure organized under State law
- Indian Tribe or Tribal organization, as defined in section 4(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304)
- foreign person or foreign entity who meets foreign person rules according to 5-PL.

#### D Ineligible Producer

The following persons or legal entities are **ineligible** for CFAP payments:

- Federal, State, and local governments, including public schools as defined in 5-PL
- persons or legal entities who did not have a reported ownership interest in any of the eligible commodities
- producers that have been suspended or debarred or otherwise excluded from participating in Federal programs

**Note:** Follow procedure in 1-CM (Rev. 3).

- persons and legal entities not meeting payment limitation, payment eligibility, AGI, and HELC/WC requirements for CFAP.

## Notice CFAP-4

### 3 Payment Limitation, Payment Eligibility, AGI, and Other Compliance Requirements

#### A Payment Limitation

The total amount of CFAP payments that a person or legal entity (excluding general partnerships and joint ventures) may receive is \$250,000, except as provided in subparagraph B.

Payments to a program applicant that is a joint operation, including a general partnership or joint venture, cannot exceed \$250,000 per person or legal entity that comprise first level ownership of the general partnership or legal entity, unless the first level member is another joint operation.

#### B Optional Increase in Limitation for Corporations, LLC, and Limited Partnership (LP)

For CFAP applicants that are a corporation, LLC or LP, an authorized representative of the legal entity may seek an increase in the \$250,000 payment limitation to either \$500,000, if 2 members, stockholders, or partners provide independently at least 400 hours or more of active personal labor or active personal management, or combination thereof; or \$750,000 if three members, stockholders, or partners provide independently at least 400 hours or more of active personal labor or active personal management, or a combination thereof (as defined in 5-PL).

The maximum limitation a corporation, LLC, or LP may receive is \$750,000.

#### C Attribution of Payments

CFAP payments to persons and legal entities will be limited according to the rules for attribution at 7 CFR 1400.105.

CFAP payments made directly or indirectly to a person or legal entity will be combined and limited to the per person or legal entity.

CFAP payments to a legal entity will be tracked through 4 levels of ownership and will be reduced for members, partners, or stockholders holding an ownership interest below the 4<sup>th</sup> level.

Rules for “common attribution” (i.e., minor children) do not apply to CFAP payments.

#### D AGI

To be eligible for payment, a person or legal entity (including members, stockholders, or partners of the legal entity) must have an average AGI for program year 2020 that does not exceed the \$900,000 limitation, unless at least 75 percent of the person’s or legal entity’s average AGI is derived from farming, ranching, or forestry operations.

## Notice CFAP-4

### 3 Payment Limitation, Payment Eligibility, AGI, and Other Compliance Requirements (Continued)

#### E Other Eligibility Provisions Applicable to CFAP

Other compliance provisions applicable to persons and legal entities requesting a CFAP payment include:

- controlled substance
- HELC/WC compliance, including AD-1026.

To be considered eligible for a CFAP payment, persons or legal entities must be “certified” with AD-1026 for the 2020 program year.

Part A, items 7A and 8 on the AD-3114 allows CFAP applicants (with either continuous certification on file or new filing) to certify with box 5B of AD-1026 if the producer:

- does not participate in any USDA benefits subject to HELC and WC compliance except Federal Crop Insurance or CFAP
- only has interest in land devoted to agriculture, which is exclusively used for perennial crops, except sugar cane, and,
- has not converted a wetland after **December 23, 1985**.

Livestock and honey applicants that do not have any interest in agricultural land (i.e., cropland, pastureland, rangeland, or forestland) certify to compliance by checking box 5A of AD-1026 (discussed in producer agreement of CFAP application Part A 7B and 8), as they do with other USDA benefits subject to conservation compliance.

Parts A and D of AD-1026 are required for producers certifying with box 5A or B. However, farm records for which a producer’s certification of compliance applies are not required.

All other producers who do not have continuous AD-1026 certification of compliance on file must file a complete AD-1026 according to 6-CP (including certification of Part B HELC/WC compliance questions). According to 6-CP, subparagraph 641 D these producers must establish farm records to which their certification of compliance applies before recording AD-1026 as “certified”. However, for CFAP record AD-1026 as “certified” when received. County Offices will keep these AD-1026s in a “needs to establish farm records folder” if information is not readily available to establish them. The producers will be contacted to do so as workload and time allows. Certification of AD-1026, recorded in subsidiary is still required for the CFAP payment to process.

## Notice CFAP-4

### 3 Payment Limitation, Payment Eligibility, AGI, and Other Compliance Requirements (Continued)

#### F Applicable Eligibility Forms for CFAP

The following forms must be on file for all persons and entities requesting CFAP benefits.

- **CCC-902 Automated** will be completed according to 5-PL and 3-PL (Rev. 2) by all CFAP applicants to collect:
  - names, addresses, taxpayer identification numbers for the person or legal entity (and its members)
  - member information for legal entities (including joint operations)
  - citizenship status for the person or legal entity (and its members)
  - contributions of foreign persons.

**Notes:** Manual forms CCC-902I (Parts A and B), CCC-902E (Parts A, B, and C) and CCC-901 (if applicable) may be used to collect the required information for CFAP. Information collected on manual forms **must** be loaded in Business File according to 3-PL (Rev. 2).

Applicants who are foreign persons or foreign entities as defined in 5-PL must complete CCC-902 to collect contributions of the foreign persons.

- **CCC-903** will be used to document COC payment limitation, producer eligibility, and foreign person eligibility determinations.
- **CCC-941** will be used to collect the certification of AGI for the CFAP applicant.
- **CCC-942** will be used to collect farm AGI certifications from the CFAP applicant and CPA or attorney, as applicable.

Failure to satisfy or comply with any of these provisions may result in a loss or reduction of payment eligibility.

#### G Timeframe for Filing Eligibility Documents

CFAP applicants **must** file all eligibility documents for CFAP within 60 calendar days from the date of signing a CFAP application.

Failure to timely provide all eligibility forms may result in no payment or a reduced payment.

Notice CFAP-4

4 CFAP Eligible Commodities and Payments

A CFAP Eligible Commodities

CFAP provides financial assistance to eligible producers with an ownership interest in the following eligible commodities that have been determined to have been impacted by the effects of the COVID-19 outbreak.

Commodity Category	Eligible Commodity
Dairy	<ul style="list-style-type: none"> <li>• Dairy (milk)</li> </ul>
Non-Specialty Crops and Wool	<ul style="list-style-type: none"> <li>• Barley – Malting only</li> <li>• Canola</li> <li>• Corn</li> <li>• Cotton – Upland</li> <li>• Millet</li> <li>• Oats</li> <li>• Sorghum</li> <li>• Soybeans</li> <li>• Sunflowers</li> <li>• Wheat – Durum</li> <li>• Wheat - Hard Red Spring</li> <li>• Wool (graded/clean and non-graded/greasy)</li> </ul>
Livestock	<ul style="list-style-type: none"> <li>• Feeder Cattle: Less than 600 Pounds</li> <li>• Feeder Cattle: 600 Pounds or More</li> <li>• Slaughter Cattle: Fed Cattle</li> <li>• Slaughter Cattle: Mature Cattle</li> <li>• All Other Cattle</li> <li>• Pigs: Less than 120 Pounds</li> <li>• Hogs: 120 Pounds or More</li> <li>• Lambs and Yearlings</li> </ul>
Value Loss Crops	<ul style="list-style-type: none"> <li>• Eligible value loss commodities will be identified in the future.</li> </ul>
Specialty Crops	<ul style="list-style-type: none"> <li>• Almonds</li> <li>• Apples</li> <li>• Artichokes</li> <li>• Asparagus</li> <li>• Avocados</li> <li>• Beans</li> <li>• Blueberries</li> <li>• Broccoli</li> <li>• Cabbage</li> <li>• Cantaloupe</li> <li>• Carrots</li> <li>• Cauliflower</li> <li>• Celery</li> <li>• Cucumbers</li> <li>• Eggplant</li> <li>• Garlic</li> <li>• Grapefruit</li> <li>• Kiwifruit</li> <li>• Lemons</li> <li>• Lettuce – Iceberg</li> <li>• Lettuce - Romaine</li> <li>• Mushrooms</li> <li>• Onions – Dry</li> <li>• Onions – Green</li> <li>• Oranges</li> <li>• Papayas</li> <li>• Peaches</li> <li>• Pears</li> <li>• Pecans</li> <li>• Peppers – Bell</li> <li>• Peppers – Other</li> <li>• Potatoes</li> <li>• Raspberries (Caneberries)</li> <li>• Rhubarb</li> <li>• Spinach (Greens)</li> <li>• Squash</li> <li>• Strawberries</li> <li>• Sweet Corn</li> <li>• Sweet Potatoes</li> <li>• Tangerines</li> <li>• Taro</li> <li>• Tomatoes</li> <li>• Walnuts</li> <li>• Watermelon</li> </ul>

## Notice CFAP-4

### 4 CFAP Eligible Commodities and Payments (Continued)

#### B CFAP Payments

The CFAP payment is:

- available to eligible producers who had or still have an ownership interest in 1 or more of the eligible commodities
- **not** subject to sequestration
- not subject to offset.

The CFAP payment will be determined in 1, 2, and/or 3 payment parts, and a total payment will be calculated based on the combined parts. The total payment amount will be multiplied by a factor of 80 percent after applying payment limitation to determine the actual payment amount. FSA may issue a second payment if funds remain available.

Generally, the initial payment of 80 percent of the calculated total will be issued as a single payment for each producer nationwide; however, subsequent payments may be issued as more data is received from each producer.

Payments will be determined according to the following table.

Commodity Category	CARES Act Funds	CCC Funds
Dairy	For each eligible producer, a payment rate in pounds of milk production including dumped milk for the months of January, February, and March 2020.	For each eligible producer, a payment rate in pounds of milk production including dumped milk for the months of January, February, and March 2020 with an adjustment factor of 1.014.
Non-Specialty Crops and Wool	For each eligible producer and commodity, eligible production will be based on the unsold production on hand on January 15, 2020, not to exceed 50 percent of the total 2019 production for that producer nationwide.	Fifty percent of production determined above will be paid using CCC funds.
	Fifty percent of production determined above will be paid using CARES Act funds.	
Livestock	For each eligible producer, payment is calculated by multiplying the number of livestock sold between January 15 and April 15, 2020, by the payment rate per head.  <b>Note:</b> Livestock must have been owned by the producer on January 15, 2020. Any offspring born from that same inventory are eligible.	For each eligible producer, payment is calculated by multiplying the highest livestock inventory between April 16 and May 14, 2020, by the payment rate per head.



**Notice CFAP-4**

**4 CFAP Eligible Commodities and Payments (Continued)**

**B CFAP Payments (Continued)**

Commodity Category	CARES Act Funds	CCC Funds
Value Loss Crops	To be determined.	
Specialty Crops	<p>There are 2 potential subparts to the payment:</p> <ul style="list-style-type: none"> <li>• For specific specialty crops, a payment for each eligible producer will be based on the volume of production sold between January 15, 2020, and April 15, 2020.</li> <li>• A payment for each producer will be based on the volume of production shipped but not sold or for which no payment was received (unpaid) between January 15, 2020, and April 15, 2020.</li> </ul>	<p>For each eligible producer, a payment will be based on the number of acres for which production was destroyed or not harvested due to market between January 15, 2020, and April 15, 2020.</p>

**Note:** All production, sales, and inventory of eligible commodities and livestock **must be subject to price risk** as of January 15, 2020. Unpriced inventory or production subject to price risk means any production, sales, and inventory that is not subject to an agreed-upon price in the future through a forward contract, agreement, or similar binding document. The producer's eligible commodity and/or livestock must still be at risk of price fluctuations after January 15, 2020, to be eligible for payment.

**Notice CFAP-4**

**5 CFAP Payment Rates and Reporting Requirements**

**A Dairy**

The following table lists the payment rates for CFAP Dairy:

<b>Commodity</b>	<b>Unit of Measure</b>	<b>CARES Act Payment Rate</b>	<b>CCC Payment Rate</b>
Dairy (Milk)	pounds	\$0.0471	\$0.0147

Each dairy operation will certify to milk production for the month of January, February, and March 2020 according to:

- milk commercially marketed for the months of January, February, and March 2020
- dumped milk during the months of January, February, and March 2020
- milk subject to price risk for the months of January, February, and March 2020.

**B Non-Specialty Crops and Wool**

The following table lists eligible non-specialty commodities and payment rates for CFAP.

<b>Commodity</b>	<b>Unit of Measure</b>	<b>CARES Act Payment Rate</b>	<b>CCC Payment Rate</b>
Barley (malting barley only)	bushel	\$0.34	\$0.37
Canola	pound	\$0.01	\$0.01
Corn	bushel	\$0.32	\$0.35
Upland Cotton	pound	\$0.09	\$0.10
Millet	bushel	\$0.31	\$0.34
Oats	bushel	\$0.15	\$0.17
Sorghum	bushel	\$0.30	\$0.32
Soybeans	bushel	\$0.45	\$0.50
Sunflowers	pound	\$0.02	\$0.02
Wheat, Durum	bushel	\$0.19	\$0.20
Wheat, Hard Red Spring	bushel	\$0.18	\$0.20
Wool (graded, clean basis)	pound	\$0.71	\$0.78
Wool (non-graded, greasy basis)	pound	\$0.36	\$0.39

Each producer will be required to certify, for each eligible commodity, their:

- total production in 2019
- 2019 production subject to price risk and unsold production as of January 15, 2020.

The payment formula is the eligible production multiplied by the applicable payment rate.

**Notice CFAP-4**

**5 CFAP Payment Rates and Reporting Requirements (Continued)**

**B Non-Specialty Crops and Wool (Continued)**

The eligible production is each producer's 2019 production subject to risk and not sold as of January 15, 2020, not to exceed 50 percent of each producer's total 2019 production. Fifty percent of the eligible production will be paid using CARES Act funds. The remaining 50 percent of the eligible production will be paid using CCC funds.

Crops used for grazing are ineligible for CFAP. Other eligible crop types and intended uses will be listed in 1-CFAP.

**C Livestock**

The following table lists eligible livestock and payment rates for CFAP.

<b>Livestock</b>	<b>Eligible Livestock</b>	<b>Unit of Measure</b>	<b>CARES Act Payment Rate</b>	<b>CCC Payment Rate</b>
<b>Cattle</b>	Feeder Cattle: Less Than 600 Pounds	Head	\$102.00	\$33.00
	Feeder Cattle: 600 Pounds or More	Head	\$139.00	\$33.00
	Slaughter Cattle: Fed Cattle	Head	\$214.00	\$33.00
	Slaughter Cattle: Mature Cattle	Head	\$ 92.00	\$33.00
	All Other Cattle	Head	\$102.00	\$33.00
<b>Hogs &amp; Pigs</b>	Pigs: Less Than 120 Pounds	Head	\$ 28.00	\$17.00
	Hogs: 120 Pounds or More	Head	\$ 18.00	\$17.00
<b>Lambs &amp; Yearlings</b>	All Sheep Less Than 2 Years Old	Head	\$ 33.00	\$ 7.00

Each producer will be required to certify, for each eligible livestock, their:

- owned inventory subject to price risk as of January 15, 2020, and any offspring from that inventory, that were sold between January 15 and April 15, 2020, and/or
- highest owned inventory between April 16 and May 14, 2020.

The payment formula is the sum of:

- the number of head sold multiplied by the applicable payment rate (CARES Act funds)
- the number of head in inventory multiplied by the applicable payment rate (CCC funds).

**Notice CFAP-4**

**5 CFAP Payment Rates and Reporting Requirements (Continued)**

**D Value Loss Crops**

No value loss crops have been determined eligible at this time. If a specific type of value loss crop is determined eligible for CFAP, producers will be required to report the value of sales and/or the value of inventory.

**E Specialty Crops**

The following table lists eligible specialty crops and payment rates for CFAP.

Specialty Crop	CARES Act Payment Rate for Sales (\$/pound)	CARES Act Payment Rate for Delivered and Unpaid (\$/pound)	CCC Payment Rate for Not Delivered (\$/acre)
Almonds	\$0.26	\$0.57	\$237.60
Apples		\$0.18	\$1,125.00
Artichokes	\$0.66	\$0.49	\$1,300.00
Asparagus		\$0.38	\$254.80
Avocados		\$0.14	\$153.60
Beans	\$0.17	\$0.16	\$233.79
Blueberries		\$0.62	\$795.60
Broccoli	\$0.62	\$0.49	\$1,563.00
Cabbage	\$0.04	\$0.07	\$367.30
Cantaloupe		\$0.10	\$478.80
Carrots	\$0.02	\$0.11	\$1,251.40
Cauliflower	\$0.11	\$0.31	\$1,327.20
Celery		\$0.07	\$560.00
Cucumbers	\$0.13	\$0.15	\$444.90
Eggplant	\$0.07	\$0.15	\$412.71
Garlic		\$0.85	\$2,635.00
Grapefruit		\$0.11	\$496.76
Kiwifruit		\$0.32	\$1,404.00
Lemons	\$0.08	\$0.21	\$1,424.00
Lettuce, iceberg	\$0.20	\$0.15	\$1,128.00
Lettuce, romaine	\$0.07	\$0.12	\$623.60
Mushrooms		\$0.59	\$33,109.96
Onions, dry	\$0.01	\$0.05	\$540.10
Onions green		\$0.30	\$1,782.00
Oranges		\$0.14	\$634.83
Papaya		\$0.32	\$1,020.00
Peaches	\$0.08	\$0.32	\$1,099.20
Pears	\$0.08	\$0.18	\$966.00
Pecans	\$0.28	\$0.93	\$116.46

**Notice CFAP-4**

**5 CFAP Payment Rates and Reporting Requirements (Continued)**

**E Specialty Crops (Continued)**

<b>Specialty Crop</b>	<b>CARES Act Payment Rate for Sales (\$/pound)</b>	<b>CARES Act Payment Rate for Delivered and Unpaid (\$/pound)</b>	<b>CCC Payment Rate for Not Delivered (\$/acre)</b>
Peppers, bell type	\$0.14	\$0.22	\$1,267.20
Peppers, other	\$0.15	\$0.22	\$644.80
Potatoes		\$0.04	\$449.00
Raspberries		\$1.45	\$3,780.00
Rhubarb	\$0.15	\$1.03	\$395.83
Spinach	\$0.37	\$0.37	\$1,022.00
Squash	\$0.72	\$0.39	\$2,534.40
Strawberries	\$0.84	\$0.72	\$7,042.00
Sweet corn	\$0.09	\$0.13	\$483.60
Sweet potatoes		\$0.18	\$871.60
Tangerines		\$0.22	\$1,224.88
Taro		\$0.23	\$481.50
Tomatoes	\$0.64	\$0.38	\$6,122.90
Walnut		\$0.45	\$322.20
Watermelon		\$0.02	\$0.00

Each producer will be required to certify, for each eligible commodity, their:

- total volume of production subject to price risk sold between January 15, 2020, and April 15, 2020
- total volume of production subject to price risk shipped (delivered) but not sold (unpaid) between January 15, 2020, and April 15, 2020
- acres left in the field or harvested but not shipped (delivered) between January 15, 2020, and April 15, 2020.

The payment formula is the volume of production subject to price risk or acres multiplied by the applicable payment rate.

The portion of the CFAP payment based on:

- volume of sold or delivered and unpaid production (first two bullets) is paid through CARES Act funds
- acres not delivered are paid through CCC funds.

## Notice CFAP-4

### 6 Outreach Responsibilities

#### A Monitoring Outreach Efforts

The SED, STC, and COC's will monitor State and county outreach efforts for CFAP in OTIS. Monitoring efforts will help ensure that program information and awareness is communicated to all producers, including underrepresented individuals, groups, and communities. Underrepresented groups and communities may include but are not limited to minority, beginning farmers, and specialty crop producers.

#### SOC's must:

- work with State Communications Coordinator (CC) and County Office Outreach Coordinators (COOC's) to ensure the availability to apply for CFAP is publicized through GovDelivery, the State's FSA website, radio, newspaper and other applicable broadcast mediums
- partner with stakeholders through the following ways:
  - provide awareness of program requirements, crops included in the program, and the opportunity to submit information through the Federal Register for consideration of commodities not included
  - discuss how stakeholders can help FSA prepare customers to apply for CFAP. Stakeholders can help producers understand:
    - how customers can set up an appointment
    - forms and documentation needed for program participation
    - expectations for the first FSA meeting
  - provide CFAP materials to partner organizations who work with local producers, including underserved producers which includes ethnic minorities, women, beginning and specialty crop producers.

## Notice CFAP-4

### 6 Outreach Responsibilities (Continued)

#### A Monitoring Outreach Efforts (Continued)

- ensure County Offices have the Telephonic Language Interpretation Service to reach an interpreter when applicable:
  - Step 1. Dial 888-331-0185 – This service is available 24 hours a day.
  - Step 2. When the operator answers, the employee will provide the following information:
    - Language requested
    - Agency: (FSA)
    - State.
  - Once this information is provided, the operator will promptly connect you with an interpreter.
- to request Document Translation Service, employees should contact the agency's limited English proficiency (LEP) representative in the Farm Production and Conservation (FPAC) Business Center Charles A. Russell II by either of the following:
  - email to [Charles.Russell@wdc.usda.gov](mailto:Charles.Russell@wdc.usda.gov)
  - telephone at 202-720-9413.
- coordinate with COOC's to ensure informational calls and/or virtual meetings regarding the program are conducted and program information is disseminated.
- ensure all county and State outreach efforts are recorded in the Outreach Tracking Information System (OTIS) timely to monitor outreach efforts in real time. Outreach activities should be categorized as "Other", and "CFAP" should be manually entered.

## Notice CFAP-4

### 6 Outreach Responsibilities (Continued)

#### B County Office Outreach Requirements

CED's and COOC's **must**:

- provide and educate producers with box client user guide to process applications
- provide CCC-860, Socially Disadvantaged, Limited Resource, Beginning and Veteran Farmer or Rancher Certification, as an optional form for producers to complete for FSA's records to capture applicable information on new program participants
- educate local groups, associations, organizations, and cooperatives on program provisions by emailing or mailing CFAP materials
- educate local groups, associations, organizations, and cooperatives on program provisions by explaining CFAP program requirements during calls and or webinars with local groups and producers
- ensure outreach efforts are entered and recorded in OTIS timely. Outreach activities should be categorized as "Other", and "CFAP" should be manually entered.

### 7 Action

#### A State Office Action

State Offices **will**:

- ensure County Offices are aware of the contents of this notice
- complete outreach efforts according to subparagraph 6 A
- provide additional assistance and/or resources that County Offices may need to prepare for CFAP signup.

#### B County Office Action

County Offices **must**:

- review this notice in advance of CFAP sign-up
- complete outreach efforts according to subparagraph 6 B.



Example of AD-3114

The following is an example of AD-3114.

This form is available electronically. Form Approved - OMB No. 0560-0295  
OMB Expiration Date: 11/30/2020

<b>AD-3114</b> (05-19-20)	1. Recording State  2. Program Year
<b>U.S. DEPARTMENT OF AGRICULTURE</b>  <b>CORONAVIRUS FOOD ASSISTANCE PROGRAM (CFAP) APPLICATION</b>	3. Recording County  4. Application Number

**NOTE:** The following statement is made in accordance with the Privacy Act of 1974 (5 USC 552a -- as amended). The authority for requesting the information identified on this form is 7 CFR Part 9, the CARES Act (Pub. L. 116-163), and 15 U.S.C. 714b and 714c. The information will be used to determine eligibility for program benefits. The information collected on this form may be disclosed to other Federal, State, and Local government agencies, Tribal agencies, and non-governmental entities that have been authorized access to the information by statute or regulation and/or as described in applicable Routine Uses identified in the System of Records Notice for USDA/FSA-2, Farm Records File (Automated). Providing the requested information is voluntary. However, failure to furnish the requested information will result in a determination of ineligibility for program benefits. Payments may be made under the program to which the form applies only to the extent permitted by applicable authorities.

**Public Burden Statement (Paperwork Reduction Act):** Public reporting burden for this collection is estimated to average 60 minutes per response, including reviewing instructions, gathering and maintaining the data needed, completing (providing the information), and reviewing the collection of information. You are not required to respond to the collection, or USDA may not conduct or sponsor a collection of information unless it displays a valid OMB control number. RETURN THIS COMPLETED FORM TO YOUR COUNTY FSA OFFICE.

**PART A PRODUCER AGREEMENT**

The Department of Agriculture (USDA) will make payments under the CFAP to producers who meet the requirements of the program. The following information is needed in order for USDA to make a determination that the applicant is eligible to receive a CFAP payment. By submitting this application, and upon approval by USDA, the applicant agrees:

- To comply with regulations set forth in 7 CFR Part 9 and any Notice of Funds Availability published by USDA. Copies of these documents may be found at [www.regulations.gov/docId=FSA-2020-0004](http://www.regulations.gov/docId=FSA-2020-0004).
- That a CFAP payment will only be made with respect to a commodity produced in the United States and intended to be marketed for commercial production; Any production/sales/inventory eligible for payment must be subject to price risk.
- To provide to USDA all information that is necessary to verify that the information provided on this form is accurate and to allow USDA representative access to all documents and records of the producer, including those in the possession of a third-party such as a warehouse operator, processor or packer;
- To comply with maximum payment limitation and adjusted gross income provisions applicable to the CFAP by completing forms:
  - CCC-902, Farm Operating Plan for Payment Eligibility (NOTE: Only Parts A and B of the form are required).
  - CCC-901, Member Information for Legal Entities, if applicable
  - CCC-941, Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information
  - CCC-942, Certification of Income From Farming, Ranching and Forestry Operations, optional
- To provide to USDA all information required for program participation within 60 days from the date the applicant signs this application. Failure of an individual, entity, or member of an entity to timely submit all information required may result in no payment or a reduced payment.
- To comply with the provisions of the Food Security Act of 1985 that protect highly erodible land and wetlands. All applicants must complete and submit all portions of form AD-1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification unless:
  - The applicant does not participate in USDA benefits subject to HELC and WC compliance except Federal Crop Insurance or CFAP, and
  - The applicant only has an interest in land devoted to the production of agricultural commodities that are perennial crops, excluding sugar cane, such as tree fruits, tree nuts, grapes, olives, native pasture and perennial forage. If the applicant produces alfalfa, the applicant must contact the Natural Resources Conservation Service to determine if such production qualifies as the production of a perennial crop; and
  - The applicant has not converted a wetland after December 23, 1985; or
- The applicant does not own or rent land devoted to an agricultural activity including cropland, rangeland, pastureland or forestland;
  - The applicant is a producer of livestock, nursery crops, honey or similar commodity that is not produced from tillage of land
- If the applicant meets either the conditions in section 7A (certification with box 5 B on AD-1026) or 7B (certification with box 5 A on AD-1026), the applicant is only required to complete Parts A and D of form AD-1026.

**PART B PRODUCER INFORMATION**

5. Producer's Name and Address (City, State and Zip Code)

PART C DAIRY PRODUCTION INFORMATION				COC USE ONLY		
6. Unit of Measure	7. January 2020 Production	8. February 2020 Production	9. March 2020 Production	10. COC Adjusted Jan 2020 Production	11. COC Adjusted Feb 2020 Production	12. COC Adjusted March 2020 Production
LBS						

PART D NON SPECIALTY CROP AND WOOL INFORMATION				COC USE ONLY	
13. Commodity	14. Unit of Measure	15. 2019 Total Production	16. 2019 Production Not Sold (as of Jan 15, 2020)	17. COC Adjusted 2019 Total Production	18. COC Adjusted 2019 Production Not Sold (as of Jan 15, 2020)

Example of AD-3114 (Continued)

AD-3114 (05-19-20) Page 2 of 2

PART E LIVESTOCK INFORMATION					COC USE ONLY		
19. Livestock	20. Unit of Measure	21. Jan 15, 2020 - April 15, 2020 Sales of Owned Inventory as of Jan 15, 2020 & Any Offspring From Owned Inventory	22. Inventory (Highest Between April 16, 2020 - May 14, 2020)	23. COC Adjusted Jan 15, 2020 - April 15, 2020 Sales of Owned Inventory as of Jan 15, 2020 & Any Offspring From Owned Inventory	24. COC Adjusted Inventory		
PART F VALUE LOSS INFORMATION				COC USE ONLY			
25. Commodity	26. Value of Sales (Jan 15, 2020 - April 15, 2020)	27. Value of Inventory (as of April 15, 2020)	28. COC Adjusted Value of Sales (Jan 15, 2020 - April 15, 2020)	29. COC Adjusted Value of Inventory (as of April 15, 2020)			
PART G SPECIALTY CROP INFORMATION (COC DETERMINATION NOT REQUIRED)					AMS USE ONLY		
30. Crop	31. Unit of Measure	32. Volume of Production Sold (Jan 15, 2020 - April 15, 2020)	33. Volume of Production Shipped but Not Sold and Unpaid (Jan 15, 2020 - April 15, 2020)	34. Acres with Production Not Shipped or Sold (Jan 15, 2020 - April 15, 2020)	35. AMS Adjusted Volume of Production Sold (Jan 15, 2020 - April 15, 2020)	36. AMS Adjusted Volume of Production Shipped but Not Sold and Unpaid (Jan 15, 2020 - April 15, 2020)	37. AMS Adjusted Acres with Production Not Shipped or Sold (Jan 15, 2020 - April 15, 2020)
PART H INCREASED PAYMENT LIMITATION FOR CORPORATIONS, LIMITED LIABILITY COMPANIES AND LIMITED PARTNERSHIPS							
38. Applicants who are Corporations, Limited Liability Companies, and Limited Partnerships may seek an increase in the per-person payment limitation from \$250,000 to either \$500,000, if such entity has two members, partners, or stockholders who each provided at least 400 hours or more of personal labor or active personal management, or combination thereof, to the farming operation as defined in 7 CFR Part 1400, or a maximum of \$750,000 if such entity has three members, partners, or stockholders who each provided at least 400 hours or more of personal labor or active personal management, or combination thereof, to the farming operation as defined in 7 CFR Part 1400. Identify the names of members, partners, or stockholders who provided at least 400 hours of active personal labor or active personal management, or combination thereof, to the farming operation identified in Part B Item 5:							
A.		B.			C.		
PART I PRODUCER CERTIFICATION							
<i>I hereby sign and acknowledge under penalty of perjury in accordance with 28 U.S.C. § 1746 and 18 U.S.C. § 1621 that the foregoing is true and correct.</i>							
39A. Signature (By)		39B. Title/Relationship of the Individual Signing in the Representative Capacity			39C. Date (MM/DD/YYYY)		
PART J COC DETERMINATION							
40. Payment Part	41. COC or Designee Signature			42. Date (MM/DD/YYYY)	43. Determination		
CARES					APPROVED	DISAPPROVED	
CCC					APPROVED	DISAPPROVED	

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its agencies, offices, and employees participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-2027, found online at [http://www.asc.usda.gov/complaint\\_filing\\_cust.html](http://www.asc.usda.gov/complaint_filing_cust.html) and at any USDA office or write a letter addressed to USDA and provide all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9892. Submit your completed form or letter to USDA by (1) mail, U.S. Department of Agriculture Office of the Assistant Secretary for Civil Rights 1400 Independence Avenue, SW Washington, D.C. 20260-0410, (2) fax, (202) 690-7442; or (3) email, [program.intake@usda.gov](mailto:program.intake@usda.gov). USDA is an equal opportunity provider, employer, and lender.

# Final Agency Determination: FAD-279

**Subject:** Two requests dated March 6, 2018, and March 21, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2018 crop year regarding the interpretation of section 20(a)(1) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

## **Background:**

Section 20 of the Basic Provisions states, in relevant part:

### **20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.**

(a) If you and we fail to agree on any determination made by us except those specified in section 20(d) or (e), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. Any mediator or arbitrator with a familial, financial or other business relationship to you or us, or our agent or loss adjuster, is disqualified from hearing the dispute.

(1) All disputes involving determinations made by us, except those specified in section 20(d) or (e), are subject to mediation or arbitration. However, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award.

\*\*\*\*\*

(b) Regardless of whether mediation is elected:

\*\*\*\*\*

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

7 C.F.R. § 400.765 states, in relevant part:

(b) Requesters may seek interpretations of those provisions of the Act and the regulations promulgated thereunder that are in effect for the crop year in which the request under this subpart is being made and the three previous crop years.

### **Interpretation Submitted**

Two interpretations were submitted in this FAD request:

#### First requestor's interpretation:

The first requestor interprets section 20(a)(1) of the Basic Provisions as requiring an interpretation from FCIC if the dispute in any way involves a policy or procedure interpretation. 7 C.F.R. § 400.765(b) limits requests for Final Agency Determinations to the current crop year in effect on the date the request is submitted and the three previous crop years. This creates a situation where an arbitrator is prohibited from ruling on a situation that requires a policy or procedure interpretation when the policy or procedure in question is outside of the scope of 7 C.F.R. § 400.765(b). If the arbitrator were to make an interpretation regarding the provisions in this situation, the award would be nullified pursuant to section 20(a)(1)(ii); however, the parties could not obtain an interpretation from the Federal Crop Insurance Corporation (FCIC) and the arbitration cannot proceed without an interpretation. Arbitration is thereby rendered impossible.

The first requestor states section 20(a)(1) of the Basic Provisions and 7 C.F.R. § 400.765(b) as prohibiting arbitration in the situation above. The arbitrator lacks authority to interpret the policy pursuant to section 20(a)(1) of the Basic Provisions. FCIC lacks the authority to interpret the policy pursuant to 7 C.F.R. § 400.765(b). Because neither the arbitrator nor FCIC is allowed to interpret the policy, arbitration is impossible, and thus ceases to be an option. The sole remaining avenue for resolving the dispute is judicial review pursuant to section 20(b)(2) of the Basic Provisions.

#### Second requestor's interpretation:

The second requestor seeks an interpretation of the policy language discussing when a final agency determination is necessary. The second requestor states that if an interpretation is over three years prior to the current crop year, no interpretation from FCIC can be sought.

In the event that an interpretation can be given, the second requestor states section 20(a)(1) of the Basic Provisions provides that FCIC need not provide any interpretations to guide state or federal court systems when only extra contractual claims are being presented against the approved insurance provider and there is no claim for breach of the insurance contract being made because there is no contract language that forms the basis of any claim being presented.

### **Final Agency Determination**

The Federal Crop Insurance Corporation (FCIC) agrees with both requesters that section 400.765(b) limits requests for Final Agency Determinations to the current crop year in effect on the date the request is submitted and the three previous crop years. If the filing for mediation, arbitration, or litigation is timely, but the dispute involves an interpretation of a policy provision that is outside the scope of crop years authorized in section 400.765(b), FCIC cannot provide an interpretation of this policy provision.

However, to the extent the language in the provisions interpreted is identical to the language applicable for any other crop year, the arbitrator can look through the archives to see whether an interpretation was previously provided. If not, any party can request an interpretation of the provision in the current year and that same interpretation can be applied to such other crop year provided that the language of the provisions is identical. Therefore, to the extent that policy language is the same, interpretations made for one year may apply to numerous years, regardless of whether or not this falls outside of the three-year period. For example, in 2018, a person can request an interpretation for policy language in effect for the 2018, 2017, 2016, or 2015 year. If the policy language was unchanged from 2013 through 2015, an interpretation could be requested for the 2015 year and the interpretation would apply for the 2013 year.

If there is a dispute of an interpretation over any policy or procedural provision, the parties are required to seek a Final Agency Determination or interpretation of procedure from FCIC. FCIC agrees with the first requestor that failure to obtain the required interpretation from FCIC, or an arbitrator disregarding an interpretation provided by FCIC, will result in nullification of any award.

In the event of a dispute, section 20(b)(3) of the Basic Provisions requires filing of a request for mediation, arbitration or litigation within one year of the determination by the approved insurance provider. The current time limit is set to allow an additional two years to pass before an interpretation must be requested to permit time for the appeals process to proceed. Most proceedings initiated within one-year of a determination that is in dispute would be readily able to request an interpretation within the timeframes established by this regulation. FCIC has yet to find the situation to exist where a Final Agency Determination or interpretation of procedure from FCIC has not been able to be requested nor a determination be given because the request of the filing for mediation, arbitration, or litigation is timely, but the dispute involves an interpretation of a policy provision that is outside the scope of crop years authorized in section 400.765(b). Therefore, given the timeline for timely mediation, arbitration, or litigation, the current crop year and three previous crop years is sufficient.

FCIC does not agree with the first requestor that if the parties are unable to resolve a disagreement through arbitration, the dispute may be resolved through judicial review pursuant to section 20(b)(2) of the Basic Provisions. As supported by FAD-193, published on RMA's website on October 21, 2013, an approved insurance provider or policyholder must complete the arbitration process before seeking resolution of a dispute through judicial

review. Therefore, if arbitration has not been completed, judicial review may not be sought. Because previously published FADs are generally applicable and may be used in an arbitration, completion of an arbitration hearing is not based solely on whether an interpretation from FCIC may be sought and received for a particular arbitration. In the case that an interpretation from FCIC may not be sought as it is outside of the time frame for which an interpretation may be requested (current crop year in effect on the date the request is submitted and the three previous crop years) the filing of a request for the particular arbitration must be examined to see if the filing requirements have been met in accordance with section 20(b)(3) of the Basic Provisions.

FCIC agrees in part with the second requestor's interpretation that section 20(a)(1) of the Basic Provisions provides that FCIC need not provide any interpretations to guide state or Federal court systems when only extra contractual claims are being presented against the approved insurance provider and there is no claim for breach of the insurance contract being made because there is no contract language that forms the basis of any claim being presented. FAD-225, published on RMA's website on February 4, 2015, explains if there is a dispute over any policy provision or procedure, the parties are required to seek an interpretation from FCIC in accordance with section 20(a)(1)(i) of the Basic Provisions. Claims and damages outside of the crop insurance contract between the approved insurance provider and the policyholder are not necessarily a dispute over any policy provision or procedure, but it is possible that even in an extra-contractual claim there is a dispute over an interpretation of provision of a Federal crop insurance policy or FCIC issued procedures. In these cases, an interpretation from FCIC must be obtained.

In accordance with 7 C.F.R. § 400.765(c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

**Date of Issue:** June 5, 2018

# Final Agency Determination: FAD-280

**Subject:** Two requests dated June 28, 2018, and July 17, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2015 crop year regarding the interpretation of section 20(b)(1) of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

## **Background:**

Section 20 of the Basic Provisions states, in relevant part:

### **20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review.**

\*\*\*\*\*

(b) Regardless of whether mediation is elected:

\*\*\*\*\*

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

## **Interpretations Submitted**

Two interpretations were submitted in this FAD request:

### First requestor's interpretation:

The first requestor interprets section 20(b)(1) to permit equitable tolling, until the time of discovery of the claim, where the policyholder's claim has been improperly and erroneously adjusted without fault of the policyholder, the policyholder has relied on the loss adjuster's (false) representation that the claim was adjusted properly and correctly, and subsequently the policyholder discovers that the claim was improperly and incorrectly adjusted. The arbitration period would not be tolled as to every aspect of the policyholder's claim, but only as to the improper and incorrect adjustment, falsely represented by the adjuster as proper and correct.

Under these circumstances—improper and incorrect claims adjustment based on the loss adjuster's failure to comply with the LAM or LASH, the policyholder's reliance on the loss adjuster's false representation that the claim had been adjusted properly and correctly, and discovery by the policyholder of the improper and incorrect claim adjustment more than one year after payment of the incorrect indemnity—compliance with the one-year limitations period is impossible unless the period is equitably tolled until the policyholder's discovery.

The first requestor is aware of the Merrill line of cases, which stand for the

proposition that a policyholder may not rely on an agent's representations about the explicit terms of the insurance policy, when those representations directly contradict the explicit terms of the policy. This is so because the policyholder is charged with the knowledge of the policy provisions; therefore, equitable estoppel does not apply. The facts of this request are fundamentally different because the false representations of the claims adjuster were based upon claims adjusting procedures—the LAM and the LASH—which the policyholder is not deemed to know. Producers are not loss adjusters, and they are not held legally responsible for knowing the particulars of loss adjustment procedures. Thus, if a loss adjuster represents that, in his professional judgment, a policyholder's claim has been adjusted properly and accurately, the policyholder is entitled to rely on that representation. If the policyholder subsequently learns that the loss adjuster's representation was false, whether intentionally so or not, the policyholder is entitled to initiate arbitration, but only if that arbitration is initiated within one year of the policyholder's learning that the loss adjuster's representation was erroneous. Furthermore, the scope of that arbitration is limited to the claims adjustment. The one-year arbitration period is tolled for the period during which the falsity of the approved insurance provider's misrepresentation was concealed from, or was otherwise unknown to, the policyholder.

If section 20(b)(1) were to be interpreted otherwise, the policyholder, by no fault of his own, would be barred from his sole remedy, given that the approved insurance provider asserts that it is under no obligation to correct erroneously adjusted claims when an underpayment has resulted. If the arbitration period may not be tolled in situations like this, then policyholders would be strongly disincentivized from ever reviewing past claims, even when they have actual knowledge that policyholders have been defrauded. Even if such reviews were conducted, and an underpayment was identified, approved insurance providers would have every incentive not to notify the policyholder of that underpayment until over one year had passed since the incorrect payment. If the approved insurance provider waited to inform the policyholder, it would be certain that the policyholder would have no remedy to recover the proper amount of indemnity owed under the policy. The policyholder would be completely at the mercy of the approved insurance provider.

#### Second requestor's interpretation:

The second requestor seeks interpretation of the policy language setting the period of time within which a policyholder can initiate an arbitration action to challenge a determination made by an approved insurance provider. The plain language of the policy provides for a period of one year from the date of the payment or determination challenged to initiate arbitration proceedings.

The first requestor proposes an interpretation that equitable principals such as laches, waiver, or estoppel can be used to limit or modify the terms of the insurance policy such that the limitations provision does not apply if the policyholder can establish by a preponderance of evidence that it did not know an error was made in the adjustment process due to an act of



misrepresentation of active concealment by a loss adjuster while adjusting a claim.

The second requestor contends that all information needed to verify the accuracy of the claim is available to a policyholder, such as the yield, the guarantee, and the number of acres, such that the policyholder can verify the amount of indemnity owed by the approved insurance provider, either independently or by consulting the policyholder's agent, at the time the payment is made and the policyholder must act to protect his or her interests and to verify the amount of the claim at the time the payment or determination is made. Further, the one-year limitations period is meaningless if the policyholder can defeat its application by alleging misrepresentation or other equitable claims to formulate a basis to toll the limitations period.

The second requestor further contends the RMA has already determined in FAD-211 that:

The policy is codified in the Code of Federal Regulations and has the force of law. Therefore, no one has the authority to waive or modify the provisions except as authorized in the regulations themselves. In accordance with section 506(l) of the Federal Crop Insurance Act (Act) (7 U.S.C. §1506(l)) state and local laws are preempted to the extent that they are in conflict with the Act, regulations or contracts of FCIC. A vast majority of the policy provisions, including the preamble to the policy, are codified in regulation so they preempt state and local laws.

FAD-211 prevents modification of the terms of the policy by equitable principals. Its precedential relevance should be acknowledged in this instance and the first requestor's interpretation should be rejected.

The second requestor also notes that the policyholder may not be without remedy under the proposed interpretation because case law acknowledges that state law-based claims may exist against the approved insurance provider outside of the insurance contract. While the limitations provision found in the Basic Provisions may require dismissal of the contractual indemnity claims brought in an arbitration proceeding, state law claims may proceed in the judicial system if there is sufficient factual basis to support the claims as required by the individual states.

Based upon the language of the policy, the second requestor proposes the following interpretation:

The one-year limitations provision prevents a policyholder from bringing a claim based upon the policy more than one year after the claim payment or the determination which is being challenged. The policyholder cannot defeat the application of the limitations provision by pleading equitable claims or defenses to its application because the policy terms cannot be waived or modified through the application of equitable principals. The policy provision itself provides no exception to its application and none can be created by equitable principals. This interpretation does not prevent the pursuit of state law-based claims in courts; however, an arbitration proceeding for

contractual damages brought more than one year after final claim payment or the determination challenged must be dismissed by the arbitrator as untimely.

### **Final Agency Determination**

The Federal Crop Insurance Corporation (FCIC) agrees with the second requestor that the one-year limitations provision prevents a policyholder from bringing an arbitration action or seek judicial review under the terms of the policy more than one year after the claim payment or the determination which is being challenged. The determination of the amount of indemnity due is a determination for the purposes of section 20(a) of the Basic Provisions. This means that the policyholder is required to file for arbitration to resolve any disputes regarding the indemnity payment prior to seeking judicial review. Under section 20(b) of the Basic Provisions, the policyholder must file for arbitration within the one-year time period for appeal. If the one-year term has expired, the producer is precluded from seeking arbitration or judicial review of any contract claims.

FCIC agrees in part with the second requestor's interpretation regarding the availability of non-contractual claims under state law. As previously provided in FAD-240, any claim for extra-contractual damages relating to a policy authorized under the Federal Crop Insurance Act (Act) may only be awarded if a determination is obtained from FCIC in accordance with section 20(i) of the Basic Provisions and 7 C.F.R. § 400.176(b). The provisions contained in 7 C.F.R. § 400.176(b), and the equivalent language in section 20(i) of the Basic Provisions, preempts any state law claims that are in conflict. That means that to the extent that State law would allow a claim for extra-contractual damages, such State law is pre-empted and extra-contractual damages can only be awarded if FCIC makes a determination that the AIP, agent or loss adjuster failed to comply with the terms of the policy or procedures issued by the Corporation and such failure resulted in the insured receiving a payment in an amount that is less than the amount to which the insured was entitled. Therefore, this means that state law claims may be possible but recovery of extra-contractual damages is limited and the determination from FCIC must first be obtained.

In accordance with 7 C.F.R. § 400.765 (c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

**Date of Issue:** September 18, 2018

# Final Agency Determination: FAD-281

**Subject:** Two requests dated June 28, 2018, and July 17, 2018, to the Risk Management Agency (RMA) requesting a Final Agency Determination for the 2015 crop year regarding the interpretation of section 3(g)(4) and section 14 of the Common Crop Insurance Policy Basic Provisions (Basic Provisions), published at 7 C.F.R. § 457.8. This request is pursuant to 7 C.F.R. § 400, subpart X.

**Background:**

Section 3(g)(4) of the Basic Provisions states, in relevant part:

**3. Insurance Guarantees, Coverage Levels, and Prices.**

\*\*\*\*\*

(g) It is your responsibility to accurately report all information that is used to determine your approved yield.

\*\*\*\*\*

(4) At any time we discover you have misreported any material information used to determine your approved yield or your approved yield is not correct, the following actions will be taken, as applicable:

- (i) We will correct your approved yield for the crop year such information is not correct, and all subsequent crop years;
- (ii) We will correct the unit structure, if necessary;
- (iii) Any overpaid or underpaid indemnity or premium must be repaid; and
- (iv) You will be subject to the provisions regarding misreporting contained in section 6(g)(1), unless the incorrect information was the result of our error or the error of someone from USDA.

\*\*\*\*\*

**14. Section 14 Duties in the Event of Damage, Loss, Abandonment, Destruction, or Alternative Use of Crop or Acreage.**

\*\*\*\*\*

Our Duties:

\*\*\*\*\*

(i) We recognize and apply the loss adjustment procedures established or approved by the Federal Crop Insurance Corporation.

**Interpretations Submitted**

Two interpretations were submitted in this FAD request:

First requestor's interpretation:

The first requester interprets sections 3(g)(4) and 14(i) of the Basic Provisions, along with Para. 1262 of the 2014 Crop Insurance Handbook (CIH), as creating a duty on the part of the Approved Insurance Provider (AIP) to correct claims that the AIP discovers were incorrectly adjusted. This correction may be made "[a]t any time," including a subsequent crop year. The first requester believes that the policy provisions and procedures also impose a duty on the AIP to repay an underpaid indemnity or to refund an overpaid premium.

First requester believes FCIC addressed a similar issue in FAD-140 and provides the following excerpts from that FAD:

Any time there has been a non-compliance with approved policy and procedure, the situation must be corrected to comply with approved policy and procedure.

Since incorrect application of approved policy or procedure must be corrected, this means the AIP may issue a new summary of coverage to the policyholder and base premiums charged and any loss payments on the corrected information.

The first requester believes that FAD-140 interpreted the policy as placing a duty on the AIP to correct errors when non-compliance with approved policy and procedure occurred and that this also encompasses correction of erroneous claims adjustment.

Second requestor's interpretation:

The second requester interprets Section 3(g)(4) of the Basic Provisions as providing the requirements for an AIP to correct policy information when an insured misstates information used to calculate the insured's approved yield. Additionally, that this policy provision does not discuss an insurer's obligation, or ability, to correct an error made in the adjustment of a claim.

The second requester believes there is a process employed by AIPs to correct errors made in the adjustment of claims. If the insured wishes to avoid arbitration, it has one year within which to bring the error to the attention of the AIP and to request an AIP to change any determination made. If the error is not willingly and voluntarily corrected, the insured may initiate arbitration proceedings within one year of the determination being made. If the insured fails to do so, further claims are barred by the limitations provision in Section 20 of the Basic Provisions and must be dismissed by the arbitrator as untimely under the policy.

**Final Agency Determination**

The Federal Crop Insurance Corporation (FCIC) agrees with second requester and agrees in part with the first requester. FCIC does not agree with first requester that Section 3(g)(4) and 14(i) of the Basic Provisions along with Para. 1262 of the 2014 CIH creates a duty on part of the AIP to correct claims that the AIP discovers were incorrectly adjusted. Section 3(g)(4) of the Basic Provisions and Para. 1262 of the CIH are specific to an error in the insured's approved yield the AIP has identified and must be

corrected. Section 3(g)(4) and CIH Para. 1262 do not address errors made in adjusting a claim.

However, that does not mean that the AIP does not have a duty to correct claims. The Federal crop insurance program uses taxpayer dollars and FCIC and AIPs have a duty to ensure those taxpayer dollars are paid in accordance with policy and procedures. As a result, FCIC agrees in part with the second requestor. If the AIP discovers a claim was not adjusted according to loss adjustment procedures established or approved by FCIC the AIP is required to correct the claim. This obligation has been confirmed by the courts in *Old Republic Insurance Company v. FCIC*, 947 F.2d 269 (7th Circuit 1991).

However, regardless of when a claim was first paid or denied, if the AIP later revises the claim because it discovered that policy and procedures were not followed, then this becomes a new determination and the producer has one year to seek arbitration from the date of such determination if the producer does not agree with the changes. Arbitration must be sought within this deadline before any judicial review may be sought.

FCIC agrees with the first requestor that in FAD-140 AIPs must correct errors when non-compliance with approved policy and procedure have occurred. If the AIP determines a claim has not been adjusted according to loss adjustment procedures established or approved by FCIC the claim must be corrected.

In accordance with 7 C.F.R. § 400.765(c), this Final Agency Determination is binding on all participants in the Federal crop insurance program for the crop years the policy provisions are in effect. Any appeal of this decision must be in accordance with 7 C.F.R. § 400.768(g).

**Date of Issue:** September 20, 2018

943 F.3d 1134

United States Court of Appeals, Eighth Circuit.

Terry R. BALVIN Plaintiff - Appellee

v.

RAIN AND HAIL, LLC Defendant - Appellant

Terry R. Balvin Plaintiff - Appellant

v.

Rain and Hail, LLC Defendant - Appellee

No. 18-3018, No. 18-3061

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Submitted: October 16, 2019

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Filed: December 2, 2019

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Rehearing and Rehearing En

Banc Denied February 6, 2020 \*

Synopsis

**Background:** Insured farmer moved to vacate arbitration award denying his claim for losses on his corn crop under multiple peril crop insurance policy, federally reinsured pursuant to the Federal Crop Insurance Act (FCIA). The United States District Court for the District of South Dakota, Lawrence L. Piersol, Senior District Judge, 336 F.Supp.3d 1008, granted the motion, in part, and denied the motion, in part. Parties filed cross appeals.

**[Holding:]** The Court of Appeals, Gruender, Circuit Judge, held that arbitrator did not exceed his authority by denying claim for losses on corn crop.

Affirmed in part, reversed in part, and remanded with instructions.

**Procedural Posture(s):** On Appeal; Application to Vacate Arbitration Award.

West Headnotes (10)

[1] **Insurance** ⚡ Federal Agencies and Regulation

**Insurance** ⚡ Government Sponsored Programs

The Federal Crop Insurance Corporation (FCIC) reinsures crop insurance policies and is supervised by the Risk Management Agency (RMA) of the United States Department of Agriculture. 7 U.S.C.A. § 6933.

[2] **Insurance** ⚡ Government Sponsored Programs

To qualify for crop reinsurance, crop insurers must comply with the Federal Crop Insurance Act (FCIA) and Federal Crop Insurance Corporation (FCIC) regulations. 7 U.S.C.A. § 6933; 7 C.F.R. § 457.8.

[3] **Insurance** ⚡ Government Sponsored Programs

**Insurance** ⚡ Formal Requisites

Though a crop insurance policy is a contract between a farmer and an insurance provider, the Federal Crop Insurance Corporation (FCIC) determines the terms and conditions of federal crop insurance policies. 7 U.S.C.A. § 6933; 7 C.F.R. § 457.8.

[4] **Alternative Dispute Resolution** ⚡ Questions of law or fact

The Court of Appeals reviews de novo the district court's legal conclusions on a motion to vacate an arbitration award, and reviews the district court's findings of fact for clear error.

[5] **Alternative Dispute Resolution** ⚡ Scope of inquiry in general

A court deciding a motion to vacate an arbitration award accords an extraordinary level of deference to the underlying award.

[6] **Alternative Dispute Resolution** ⚡ Consistency and reasonableness; lack of evidence

It is only when an arbitrator strays from interpretation and application of the arbitration agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. [9 U.S.C.A. § 10\(a\)\(4\)](#).

[7] **Alternative Dispute Resolution**  Error of judgment or mistake of law


**Alternative Dispute Resolution**  Mistake of fact and miscalculation

An arbitrator does not exceed his powers, as may support vacatur of the arbitration award, by making an error of law or fact, even a serious one.


[9 U.S.C.A. § 10\(a\)\(4\)](#).

[8] **Alternative Dispute Resolution**  Actions exceeding arbitrator's authority

**Alternative Dispute**

**Resolution**  Consistency and reasonableness; lack of evidence

So long as the arbitrator is even arguably construing or applying the relevant contract and acting within the scope of his authority, the arbitration award should be confirmed.

[9] **Insurance**  Subjects and scope of determination, in general

Arbitrator did not exceed his authority by denying insured farmer's claim for losses on his corn crop, under multiple peril crop insurance policy, federally reinsured pursuant to the Federal Crop Insurance Act (FCIA), based on finding that the appraised value of his crops exceeded policy's guaranteed minimum crop production; although the policy provided that interpretations of the policy terms had to be obtained from Federal Crop Insurance Corporation (FCIC) and arbitrator did not seek determination from FCIC as to meaning of "appraised value" in the policy, arbitrator did not interpret meaning of "appraised value" in making denial determination, and neither party argued during arbitration that arbitrator was required to make that interpretation. [7 U.S.C.A.](#)

[§ 6933](#); [9 U.S.C.A. § 10\(a\)\(4\)](#); [7 C.F.R. §§ 400.766\(b\)\(4\), 457.8](#).

[10] **Alternative Dispute Resolution**  Arbitrability of dispute

When an arbitration agreement incorporates American Arbitration Association (AAA) rules, the parties agree to allow the arbitrator to determine threshold questions of arbitrability.

\*1135 Appeal from United States District Court for the District of South Dakota - Sioux Falls

**Attorneys and Law Firms**

J. Grant Ballard, ARK AG LAW, Little Rock, AR, for Plaintiff-Appellee.

William Fuller, Derek A. Nelsen, FULLER & WILLIAMSON, Sioux Falls, SD, for Defendant-Appellant.

Before SMITH, Chief Judge, GRUENDER and BENTON, Circuit Judges.

**Opinion**

GRUENDER, Circuit Judge.

Rain and Hail, LLC appeals the district court's order vacating an arbitration award, arguing that the district court did not properly defer to the arbitrator's decision. Claiming that the district court should have vacated the arbitration award for additional reasons, Terry Balvin cross appeals. We affirm in part, reverse in part, and remand to the district court to enter an order confirming the arbitration award.

[1] [2] [3] Rain and Hail issues federal crop insurance policies through a Standard Reinsurance Agreement with the Federal Crop Insurance Corporation ("FCIC"). The FCIC reinsures crop insurance policies and is supervised by the Risk Management Agency ("RMA") of the United States Department of Agriculture. See \*1136 *Davis v. Producers Agric. Ins. Co.*, 762 F.3d 1276, 1284-85 (11th Cir. 2014); [7 U.S.C. § 6933](#). To qualify for the reinsurance, insurers must comply with the Federal Crop Insurance Act ("FCIA") and FCIC regulations. *Davis*, 762 F.3d at 1284. Though the policy

is a contract between a farmer and an insurance provider, the FCIC determines the terms and conditions of federal crop insurance policies. See *id.* at 1284-85; 7 C.F.R. § 457.8.

Rain and Hail issued a crop insurance policy to Balvin, a South Dakota farmer, in 2015. Balvin filed a claim under the policy later that year. He claimed he could not timely harvest his crop due to moisture, a severe blizzard, and large snowfall. Rain and Hail determined that the appraised value of Balvin's crop exceeded his policy's guaranteed minimum crop production and denied his claim as a "non-loss."

Balvin initiated arbitration proceedings in accordance with the terms of the policy, and the arbitrator denied his claim. Balvin filed a motion to vacate the arbitration award in the United States District Court for the District of South Dakota. Rain and Hail filed a motion to confirm the arbitration award. The district court denied in part and granted in part Balvin's motion and denied in part and granted in part Rain and Hail's motion. Rain and Hail appeals, arguing that the arbitrator did not exceed his powers by interpreting a policy or procedure. Balvin cross appeals, arguing that the arbitration decision should be vacated for an additional reason—the arbitrator exceeded his powers by determining Balvin abandoned his crop.

[4] [5] We review *de novo* the district court's legal conclusions, and we review its findings of fact for clear error. See *Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 897 (8th Cir. 2018); *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001). We "accord an extraordinary level of deference to the underlying award." *SBC Advanced Sols., Inc. v. Commc'ns Workers of Am., Dist. 6*, 794 F.3d 1020, 1027 (8th Cir. 2015) (internal quotation marks omitted).

[6] [7] [8] The Federal Arbitration Act specifies when a district court may vacate an arbitration award. As relevant here, a district court may vacate the award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). "It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (brackets and internal quotation marks omitted). "An


arbitrator does not 'exceed his powers' by making an error of law or fact, even a serious one." *Beumer Corp. v. ProEnergy Servs., LLC*, 899 F.3d 564, 565 (8th Cir. 2018). "[S]o long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the award should be confirmed." *Id.* (internal quotation marks omitted).

Rain and Hail argues that, contrary to the district court's decision, the arbitrator did not exceed his powers by interpreting a policy or procedure when he concluded that the appraised value of Balvin's crop should be used to determine whether Balvin had an insured loss, resulting in a denial of Balvin's claim. The crop insurance policy states that the arbitrator cannot interpret the policy or FCIC procedures: "[I]f the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any \*1137 policy provision or procedure, either [Balvin] or [Rain and Hail] must obtain an interpretation from FCIC ...." It further provides that "[f]ailure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award."

Balvin claims, and Rain and Hail agrees, that FCIC handbooks require a production worksheet and a signed appraisal worksheet when an appraisal is performed and that Rain and Hail did not complete a production worksheet nor was the appraisal worksheet signed when Rain and Hail appraised Balvin's crop. Balvin thus argued before the district court that the arbitrator "exceeded his authority" because the arbitrator's determination required that he interpret the policy term "appraised value." The district court agreed, observing that the parties do not point to an "applicable procedure for determining appraised value when a Production Worksheet is not done and Appraisal Worksheets are not signed." It therefore concluded that the arbitrator exceeded his powers because Balvin's argument about appraised value "is precisely the type of dispute regarding the application of policy and procedure that needed to be submitted to the FCIC for interpretation."


[9] [10] On appeal, Rain and Hail argues that the arbitrator did not exceed his authority because he "reasonably concluded that the dispute over the corn appraisals completed by Rain and Hail was an evidentiary or factual dispute within his authority to resolve." Balvin, on the other hand, argues that whether the appraisal dispute involves an interpretation is a threshold arbitrability question for a court to decide. But the policy's arbitration clause incorporated the American



Arbitration Association (“AAA”) rules. “By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability.”  [Green v. SuperShuttle Int’l, Inc.](#), 653 F.3d 766, 769 (8th Cir. 2011). Thus, the arbitrator was free to determine any threshold arbitrability questions to the extent they were at issue.

After reviewing Balvin’s briefing and the arbitrator’s decision, we conclude that the arbitrator did not exceed his powers because the dispute about the interpretation of “appraised value” was not even before the arbitrator. Balvin argued to the arbitrator that the appraisals were irrelevant and inaccurate. Though Balvin did point out that the appraisals were not signed and were incomplete, he did not argue that this required the arbitrator to interpret the policy term “appraised value,” and Balvin acknowledged that “[t]he hearing officer in [his] arbitration [would] need to decide whether to allow the appraisals to dictate the adjustment of the loss.”

The arbitrator addressed Balvin’s arguments, saying, “Claimant implied in his testimony and argued in his post-hearing brief that the January and March appraisals are ‘irrelevant,’ ‘questionable,’ or that the numbers may have been ‘fudged.’ There is no evidence of a motive to falsify that might support such inferences.” Based on this language and the arguments before the arbitrator, the arbitrator was at least “arguably construing or applying the contract and acting within the scope of his authority” because he was making a credibility determination about the appraisals, rather than interpreting a policy or procedure. *See Beumer Corp.*, 899 F.3d at 565.

It was not until after the arbitration decision that Balvin first raised the argument that the arbitrator impermissibly interpreted a term of the policy.<sup>1</sup> An arbitrator \*1138 has not exceeded his powers where neither party suggested that a term of the policy was subject to interpretation, but the interpretation dispute instead arose after the arbitration proceedings. We emphasize that we “accord an extraordinary level of deference” to the arbitrator’s decision.  [SBC Advanced Sols.](#), 794 F.3d at 1027 (internal quotation marks omitted). The arbitrator thus did not exceed his authority by denying Balvin’s claim based on the appraised value of his crops.


The arbitrator’s findings also support denial of Balvin’s claim on a different ground—that he abandoned his crop


—despite Balvin’s argument to the contrary in his cross appeal. “To receive any indemnity,” Balvin’s policy requires “[t]hat the loss was caused by one or more of the insured causes.” His policy provided coverage for “unavoidable, naturally occurring events” and did not provide coverage for “[a]ll other causes of loss.” The arbitrator found that “[f]or unexplained reasons, [Balvin] abandoned his ... crop by failing to harvest the crop in a timely manner,” a cause of loss not covered under the policy. The arbitrator noted that Balvin’s neighbor was able to harvest his entire crop and that no other farmer in Balvin’s county submitted a claim for loss because they were not able to harvest their crops due to excess moisture.

Balvin responds that the arbitrator could not properly make an abandonment finding because such a finding involved a “good farming practices” determination.<sup>2</sup> The crop insurance policy defines “abandon” to include the “failure to harvest in a timely manner.” According to Balvin, an FCIC manual states that failure to timely harvest cannot be considered abandonment unless the crop is in a condition where “harvest would be considered as a good farming practice.” Balvin thus claims that the arbitrator’s abandonment finding necessarily involved a good farming practices determination. He additionally notes that the policy allows arbitration of disputes about decisions Rain and Hail makes, but it excepts those decisions with respect to good farming practices. Instead, the policy provides Balvin the right to request a determination from the FCIC if he disagrees with Rain and Hail’s good farming practices determination.

Balvin argues that the arbitrator did not have the authority to make a good farming practices determination in the first instance under the terms of the policy because Rain and Hail should have made the determination first, thereby giving Balvin the option to appeal the determination to the FCIC. He urges us to vacate the arbitration award on this ground.<sup>3</sup> Although \*1139 the policy provides that Rain and Hail initially would make any good farming practices determinations, it does not expressly prohibit the arbitrator from making a good farming practices determination for the first time in the event the need arises during an arbitration proceeding. *See CenterPoint Energy Res. Corp. v. Gas Workers Union, Local No. 340*, 920 F.3d 1163, 1167 (8th Cir. 2019) (“The arbitrator’s disregard of the contract must be clear: that an opinion includes an ambiguity that permits the inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce the award.” (internal quotation marks omitted)).

While the fact that the arbitrator made the good farming practices determination in this case may be unusual given that the policy contemplates that Rain and Hail would make such a determination, that does not necessarily mean the arbitrator exceeded his powers. “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *Great Am. Ins. Co. v. Russell*, 914 F.3d 1147, 1150 (8th Cir. 2019) (alteration in original).

But even if the arbitrator did exceed his powers by making a good farming practices determination, the error is harmless because he did not exceed his powers in denying Balvin’s claim based on the appraised value of Balvin’s crop. See  9 U.S.C. § 10(a) (providing that courts “may” vacate an arbitration award where the arbitrator exceeded his powers (emphasis added)); cf. *Coutee v. Barington Capital Grp.*,


*L.P.*, 336 F.3d 1128, 1134 (9th Cir. 2003) (“Arbitrators act beyond their authority if they fail to adhere to a valid, enforceable choice of law clause agreed upon by the parties. If such error is harmless, however, it is not grounds for vacatur.” (citation omitted));  *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005) (“[T]he arbitrator’s error was harmless, since he would have arrived at the conclusion he reached here, even absent the discussion of the aberrant language.”). In other words, the abandonment finding was not necessary to the arbitrator’s denial of Balvin’s claim.

For the foregoing reasons, we reverse in part, affirm in part, and remand to the district court to enter an order confirming the arbitration award.

#### All Citations

943 F.3d 1134

### Footnotes

- \* Judge Kelly did not participate in the consideration or decision of this matter.
- 1 The RMA has contemplated such a scenario. It issued a Final Agency Decision in 2015 recognizing that a dispute about the interpretation of a policy or procedure “may arise after the arbitration award has been rendered.” RMA Final Agency Determination 230 (U.S.D.A. 2015). And according to a new FCIC regulation, if either party to an arbitration “believes an award or decision was rendered by ... [an] arbitrator ... based on a disputed provision in which there was a failure to request a final agency determination or FCIC interpretation ... the party may request FCIC review the matter to determine if a final agency determination or FCIC interpretation should have been sought.” 7 C.F.R. § 400.766(b)(4).
- 2 It is less than clear that the arbitrator in fact made a good farming practices determination. An RMA and FCIC handbook lists “What Does Not Qualify for GFP [good farming practices] Determination,” which includes “identifying or determining that an insured cause of loss was present.” U.S. Dep’t of Agric., FCIC 14060-1, *Good Farming Practice Determination Standards Handbook* 11-12 (2018). For the purposes of this appeal, we assume the arbitrator made a good farming practices determination.
- 3 At times in his briefs Balvin appears to raise arguments about which sections of an FCIC manual the arbitrator should have applied. The district court did not address these arguments, and it is not clear they were raised before the district court. See  *Local 2, Int’l Bhd. Of Elec. Workers, AFL-CIO v. Anderson Underground Constr., Inc.*, 907 F.2d 74, 76 (8th Cir. 1990) (declining to consider a challenge to an arbitration award that was raised “for the first time on appeal”). To the extent the arbitrator applied the wrong sections of the manual, “[t]he parties bargained for the arbitrator’s decision; if the arbitrator got it wrong, then that was part of the bargain.” *Beumer Corp.*, 899 F.3d at 566.

914 F.3d 1147

United States Court of Appeals, Eighth Circuit.

GREAT AMERICAN INSURANCE  
COMPANY, Plaintiff - Appellee

v.

Jonathan L. RUSSELL, Defendant - Appellant

No. 17-2441

Submitted: November 13, 2018

Filed: January 31, 2019

**Synopsis**

**Background:** Insurer brought action to vacate arbitration award in favor of insured for wrongfully denying his claim under crop insurance policy for damage to his corn crop. The United States District Court for the Western District of Missouri, Dean Whipple, J., [2017 WL 4750630](#), vacated arbitration award. Insured appealed.

**[Holding:]** The Court of Appeals, Kelly, Circuit Judge, held that arbitration panel's failure to break down award by each county where insured had corn crop did not mean panel imperfectly executed its powers such that it rendered no mutual, final, and definite award.

Vacated and remanded.

**Procedural Posture(s):** On Appeal; Motion to Set Aside or Vacate Arbitration Award.

West Headnotes (7)

[1] **Insurance** Authority

**Insurance** Award

**Insurance** Alternative dispute resolution

Although federal regulations impose certain limitations on the powers of arbitrators assessing federally-reinsured crop insurance claims, arbitral awards are still governed by the Federal Arbitration Act. [9 U.S.C.A. § 10\(a\)\(4\)](#); [7 C.F.R. §§ 457.8, 457.113](#).

[2] **Insurance** Trial de novo

Court of Appeals would review de novo district court's vacatur of arbitration award in favor of insured and against insurer for wrongfully denying insured's claim under crop insurance policy for damage to his corn crop, where district court's order dealt entirely with questions of law as to whether federal regulations required arbitration award to be broken down into separate awards for each county where insured had acreage of insured crop. [9 U.S.C.A. § 10\(a\)\(4\)](#); [7 C.F.R. §§ 457.8, 457.113](#).

[3] **Alternative Dispute**

**Resolution** Constitutional and statutory provisions and rules of court

Federal Arbitration Act is a congressional declaration of a liberal federal policy favoring arbitration agreements. [9 U.S.C.A. § 10\(a\)\(4\)](#).

1 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Scope and Standards of Review

Court's review of an arbitration award is very limited under the Federal Arbitration Act.

1 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Mistake or Error


As long as arbitrator is even arguably construing or applying contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision under Federal Arbitration Act. [9 U.S.C.A. § 10\(a\)\(4\)](#).

1 Cases that cite this headnote


[6] **Insurance** Making and formal requisites

Arbitration panel's failure to break down award by each county where insured had corn crop

did not mean panel imperfectly executed its powers such that it rendered no mutual, final, and definite award in favor of insured and against insurer for wrongfully denying claim under crop insurance policy for damage to corn crop, as would require vacatur of award under Federal Arbitration Act; federal regulation required that award describe “breakdown by claim for any award” and defined “claim for indemnity” as “claim made on [the insurer’s] form,” insured submitted single claim covering his corn crop, insurer assigned single claim number, panel accepted insurer’s decision to treat claim as singular, and no regulation required panel to segregate claim into multiple separate claims.

 9 U.S.C.A. § 10(a)(4); 7 C.F.R. §§ 457.8, 457.113.

[7] **Alternative Dispute Resolution**  Findings, conclusions, and reasons for decision

There is no requirement under the Federal Arbitration Act that the arbitrator’s decision be particularly detailed; so long as it adequately explains the disposition of each claim at issue, it should be upheld.  9 U.S.C.A. § 10(a)(4).

[1 Cases that cite this headnote](#)

\*1148 Appeal from United States District Court for the Western District of Missouri - St. Joseph

**Attorneys and Law Firms**

[John L. Hayob](#), BROWN & RUPRECHT, Kansas City, MO, [Thomas C. James, Jr.](#), SANDERS & ASSOCIATES, Cincinnati, OH, for Plaintiff - Appellee.

Michael Brett Ryan, III, WATSON & RYAN, Council Bluffs, IA, for Defendant - Appellant.

Before [GRUENDER](#), [KELLY](#), and [GRASZ](#), Circuit Judges.

**Opinion**

[KELLY](#), Circuit Judge.

Jonathan Russell appeals the district court’s vacatur of the arbitration award he received against his insurer, Great American Insurance Company, for wrongfully denying his claim for damage to his 2013 corn crop. Because the arbitrators rendered a sufficiently mutual, final, and definite award, vacatur was improper. We accordingly vacate the district court’s judgment and remand for further proceedings.

I

[1] Russell submitted claims to Great American for damage to his 2013 corn and soybean crops in Atchison, Holt, and Nodaway counties in Missouri. Russell’s crop insurance policy is governed by federal regulations; 7 C.F.R. §§ 457.8 and \*1149 457.113 (2013) form the policy’s essential terms. After Great American denied his claims, Russell invoked the arbitration provision in § 457.8 ¶ 20. Although the regulations impose certain limitations on the powers of arbitrators assessing federally-reinsured crop insurance claims like Russell’s, arbitral awards are still governed by the Federal Arbitration Act. See, e.g., [J.O.C. Farms, L.L.C. v. Fireman’s Fund Ins. Co.](#), 737 F. App’x 652, 655 (4th Cir. 2018) (per curiam); [Davis v. Producers Agric. Ins. Co.](#), 762 F.3d 1276, 1283–85 (11th Cir. 2014).

Following an evidentiary hearing, the three-arbitrator panel awarded Russell \$1,433,008 for damage to his corn crop in the three counties but denied his soybean claim. The panel found that Great American’s denial of Russell’s corn claim—based on (1) Great American’s inability to substantiate an insurable cause of loss and (2) Russell’s failure to provide adequate records to establish production “by unit”—was erroneous. After reviewing the evidence, the panel concluded that Russell’s accounts of insurable crop damage were independently verified but that Great American had failed to conduct a timely on-site inspection until after harvest was completed. The arbitrators credited testimony of witnesses that the crops in question experienced significant damage from drought, rootworm, and heavy winds. As to the second ground for denial, the panel noted that Great American had “collaps[ed] all acres farmed by Russell into a single unit pursuant to policy provisions.” The panel accepted the analysis of Russell’s damages expert, who calculated the total damage to the corn crop as \$1,433,008. Great American did not challenge this calculation or offer a different calculation.

On May 25, 2016, Great American moved to vacate or modify the award. The panel denied the motion as untimely

because the award issued on February 23, 2016, and the arbitration association's rules require that any motion to correct computational errors be filed within 20 days of the award. Great American then appealed the award under 9 U.S.C. § 10(a)(4), which permits a district court to vacate an arbitration award if "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Great American argued that the arbitrators "imperfectly executed" their powers because they failed to comply with the regulations governing the arbitration proceeding. The applicable regulations required the panel to provide "a written statement describing the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award." 7 C.F.R. § 457.8 ¶ 20(a)(2). "Failure of the arbitrator to provide such written statement will result in the nullification of all determinations of the arbitrator." *Id.* Great American posited that the panel (1) did not break down the award by county, which was required by the "breakdown by claim" language; (2) did not explain how the award amount was calculated; and (3) made impermissible interpretations of applicable regulations.

[2] The district court agreed that the panel had failed to properly break down the award "by claim," nullifying the entire award. The court based its decision on § 457.113 ¶ 11(a), which states in part that the insurer "will determine [the insured's] loss on a unit basis," and on § 457.8 ¶ 1, which defines an enterprise unit as "[a]ll insurable acreage of the same insured crop ... in the county in which you have a share on the date coverage begins for the crop year." Relying on this language, the district court concluded that the arbitration panel was required to break down the \*1150 award into separate awards for each of the three counties to provide the required "breakdown by claim." It vacated the award and did not address Great American's argument that the panel made improper interpretations of the regulations. Because the district court's order deals entirely with questions of law, we review it de novo. [MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499](#), 345 F.3d 616, 619 (8th Cir. 2003).

## II

[3] [4] [5] The Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration

agreements." [Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.](#), 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Accordingly, a court's review of an arbitration award is "very limited." [Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC](#), 319 F.3d 1060, 1064 (8th Cir. 2003). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." [United Paperworkers Int'l Union v. Misco, Inc.](#), 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

[6] We are not convinced that the arbitration panel's failure to break down the award by county means that it "so imperfectly executed" its powers such that it rendered no "mutual, final, and definite award." 9 U.S.C. § 10(a)(4). The award needed only to "describ[e] the issues in dispute, the factual findings, the determinations and the amount and basis for any award and breakdown by claim for any award." 7 C.F.R. § 457.8 ¶ 20(a)(2). "Claim for indemnity" is defined as "[a] claim made on [the insurer's] form that contains the information necessary to pay the indemnity." *Id.* ¶ 1. Russell submitted a single claim covering both his corn and soybean crops, and Great American assigned it a single claim number. Nothing in the regulations required the panel to segregate this claim into multiple separate claims.

Great American correctly notes that applicable regulations require the insurer to "determine [the] loss on a unit basis," § 457.113 ¶ 11(a), and units cannot cover more than one county, § 457.8 ¶ 1 (defining "enterprise unit"). But the arbitration panel was obligated to break down its award only by claim, not by unit, and Great American points to no regulation equating claims and units. Moreover, the arbitration panel concluded that Great American had "collaps[ed] all acres farmed by Russell into a single unit pursuant to policy provisions." There appears to be no reason why the arbitration panel could not accept Great American's decision to treat Russell's claim as singular when rendering its decision. Indeed, it appears that Great American raised no objection to this approach until its untimely motion to vacate or modify the award.

Although few cases analyze the applicable crop insurance regulations in depth, those that do support the panel's approach. In one case, the arbitrator combined its analysis for twenty-three farming units into three groups, and denied the claims for each group on different grounds. See [Farm](#)

[Mgmt. Co. v. Rural Cmty. Ins. Agency](#), No. 14-CV-5024-EFS, 2015 WL 1809789, at \*2 (E.D. Wash. Apr. 21, 2015). The reviewing court found no error with this approach, even though the arbitrator did not break down its analysis unit-by-unit. See [id.](#) at \*6.

[7] We also find that the panel's written explanation for the award amount was adequate. Although the panel simply adopted the calculation of Russell's expert, Great American failed to contest this calculation or provide its own alternative at the evidentiary hearing. Other courts have **\*1151** affirmed arbitral awards issued under the same regulations even though the arbitrator did not provide any calculations supporting its award amount. See, e.g., [Great Am. Ins. Co. v. Doan](#), No. 5:11-CV-342-OC-34PRL, 2012 WL 13098715, at \*13–14 (M.D. Fla. Sept. 25, 2012); [Garnett v. NAU Country Ins. Co.](#), No. 5:09-CV-00144-R, 2009 WL 3644762, at \*3

(W.D. Ky. Oct. 27, 2009). There is no requirement that the arbitrator's decision be particularly detailed; so long as it adequately explains the disposition of each claim at issue, it should be upheld. See [Green v. Ameritech Corp.](#), 200 F.3d 967, 976 (6th Cir. 2000).

Accordingly, the district court's decision vacating the arbitration award is vacated. The case is remanded for further consideration of Great American's alternative argument that the arbitration panel's decision rests on improper interpretations of the applicable regulations, which the district court did not address in the first instance.

#### All Citations

914 F.3d 1147

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
NORTHERN DIVISION

OCCIDENTAL FIRE & CASUALTY )  
COMPANY OF NORTH CAROLINA, )

Plaintiff, )

v. )

No. 2:19 CV 67 CDP

FRANKLIN BUSH, )

Defendant. )

**MEMORANDUM AND ORDER**

In January 2015, plaintiff Occidental Fire & Casualty Company of North Carolina determined that its insured, defendant Franklin Bush, owed \$278,069.51 in overpaid indemnities under federally reinsured crop insurance policies, and an overdue insurance premium in the amount of \$41,863.31. The insurance policies contain a provision mandating arbitration on all disputes involving determinations made by Occidental and requiring that arbitration proceedings be initiated within one year of the disputed determination. Neither party initiated arbitration proceedings on Occidental's January 2015 determination. Because judicial proceedings are unavailable to resolve the dispute in the first instance, I will dismiss Occidental's complaint and Bush's counterclaim, but without prejudice pending mandatory arbitration.

## **Background**

Defendant Bush is a retired farmer whose crops were insured under federally reinsured crop insurance policies issued by Occidental through its administrative arm, Agrilogic. For Crop Years 2011, 2012, and 2013, Bush submitted historical production and acreage reports to Occidental from which Occidental determined that Bush suffered losses each year. Occidental paid indemnities to Bush for his reported losses. After an audit initiated by the U.S. Department of Agriculture's Risk Management Agency (RMA), Occidental reviewed the relevant policies and made changes to Bush's historical acreage and production reports for Crop Years 2011 through 2013. As a result of these changes, Occidental determined that it had overpaid indemnities to Bush. It informed Bush of this determination in a letter dated September 23, 2014.

In October 2014, Bush requested that Occidental review its September 2014 determination, stating that his records did not support some of Occidental's information. Upon further review, Occidental made additional changes, which reduced the amount of overpaid indemnities it claimed Bush owed. On January 13, 2015, Occidental notified Bush of its determination that he owed \$278,069.51 in overpaid indemnities and an overdue premium for Crop Year 2014 in the amount of \$41,863.31. Bush never repaid the alleged overpaid indemnities or the 2014 premium.



Invoking federal diversity jurisdiction, Occidental filed this judicial action on August 6, 2019, seeking a declaration that it is entitled to recover overpaid indemnities for Crop Years 2011, 2012, and 2013, as well as the unpaid premium for Crop Year 2014, totaling \$319,932.82. Occidental also seeks recovery of these monies under common law theories of “contractual reimbursement,” unjust enrichment, money had and received, and “account stated”; and it seeks to recover its attorney’s fees as provided by the insurance contract.

Bush filed a counterclaim, alleging that Occidental’s retroactive revisions to his reports were improper and illegal given that it lacked evidence that Bush knowingly misreported his actual production history, which is required under the insurance policies for Occidental to recover overpaid indemnities. Bush contends that the revised production reports were created at RMA’s behest when RMA reinsured all policies issued by Occidental and Agrilogic, and not on account of any alleged misinformation. Bush also asserts that the RMA directed in 2016 that insurance providers such as Occidental restore actual production histories of insureds such as himself, but that Occidental failed to do so. Bush brings claims of breach of contract, bad faith, and negligence, asserting that Occidental’s conduct caused him to suffer financial damage, lost crop insurance coverage, and continuous injury. He seeks punitive damages and attorney’s fees.

## Federally Reinsured Crop Insurance

The Federal Crop Insurance Corporation (FCIC) is a federal agency established under the Federal Crop Insurance Act to administer the federal crop insurance program. 7 U.S.C. § 1503. The FCIC provides reinsurance to approved insurers of producers of agricultural commodities grown in the United States. 7 U.S.C. § 1508(k)(1). It regulates premiums, authors and approves policy terms, defines the rights and obligations of the insurer and insured, mandates the terms of dispute resolution procedures under subject policies, and reinsures FCIC created or approved policies issued by private insurers to farmers. *See William J. Mouren Farming, Inc. v. Great Am. Ins. Co.*, No. CV F 05-0031 AWI LJO, 2005 WL 2064129, at \*2 (E.D. Cal. Aug. 24, 2005). The RMA acts on behalf of the FCIC to administer FCIC programs and to underwrite crop insurance policies that are sold and serviced by private insurance companies. USDA, Risk Management Agency, <https://legacy.rma.usda.gov/help/faq/basics.html> (last updated Aug. 14, 2008). “For all relevant and practical purposes, the RMA and the FCIC are one and the same.” *William J. Mouren Farming*, 2005 WL 2064129, at \*2.

When the relevant policies here were in effect, Occidental and the FCIC were parties to a Standard Reinsurance Agreement (SRA), which is a cooperative financial assistance agreement establishing the terms under which the FCIC provides reinsurance and subsidies on eligible crop insurance contracts sold by the

insurance provider. USDA, Risk Management Agency, Reinsurance Agreements, <https://www.rma.usda.gov/en/Topics/Reinsurance-Agreements> (last viewed Apr. 21, 2020). The SRAs require the approved insurance provider (AIP) to bear a sufficient share of any potential loss under the agreement so as to ensure that the reinsured company will sell and service policies of insurance in a sound and prudent manner. 7 U.S.C. § 1508(k).

Under its rule-making authority, the FCIC promulgates rules and regulations setting the terms of crop-insurance contracts issued by private AIPs such as Occidental. *William J. Mouren Farming*, 2005 WL 2064129, at \*2. Occidental sold insurance policies under these FCIC regulations. Unlike typical private insurance agreements, the federal government backs the policies sold subject to FCIC reinsurance. These policies must therefore adhere to governing regulations, which have the force of federal law. *Williamson Farm v. Diversified Crop Ins. Servs.*, No. 5:17-CV-513-D, 2018 WL 1474068, at \*1 (E.D.N.C. Mar. 26, 2018) (citing *Felder v. FCIC*, 146 F.2d 638, 640 (4th Cir. 1944); *Byrne v. FCIC*, 289 F. Supp. 873, 874 (D. Minn. 1968)), *aff'd*, 917 F.3d 247 (4th Cir. 2019). *Cf. FCIC v. Merrill*, 332 U.S. 380, 385 (1947) (effect given to regulations is “as if they had been enacted by Congress directly”). The Federal Common Crop Insurance Policy Basic Provisions, codified at 7 C.F.R. § 457.8, apply to Bush’s policies at issue here. (*See* ECF 1-1 (“Policy”)). The terms and conditions of these Basic Provisions preempt

any contrary state laws that would apply to other insurance contracts normally issued by private insurance companies. *See William J. Mouren Farming*, 2005 WL 2064129, at \*2.

In relevant part, § 20 of the Basic Provisions and Bush’s Policy with Occidental provides:

(a) If you and we fail to agree on any determination made by us . . . , the disagreement may be resolved through mediation . . . . If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA)[.]

(1) All disputes involving determinations made by us . . . are subject to mediation or arbitration. . . .

. . .

(b) Regardless of whether mediation is elected:

(1) The initiation of arbitration proceedings must occur within one year of the date we denied your claim or rendered the determination with which you disagree, whichever is later;

(2) If you fail to initiate arbitration in accordance with section 20(b)(1) and complete the process, you will not be able to resolve the dispute through judicial review;

(3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered[.]

7 C.F.R. § 457.8 (Reinsurance Policies); Policy at pp. 31-32.<sup>1</sup> Regardless of whether the dispute is addressed in mediation, arbitration, or judicial review,

if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is

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<sup>1</sup> For purposes of the Policy, “you” refers to the insured producer and “we” and “us” refer to the insurance company. (Policy at p.1., preamble.)

applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC.

7 C.F.R. § 457.8 (Reinsurance Policies); Policy at p. 32, § 20(b)(4); *see also* Policy at p. 32, § 20(a)(1). Any interpretation by the FCIC is binding. Policy at p. 32, § 20(a)(1)(i), (b)(4).

### **Discussion**

Bush moves to dismiss Occidental's complaint in its entirety for failure to state a claim, arguing that Occidental's failure to timely initiate arbitration on its disputed determination of overpaid indemnities and for premium payment bars it from seeking judicial relief.<sup>2</sup> In a separate motion, Bush moves to dismiss Occidental's request for declaratory relief, arguing that the availability of a legal remedy bars this equitable claim. Occidental moves for judgment on the pleadings, arguing several bases for dismissal of Bush's counterclaim, including that the Policy bars Bush from seeking judicial relief because he failed to timely initiate arbitration.

I review a motion for judgment on the pleadings and Rule 12(b)(6) motions to dismiss under the same legal standard. *See Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). Therefore, when reviewing Bush's motions to dismiss, I consider the factual allegations of the complaint as true to determine if the complaint

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<sup>2</sup> Within the body of his memorandum in support, Bush makes a passing reference to the appropriateness of possibly referring the case to arbitration. (ECF 10 at p. 2.)

states a “claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Likewise, on Occidental’s motion for judgment on the pleadings, I consider the factual allegations of the counterclaim as true and grant all reasonable inferences in favor of the nonmoving party. *Clemons*, 585 F.3d at 1124. I may not grant judgment on the pleadings unless “the moving party has clearly established that no material issue of fact remains and [it] is entitled to judgment as a matter of law.” *Waldron v. Boeing Co.*, 388 F.3d 591, 593 (8th Cir. 2004) (internal citation and quotation marks omitted).

The core issue in resolving the parties’ motions is whether either party can seek initial relief on their respective claims through judicial action given that neither party initiated mandatory arbitration proceedings on their dispute involving Occidental’s January 2015 determination. For the reasons that follow, I conclude that neither party can, and I will dismiss this action.

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, applies here because a written agreement to arbitrate exists within a contract involving commerce. 9 U.S.C. § 2. *See also In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F.Supp.2d 992, 995 (D. Minn. 2002) (federal crop insurance policy is subject to FAA because “insurance policies are contracts ‘involving commerce’”) (citing *United States Dep’t of Treasury v. Fabe*, 508 U.S. 491 (1993); *Allied–Bruce*

*Terminix Co., Inc. v. Dobson*, 513 U.S. 265 (1995)); *Wardlaw v. Rural Cmty. Ins. Servs.*, No. 1:10-CV-01004, 2010 WL 4259792, at \*1 (W.D. Ark. Sept. 27, 2010), *R&R adopted*, No. 1:10-CV-01004, 2010 WL 4235662 (W.D. Ark. Oct. 21, 2010) (FAA applies to FCIC federal crop insurance policies). Accordingly, I must enforce the Policy's arbitration provisions according to their terms. See 9 U.S.C. § 2; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019).

The FAA “reflects ‘a liberal federal policy favoring arbitration.’” *Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015) (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). An arbitration agreement's scope is interpreted liberally, with any doubts resolved in favor of arbitration, “whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); see also *MedCam, Inc. v. MCNC*, 414 F.3d 972, 975 (8th Cir. 2005).

Here, the parties agree that the Policy's arbitration provision is valid; and a dispute involving Occidental's January 2015 determination exists between them, thereby bringing the dispute within the provision's scope. The parties disagree, however, as to who bears the responsibility under the Policy to initiate arbitration proceedings on the dispute and thus whether that party's failure to do so bars their seeking judicial relief on related claims. Bush contends that Occidental cannot

seek judicial relief on its claims for overpaid indemnities and an overdue premium because arbitration proceedings were not initiated within one year of Occidental's January 2015 determination, and indeed were never initiated. In response, Occidental argues that the Policy's arbitration provision requires that the insured policyholder, and not the insurer, initiate arbitration proceedings and that therefore only Bush was required to seek arbitration to preserve his right to judicial relief.

Under the express terms of the Policy, if Bush and Occidental "fail to agree on *any* determination" made by Occidental, "the disagreement *must* be resolved through arbitration[.]" (Emphasis added.)<sup>3</sup> This mandatory arbitration provision applies to "*all* disputes involving determinations made by" Occidental. (Emphasis added.) And "the initiation of arbitration proceedings must occur within one year" of the date Occidental rendered the disputed determination. As stated above, the question is whether the Policy's "initiation of arbitration" requirement applies only to Bush or to both Bush and Occidental to preserve their respective right to seek judicial relief.

An insurer's disputed claim to recover overpayment from its insured falls within the scope of the Policy's arbitration provision. *See William J. Mouren Farming*, 2005 WL 2064129, at \*8. And § 20 requires that "any" and "all"

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<sup>3</sup> This is in the event mediation failed or was not pursued. It is unclear whether the parties participated in mediation on their dispute. *See* ECF 5 (seeking extension of time to answer complaint because parties agreed to mediation).



disagreements on the insurer's determinations must be resolved through arbitration in accordance with the rules of the American Arbitration Association. "Making the company's determinations conclusive [without arbitration] would conflict with those provisions." Common Crop Insurance Regulations; Basic Provisions; and Various Crop Insurance Provisions, 62 FR 65130-01, at \*65138, 1997 WL 756435 (Dec. 10, 1997). Section 20 does not state that the disagreement *may* be resolved by arbitration; nor does it say that it will be resolved by arbitration only if the *insured* so chooses. *Nobles v. Rural Cmty. Ins. Servs.*, 122 F. Supp. 2d 1290, 1296 (M.D. Ala. 2000). "It says it will be arbitrated." *Id.* The arbitration is therefore mandatory without regard to the identity of the initiating party. Accordingly, the mandate to arbitrate disputes relating to determinations made by Occidental applies with equal force to Occidental, and nothing precluded Occidental from initiating arbitration on its January 2015 determination wherein it claimed that Bush owed it monies under the Policy.<sup>4</sup>

Section 20 also unequivocally provides that arbitration proceedings must be initiated within one year of the disputed determination. Policy at p. 32, § 20(b)(1). Section 20(b)(1) does not limit its application to only those arbitration proceedings initiated by an insured. Its plain language is broad and applies to all arbitration

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<sup>4</sup> I agree with Bush that this distinction is significant, that is, that Bush had no claim against Occidental during the period in question and that Occidental is the party who seeks a binding and enforceable monetary judgment against him as an individual. (See ECF 20 at pp. 4, 5.)

proceedings involving determinations made by the insurer, regardless of who initiates the proceedings. Notably, another arbitration section of 7 C.F. R. § 457.8 and the Policy expressly assigns the burden of seeking arbitration to the insured. See Policy at p. 31, § 18(k)(4). If the FCIC intended for the insured – and only the insured – to bear the same burden under § 20, it could have said so. Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983).

It is undisputed that over one year has passed since the January 2015 determination giving rise to Occidental's claims in this action. Bush argues that Occidental's failure to initiate arbitration on its claims within that one-year period forever bars it from seeking judicial relief. But whether arbitration is timely initiated is a question to be resolved by an arbitrator, not the Court. *J.O.C. Farms, L.L.C. v. Fireman's Fund Ins. Co.*, 737 F. App'x 652, 656 (4th Cir. 2018) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002)). “[I]ssues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.” *Howsam*, 537 U.S. at 85 (internal quotation marks and citation omitted) (emphasis in *Howsam*). See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Automotive, Petroleum & Allied Indus. Emps. Union, Local No. 618 v. Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983). Without this threshold determination properly made by an arbitrator, I am unable to

conclude that Occidental is forever barred from seeking judicial relief on its claims.

I reach the same conclusion with Bush's counterclaim. Because Bush's claims involve a dispute between him and Occidental on one or more determinations made by Occidental, they are subject to mandatory arbitration under § 20.

Although Bush argues that his claims fall outside the parameters of the Policy provisions and thus may be brought under state common law theories of recovery, I cannot conclusively determine this to be so – especially given the liberal scope given to arbitration provisions as well as the Policy's preemptive effect over state law.

Without the parties having participated in arbitration, I cannot decide here whether or which terms of the Policy and/or whether or which of an arbitrator's findings might have preclusive effect in a judicial proceeding. *See Nobles*, 122 F. Supp. 2d at 1301. Because the issues are not properly before the Court at this time, I will not opine on whether Bush may recover on his claims in this forum. *Id.* The parties must first comply with the relevant contractual provisions before litigating their claims here. *Id.*

Nor does Bush's argument that his claims did not ripen until Occidental filed its judicial complaint in August 2019 relieve him from mandatory arbitration on the claims. Whether initiating arbitration now on claims first raised in August 2019 involving a determination made in January 2015 would be timely under the terms of the Policy is a matter for an arbitrator to decide. And, indeed, Bush alludes to that

possibility. (See ECF 20 at p. 9.) It is not my role to determine whether initiation of arbitration proceedings today – by either party – would be untimely under the Policy.

I also reject Occidental’s argument that Bush waived his right to have this dispute arbitrated by failing to initiate arbitration proceedings within one year of January 13, 2015. I may find waiver if Bush 1) knew of an existing right to arbitration, 2) acted inconsistently with that right, and 3) prejudiced Occidental by his inconsistent acts. *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117 (8th Cir. 2011); *Ritzel Commc’ns, Inc. v. Mid-Am. Cellular Tel. Co.*, 989 F.2d 966, 969 (8th Cir. 1993). See also *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 997. Although Bush knew of the right to arbitrate given that it was clearly set out in the Policy, I cannot conclusively find that he acted inconsistently with that right or that Occidental was prejudiced. As noted above, the onus was not on Bush alone to pursue arbitration – especially in the circumstances here where it was Occidental, and not Bush, that sought and continues to seek affirmative monetary relief on its January 2015 determination. I cannot say that Bush engaged in acts inconsistent with the right to arbitrate if he had no claim and sought no affirmative relief against Occidental within the one-year period after Occidental issued its determination. I also cannot find that Occidental was prejudiced by Bush’s failure to initiate arbitration proceedings within that year. Nothing

precluded Occidental from initiating arbitration proceedings on its claims for affirmative relief, and it would be difficult at best to show prejudice when Occidental itself waited over four years to pursue any action on the January 2015 determination.<sup>5</sup> That resolution of a dispute might be complicated is not grounds for me to find prejudice or waiver of arbitration. *See In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 998. Given the strong federal policy favoring arbitration, courts are encouraged to resolve any doubts concerning waiver of arbitrability in favor of arbitration. *Ritzel Commc'ns*, 989 F.2d at 968-69. I will do so here.

Finally, Occidental avers that it has requested an interpretation from the FCIC on whether § 20's burden to initiate arbitration proceedings lies with the insurer, the insured, or both, and it asks that I delay my ruling on Bush's first motion to dismiss until FCIC's response given that its interpretation will be binding. But under the terms of the Policy, an FCIC interpretation is likewise binding on the arbitrator. *See Policy* at p. 32, § 20(a)(1)(i). Given that the disputes in this action are subject to mandatory arbitration, that the timeliness of initiating arbitration proceedings is an issue for the arbitrator to resolve, and that FCIC interpretations are binding on the arbitrator, there is no compelling reason for me to delay my ruling.

Under the terms of the federal code and the Policy, any and all disputes

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<sup>5</sup> Notably, under the terms of the Policy, Occidental cannot waive § 20's arbitration provisions. *See Policy* at p. 1, preamble.

involving a determination by Occidental must be resolved through arbitration unless they are successfully mediated. “[N]ot even the temptations of a hard case can elude the clear meaning of the regulation.” *Merrill*, 332 U.S. at 386. The parties are therefore required to follow the administrative scheme for resolution of their claims, which they have failed to do in this case. If this dispute is to be resolved at all, it must be through mediation or arbitration and not by judicial action in the first instance. I am not persuaded that the parties need not exhaust the administrative avenue in this case. *See Buschkoetter v. Johanns*, No. 8:05CV115, 2006 WL 1479165, at \*4 (D. Neb. May 24, 2006).

I will therefore dismiss Occidental’s complaint and Bush’s counterclaim, but without prejudice. Given this disposition, I need not decide the remaining issues raised by the parties in this case.

Accordingly,


**IT IS HEREBY ORDERED** that defendant Franklin Bush’s First Motion to Dismiss Based on Plaintiff’s Failure to Comply with Arbitration Provision [9] is granted.

**IT IS FURTHER ORDERED** that plaintiff Occidental Fire & Casualty Company of North Carolina’s Motion for Judgment on the Pleadings as to Defendant Bush’s Counterclaim [22] is granted to the extent Occidental seeks dismissal of Bush’s counterclaim for lack of arbitration. In all other respects, the

motion is denied without prejudice.

**IT IS FURTHER ORDERED** that plaintiff Occidental Fire & Casualty Company of North Carolina's complaint and defendant Franklin Bush's counterclaim are dismissed without prejudice.

All remaining motions are denied as moot without prejudice.

  
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CATHERINE D. PERRY  
UNITED STATES DISTRICT JUDGE

Dated this 26th day of May, 2020.