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THE AMERICAN LAW INSTITUTE

PRINCIPLES OF THE LAW GOVERNMENT ETHICS

Tentative Draft No. 2

(March 12, 2018)

SUBJECTS COVERED

- CHAPTER 2 Gifts from and Financial Relationships with Prohibited Sources
 - PART A General Principle (§ 201)
 - PART B Specific Provisions (§§ 211-221)
- CHAPTER 5 Post-Government Employment Restrictions (Introductory Note)
 - PART A General Principles (§ 501)
 - PART B Specific Provisions (§§ 511-513)
- APPENDIX A Black Letter of Tentative Draft No. 2
- APPENDIX B Other Relevant Black-Letter Text

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The typical ALI Section is divided into three parts: black letter, Comment, and Reporter’s Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project’s Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter’s and Statutory Notes remain the work of the Reporter.

The Council approved the initiation of this project in October 2009. A Tentative Draft containing §§ 401-404 of Chapter 4 was approved at the 2015 Annual Meeting.

Earlier versions of Chapter 2 are contained in Preliminary Draft Nos. 2 and 3 (2015, 2016) and Council Draft No. 4 (2017). Earlier versions of Chapter 5 are contained in Preliminary Draft No. 2 (2015) and Council Draft Nos. 2, 3, and 4 (2015, 2017, 2017).

**Principles (excerpt of the Revised Style Manual approved by the ALI Council
in January 2015)**

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called "Principles of Corporate Governance and Structure: Restatement and Recommendations," but in the course of development the title was changed to "Principles of Corporate Governance: Analysis and Recommendations" and "Restatement" was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable "Principles" project.

The "Principles" approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of "rules of statewide application," as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family
Dissolution: Analysis and
Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

“Principles” may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute’s Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

PROJECT STATUS AT A GLANCE

Chapter 4. The Election-Related Activities of Public Servants

§§ 401-404 (T.D. No. 1) - approved at 2015 Annual Meeting

Foreword

The ALI's project on Principles of the Law, Government Ethics is designed to provide guidance to government agencies and individuals on the proper standards of conduct that should apply to current and former public employees and officials. This topic is of critical importance to the confidence that citizens have in their government. The ALI Council undertook this project following an era of widely publicized scandals that raised issues of public integrity. As a result, all levels of government have struggled to develop, revise, and refine the rules and procedures intended to ensure that public officials act in the public interest and use public resources for public, not private, purposes. The ALI, with its tradition of painstaking research and broad engagement by diverse groups of leaders of the legal profession, can play an important role as this area begins to move toward maturity.

Our project will address a wide variety of specific issues: Under what circumstances, if ever, can elected officials receive gifts, free meals, entertainment, or travel from private citizens whose interests are affected by government? What restrictions should be imposed on the private economic activities of elected officials and government employees? What restrictions, if any, should apply to former government officials who seek or accept private employment? What should lobbyists be required to disclose about their activities? What procedures should be used to investigate and resolve claims of ethical misconduct or conflict of interest?

At the 2015 Annual Meeting, the membership approved four important Sections of Chapter 4, dealing with The Election-Related Activities of Public Servants. Chapter 2, on Gifts from and Financial Relationships with Prohibited Sources, and four Sections of Chapter 5, on Post-Government Employment Restrictions, are now being presented for the membership's approval.

I am very grateful to the Reporter, Richard Briffault of Columbia Law School, and to the Associate Reporters, Kathleen Clark of Washington University School of Law and Richard Painter of University of Minnesota Law School, for their very significant work on this project. Their Advisers and Members Consultative Group contributed sustained attention and important insights, and also deserve our deep thanks.

RICHARD L. REVESZ
Director
The American Law Institute

March 12, 2018

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PRINCIPLES OF THE LAW, GOVERNMENT ETHICS

TENTATIVE DRAFT NO. 2

REPORTERS' MEMORANDUM

The ethical standards that ought to govern the behavior of government officials have long been a matter of great public interest. The development of the standards and procedures needed to assure that public servants act in the public interest and use public resources for public, not private purposes, has been the focus of criminal codes, ethics laws, executive orders, and legislative rules at all levels of government—federal, state, and local. The goal of the Principles of the Law, Government Ethics project is to distill a basic set of principles that articulate the values that ought to shape the field and, when possible, to present operational rules that will vindicate those goals in order to provide some guidance to the many governments, particularly at the state and local level, that may be developing ethical standards for the first time or revising, refining, and strengthening rules previously adopted.

The Principles of the Law, Government Ethics will consist of the following Chapters:

- Chapter 1. Scope, General Principles, and Definitions
- Chapter 2. Gifts from and Financial Relationships with Prohibited Sources
- Chapter 3. Conflicts of Interest and the Outside Activities of Public Servants
- Chapter 4. The Election-Related Activities of Public Servants
- Chapter 5. Post-Government Employment Restrictions
- Chapter 6. Administration and Enforcement of Government Ethics

A potential seventh Chapter (which would become Chapter 6, and the administration and enforcement Chapter would become Chapter 7) would address Lobbying.

In brief, after an initial Chapter laying out the scope and general principles of the project and defining key terms that will be used throughout the project, the next four Chapters address the substantive principles of government ethics. Chapter 2 considers the provision of benefits by outsiders to public servants. Chapter 3 addresses financial conflicts of interests and issues arising from the outside activities of public servants. Chapter 4 focuses on the election-related activities of public servants. Chapter 5 examines the “revolving door” problem that arises when public servants seek and obtain private employment. Chapter 6 turns from substantive principles to the equally important topic of the administration and enforcement of those principles. The Chapter on

lobbying would, if we add it, consider the rules that ought to govern the actions of people outside government who seek to influence government actions.

At the May 2015 Annual Meeting, the membership approved four Sections of Chapter 4 that deal with the use of public resources in election campaigns, including specific Sections that address publicly funded communications, publicly funded travel, and restrictions on public-servant participation in election campaigns and partisan activities.

With this memorandum, the Reporters submit Chapter 2 and four Sections of Chapter 5.

As a preliminary matter, the Reporters would like to address the format of these Principles and some overall concerns about the project that were raised at meetings of the project's Advisers and Members Consultative Group and at the Council Meetings over the last two and a half years.

Many participants in these discussions expressed the view that initial drafts of this project on "principles" had too many rules and not enough principles; that is, relatively general statements that ought to guide—but not necessarily direct—the many jurisdictions that may be interested in our project in the shaping and revising of their government ethics codes. Consequently, we have adopted a new format for these Principles, which the Council approved at its January 2018 meeting. Each Chapter now consists of two Parts. The first Part enunciates the "general principles" of government ethics relevant to the subject of that Chapter, with Comments intended to explain their purpose and place in an ethics code. These general principles are in the Sections numbered in the "100s" (e.g., §§ 201, 501). Thereafter, each Chapter turns to a second Part of "specific provisions" in Sections numbered in the 110s (e.g., §§ 211, 212, 511, 512) that consist of more rule-like black-letter statements intended to provide more specific direction to interested jurisdictions, albeit still not as precise as what would be found in a statutory code.

This follows from our "middle path" vision of the Principles project. The Reporters recognize that there has been some uncertainty as to what exactly these "Principles" are or are intended to be. That is understandable. It may be clearer to say what they are not. They are not intended to be a detailed Model Code. Given the enormous range in the size and types of governments in the United States and the just-referred-to variation in types of public positions, the Reporters do not think that a Model Code is possible or desirable. There will inevitably be different specific rules for the Congress of the United States and the water board of a small town. On the other hand, the Principles are not intended to be a "ten commandments" set of very general norms that would fit on a single stone tablet. The Reporters do not think that such a purely high-level set

of “golden rule” principles would provide much guidance to a jurisdiction considering the adoption or modification of its ethics rules. Our goal has been to find something in between—specific enough to be useful but not so specific as to be unsuitable for the vast gamut of public positions. We hope and intend that our combination of general principles and more rule-like specific provisions will enable this project to provide governments adopting or revising ethics regulations with both an overarching approach to thinking about government ethics as well as guidance for addressing specific issues.

Although we intend to more fully address the scope of these Principles in Chapter 1, the Reporters believe that two points about scope are appropriate for reading the Sections that follow. First, the Principles are not intended to apply to the judiciary. Although most, perhaps all, of the Principles could apply to judicial officers, courts do raise special issues and often may require the application of ethical standards higher than those applied to other public officers. In any event, there is a long tradition of distinct codes of ethics for the judiciary, and the Reporters will abide by that tradition. Second, we believe that the Principles, as principles, should apply generally to both elected and non-elected officials, and to both the executive and legislative branches. Although particular applications of the Principles may well vary with the type of position held, the ethical standards articulated by these Principles apply across the board. Public office—all public office—is a public trust, and all office holders must use their public positions on behalf of the public rather than for themselves. This is as true for elected officials as for appointed ones, and for members of the legislative branch as for the executive branch. Indeed, many jurisdictions throughout the country apply ethics rules—particularly those implementing the principles concerning gifts to and financial transactions with public servants, and the post-public service employment of public servants—to both elected and appointed officials and to members of both the legislative and executive branches of government. Some of the Principles and Comments herein will note when some variation in the application of a Principle is appropriate in light of the elected versus appointed status of the public servant, or due to other attributes of particular positions. In some situations, a particular position may call for more restrictive ethical regulation, and in some situations the regulation may appropriately be more relaxed. So, too, principles may be implemented or enforced differently according to the status of the public servant or the position held. But the Principles qua principles are intended to apply to public servants generally. Chapter 1’s discussion of project scope will more fully address the issues raised by elected versus appointed

status, full-time versus part-time position, membership on advisory bodies or on entities intended to represent interest groups, and other situations requiring special attention.

Turning to the two Chapters that follow, Chapter 2 opens with an articulation of the broad principle (§ 201) that a public servant should not solicit or accept any gift or engage in any financial transaction or relationship in circumstances in which a reasonable person would infer that the gift or transaction/relationship could affect the public servant's performance of his or her official duties. The rest of the Chapter then develops the concept of the "prohibited source" (§ 211); addresses gifts from and financial transactions with prohibited sources (§§ 212-215), including gifts of complimentary attendance at events, travel, lodging, and meals (§§ 216-217); and considers other issues, including gifts and financial transactions between superior and subordinate public servants (§ 220) and donations to legal-defense funds (§ 221). As a Comment to § 201 explains, campaign-finance practices are generally excluded from this Chapter's coverage. This draft of Chapter 2 is intended to be the complete treatment of gifts to and financial transactions and relationships with public servants. Readers should consider whether there are any additional subjects that fall within the Chapter's scope that ought to be addressed. The Reporters recognize that some of the Sections of this Chapter are somewhat more detailed than other Sections of the Principles. This reflects in part the fact that gifts and financial transactions/relationships have often received more detailed attention in existing ethics codes. Readers should consider whether they would prefer less detail, and, if so, which Sections they would like pruned back.

Chapter 5 addresses the principles that ought to apply when a public servant leaves public employment for a private-sector position—often colloquially known as the "revolving door." Section 501 sets out the basic principles that a public servant should avoid the conflicts of interest that would arise (a) if the public servant seeks or accepts an offer of employment from a private individual or organization when the public servant is substantially involved in addressing a particular matter that a prospective employer has before the public servant's agency; (b) if, after leaving government employment, the former public servant works for a private employer on a matter in which he or she was substantially involved while in public service; and (c) if the former public servant appears before or communicates with his or her former government agency within a defined period of time after leaving public service. Sections 511, 512, and 513 then articulate more specific provisions to implement these general principles. An additional Section is planned for this Chapter dealing with what is sometimes called the "reverse revolving door" or "revolving

in” problem—the concern that an individual entering public service from the private sector may have commitments to or otherwise favor a former employer whose interests could be affected by the public servant’s decisions. Some aspects of the “revolving in” problem—such as continued financial ties to the former employer—may be addressed by Chapter 3’s treatment of a public servant’s participation in particular matters that involve a financial conflict of interest. Nonetheless, it seems appropriate to adopt a general principle restricting a public servant from acting on matters affecting his or her former private employer.

Rules reflecting these Principles concerning gifts, financial transactions and relationships, and post-government employment may be found at all levels of government—federal, state, and local—in statutes, ethics codes, and regulations adopted by agencies. The specific principles and provisions proposed here are not identical to the rules in any specific jurisdiction. Rather, they represent an overlapping consensus of the many jurisdictions surveyed plus the Reporters’ sense of the best practices. It is also worth noting that in many jurisdictions, including but not limited to the federal government, some of these principles are embodied in the criminal law so that a violation constitutes criminal behavior. Enforcement through criminal penalties typically requires a greater degree of specificity in spelling out the precise prohibitions of a rule and increases the burden of proof on the enforcement agency. The principles laid out in the Sections to follow are presented as ethical standards, not as part of a criminal code. These Chapters do not address the penalties for violations; that is reserved for the treatment of implementation and enforcement generally that will be taken up in Chapter 6. For purposes of analyzing the following rules, it is fair to assume that many will be enforced through administrative penalties, although in some situations civil fines may be imposed, with criminal law likely to be reserved for only the most serious violations. This may permit somewhat more general principles than the more precise rules that are the predicate for treating conduct as criminal.

—Richard Briffault
Reporter

—Kathleen Clark
—Richard Painter
Associate Reporters

CHAPTER 2
GIFTS FROM AND FINANCIAL RELATIONSHIPS
WITH PROHIBITED SOURCES
PART A
GENERAL PRINCIPLE

1 **§ 201. Restrictions on Gifts, Financial Transactions, and Financial Relationships**

2 **A public servant should not solicit or accept any gift or engage in any financial**
3 **transaction or financial relationship under circumstances in which a reasonable person**
4 **would infer that the gift or transaction could affect the public servant’s performance of**
5 **official duties.**

6 **Comment:**

7 *a. Purpose.* The restrictions on gifts to and financial transactions and financial relationships
8 with public servants are intended to avoid the possibility that the public servant might be
9 influenced by the gift or financial benefit to take or desist from taking official action, or appear to
10 take or desist from taking official action. Bribery is one of the oldest problems in government
11 ethics. See John T. Noonan, Jr., *Bribes: The Intellectual History of a Moral Idea* (1984) (tracing
12 incidents of bribery and efforts to combat bribery over 2000 years). Bribes and illegal gratuities
13 are prosecutable as crimes, but convictions may be hard to achieve because of the difficulty of
14 proving, under the “beyond a reasonable doubt” standard the criminal law requires, actual quid pro
15 quo arrangements in which a gift is given in exchange for or in response to an official decision.
16 Moreover, in many instances, there is no actual quid pro quo, but the gift may nonetheless subtly
17 influence the public servant’s official decisionmaking or appear to do so. Gifts or financial benefits
18 provided even without strings attached may cause a grateful public servant to be unduly favorably
19 disposed to his or her benefactor’s interest in a government action. So, too, the acceptance of such
20 gifts or benefits can create an appearance of favoritism that undermines public confidence in
21 government. By prohibiting gifts, financial transactions, and financial relationships in
22 circumstances in which a reasonable person would infer that the gift, transaction, or relationship
23 could influence public decisionmaking, ethics rules can deter both actual corruption and undue

1 influence short of criminal misconduct and thereby promote public confidence in the integrity of
2 government.

3 *b. Ethics principles, criminal laws, and other regulations.* These general principles impose
4 obligations separate from the prohibitions on bribes and gratuities and attempted bribes and
5 gratuities in criminal law. A gift or transaction that is not a bribe or gratuity under the criminal law
6 may still violate ethical restrictions. So, too, a gift or transaction that technically complies with
7 government ethics rules can still be prosecuted as a bribe or gratuity in situations in which the facts
8 suggest that the elements of those crimes have been met, for example because there is a quid pro
9 quo exchange of a technically permissible gift for official action by a public servant. Federal, state,
10 and local laws and regulations may impose additional restrictions on the financial relationships
11 between specific categories of public servants and certain persons or entities.

12 *c. Disclosure.* This Section is used to determine whether a public servant may or may not
13 accept a gift or enter into a particular transaction. Whether ethics rules should require a public
14 servant to disclose those gifts or transactions that are permitted is a separate question. For example,
15 a gift above a threshold level from a close personal friend might be permitted under these Principles
16 but it might still have to be disclosed on an annual or other financial-disclosure report required
17 under applicable laws and regulations. An important purpose of such disclosure is to assist the
18 public in monitoring compliance with the principles set forth here governing gifts and transactions.
19 The role of disclosure in securing compliance with ethical restrictions is addressed more fully in
20 Chapter 6 of these Principles.

21 *d. Circumstances suggesting an improper gift or financial transaction.* The most common
22 circumstance in which a reasonable person would infer that a gift or financial transaction could
23 affect a public servant's judgment is when the gift comes from or the transaction is with a person
24 seeking official action from, doing business with, or conducting activities regulated by the public
25 servant's agency, or whose interests may be substantially affected by the performance or
26 nonperformance of the public servant's official duties. These are considered to be "prohibited
27 sources" from whom gifts and with whom transactions are restricted unless it is clear that the gift
28 or transaction has no connection with the public servant's official position. "Prohibited source" is
29 defined and the concept more fully examined in §§ 211 through 215 of these Principles.

30 *e. Gifts motivated by official position.* A public servant must not solicit and probably should
31 not accept any gift or any advantage in a transaction in circumstances in which a reasonable person

1 could infer that the gift or transaction is motivated by the public servant's official position. This
2 prohibition applies regardless of whether the gift is given by a "prohibited source." Some
3 jurisdictions may choose to prohibit acceptance of these gifts, although doing so involves a
4 subjective inquiry into the intent of the gift-giver. Another approach is to prohibit only solicitation
5 of gifts given because of official position, but not their acceptance if there is no solicitation and
6 the gift-giver is not a prohibited source. Application of such a solicitation prohibition would focus
7 on whether the public servant intended to use his or her official position to solicit the gift.

8 *f. Scope of gift restriction.* Restricted gifts include, inter alia, (i) free admission to social
9 functions or other events for which other attendees pay admission, if a reasonable person would
10 infer that the acceptance of free attendance could influence the public servant's official actions;
11 and (ii) free travel, meals, or lodging provided by a prohibited source. Exceptions may be made to
12 the restriction on free admission if the public servant's agency or department determines that it is
13 in the public's interest for the public servant to attend the event. Similarly, the public servant's
14 agency or department may, consistent with applicable law, authorize acceptance of travel, meals,
15 and lodging provided in connection with official business. These restrictions and exceptions are
16 discussed more fully in §§ 216 and 217.

17 *g. Scope of restriction on financial transactions and financial relationships.* (i) A public
18 servant may engage in *consumer transactions*, including the purchase of goods and services, only
19 on the same terms that are available to the general public. (ii) A public servant may engage in
20 *personal financial transactions*, including borrowing and lending, only on the same terms that are
21 available to the general public or that would be agreed upon by similarly situated parties in an
22 arm's-length transaction. (iii) A public servant may engage in *business transactions and*
23 *investments* only on the same terms that would be agreed upon by similarly situated parties in an
24 arm's-length transaction, and should not accept business or investment opportunities that are not
25 also available to similarly situated persons who are not public servants. (iv) Similarly, a public
26 servant may provide professional and other services for compensation only if the consideration
27 paid to the public servant and other terms of the agreement for services are the same as the terms
28 that would be obtainable by similarly situated service providers who are not public servants.
29 Compensation should not be paid to the public servant for services by the public servant or anyone
30 else by a person seeking to influence the government of which the public servant's agency or

1 department is a part, and the compensation should not be enhanced because of the public servant's
2 official position.

3 *h. Gifts from and transactions with friends and family.* A public servant may accept a gift
4 or advantage in a transaction from a family member or personal friend who is a prohibited source
5 but only in circumstances in which a reasonable person would conclude that it is motivated solely
6 by the family relationship or personal friendship and not by the public servant's official position.

7 *i. Gifts to and transactions involving spouses and dependents of public servants.* A public
8 servant should discourage a spouse, dependent, or other person living in the public servant's home
9 from accepting a gift or other advantage that the public servant should not accept. To the extent
10 practical, a public servant should do the same with respect to persons with whom the public servant
11 has an engagement to marry or a long-term relationship.

12 *j. Gifts between public servants.* Gifts and financial transactions between public servants
13 who are employees of the same agency or department should be permitted only in circumstances
14 in which a reasonable person would not believe that the gift, financial transaction, or financial
15 relationship creates a risk of favoritism or other distortion of decisionmaking within the agency or
16 department. In general, gifts from subordinates to superiors—other than nominal gifts given at
17 holidays or ceremonial occasions when gift-giving is customary—should be prohibited.

18 *k. Campaign-finance practices not covered.* Campaign contributions or expenditures
19 supporting or opposing the campaign of an elected official or a person seeking elected public office
20 present many of the ethical concerns raised by gifts. To be sure, contributions are typically given
21 to a candidate's campaign committee rather than to the candidate personally, but the fact of
22 political benefit to the candidate and the concern about undue influence are just the same.
23 Campaign contributions and expenditures are, however, protected by the First Amendment. They
24 are crucial for enabling candidates without independent means to run for office, and they provide
25 an avenue for participation by politically engaged voters. Because of the special role campaign-
26 finance activities play in our democracy, campaign contributions and expenditures are almost
27 always separately regulated by campaign-finance laws rather than by ethical constraints. These
28 laws also typically limit the use of campaign contributions to campaign-related activities, such as
29 persuading and mobilizing voters, while barring their use for the personal expenses of candidates
30 that would exist even if the candidates were not running for office. Campaign contributions and
31 expenditures may also be subject to bribery, gratuity, and other applicable criminal laws.

1 *l. Legislative and executive branches.* These Principles do not distinguish between the
2 legislative and executive branches, although some distinctions are made between elected and
3 unelected officials (for example, with respect to political fundraisers, see §§ 216 and 217).

4 *m. Part-time and advisory public servants.* Although the concerns that gifts may
5 improperly influence public servants' decisionmaking or may appear to the public to do so apply
6 to all public servants, certain categories of public servants—part-time government employees,
7 individuals serving in purely advisory positions, public members of boards or commissions,
8 uncompensated volunteers—may present special cases. Jurisdictions may choose to take a less
9 restrictive approach to public servants in these positions.

10 *n. Solicitation of gifts to charities, relief efforts, and similar causes.* Public servants should
11 not solicit prohibited sources to make gifts to charities, relief efforts, and similar causes benefiting
12 third persons if there is a substantial personal benefit also for the public servant. Such a substantial
13 personal benefit could involve the public servant's name or that of a family member being
14 associated with the charity, a family relationship or close personal friendship between the public
15 servant and an individual who is an officer or employee of the charity, or a similar circumstance.
16 Public servants may, however, solicit prohibited sources to make gifts to charities, relief efforts,
17 and similar causes benefiting third persons if there is no substantial personal benefit to the public
18 servant that is disproportionate to the benefit to the larger group of people who are the intended
19 beneficiaries of the gift. Even when the public servant receives no private benefit, the public
20 servant may not use public resources—including but not limited to the public servant's official
21 title, official letterhead, government e-mail account, or government computer—in making any
22 such solicitation.

REPORTERS' NOTE

23 *Comment a. Purpose.* These Principles are designed to prohibit certain gifts whether or not
24 the gifts actually influence or are intended to influence the public servant. These Principles opt for
25 objective criteria for determining whether a gift is permitted or prohibited. Such an objective
26 approach, however, is not the only way to accomplish this purpose.

27 Gift rules in some jurisdictions also use criteria based upon inferences that can be drawn
28 by a reasonable person about the gift, as well as the factual circumstances of the gift. For example,
29 New York permits a gift from an "Interested Source" (a defined term very similar to a "prohibited
30 source" under these Principles) only if certain criteria are met:

(a) If the item, service, or any other thing of value solicited, received, or accepted by a Covered Person meets the definition of Gift and is from an Interested Source, it is presumptively impermissible. Such Gift is only permissible if, under the circumstances, *all* of the following criteria are met:

- (1) it is not reasonable to infer that the Gift was intended to influence the Covered Person; and
- (2) the Gift could not reasonably be expected to influence the Covered Person in the performance of his or her official duties; and
- (3) it is not reasonable to infer that the Gift was intended as a reward for any official action on the Covered Person's part.

N.Y. COMP. CODES R. & REGS. tit. 19, § 933.3(a) (emphasis added). In sum, if no reasonable person could infer that at least one underlying rationale for the gift rules applies, then the gift is permitted even if it technically fits within the objective criteria set forth in the rules. New York also uses this “reasonable inference” approach to prohibit a gift that would otherwise be permitted because it is from someone who is not an “Interested Source,” if any one of the same criteria is met:

(b) If the item, service, or any other thing of value solicited, received, or accepted by a Covered Person meets the definition of Gift and is not from an Interested Source, then the Gift is permissible unless, under the circumstances, any one of the following criteria is met:

- (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Covered Person; or
- (2) the Gift could reasonably be expected to influence the Covered Person in the performance of his or her official duties; or
- (3) it could reasonably be inferred that the Gift was offered or given with the intent to reward the Covered Person for any official action on his or her part.

N.Y. COMP. CODES R. & REGS. tit. 19, § 933.3(b).

Such an approach is useful in situations in which a reasonable person could infer that a gift from Person A, not a prohibited source, is intended to influence or reward a public servant for official action benefiting Person B. These Principles address this situation in part by including Person A in the definition of “prohibited source” if Person A actually wants any official action regardless of who it benefits. The New York approach goes somewhat further in banning the gift in a situation in which a reasonable person could infer that Person A wants official action even if that is not in fact the case.

Some jurisdictions, however, opt, as do the federal gift rules, for more objective criteria, thereby avoiding the ambiguity that accompanies a determination of what a reasonable observer would infer from the gift.

Comment b. Ethics principles, criminal laws, and other regulations. The federal bribery statute prohibits giving, offering, or promising anything of value to a federal official with the intent of influencing him or her to perform an official act. The statute also prohibits the act of receiving those same types of bribes by public officials. 18 U.S.C. § 201. The statute also forbids the payment

1 and receipt of “illegal gratuities”—payments or gifts given because of some official act, but
2 without the prior “quid pro quo” of a bribe. See 18 U.S.C. § 201(c).

3 State and local officials can be prosecuted for these same offenses under the federal Mail
4 Fraud and Wire Fraud statute, 18 U.S.C. §§ 1341 and 1343, the Hobbs Act, 18 U.S.C. § 1951, and
5 the RICO Act, 18 U.S.C. § 1961. The Hobbs Act and the RICO Act prohibit racketeering, which
6 can include bribery of public officials. In addition to these statutes, state and local officials can be
7 prosecuted under state laws criminalizing bribes, gratuities, and similar acts.

8 Gifts can be prosecuted as bribes if there is a quid pro quo exchange of official action—or
9 inaction—for the gift. However, the definition of “official action”—under the federal bribery
10 statute at least—does not include setting up meetings and providing other preferential access in
11 exchange for the gift. In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the U.S. Supreme
12 Court interpreted the federal bribery statute, 18 U.S.C. § 201, which makes it a crime for a public
13 official to “receive or accept anything of value” in exchange for being “influenced in the
14 performance of any official act.” “An ‘official act’ is a decision or action on a ‘question, matter,
15 cause, suit, proceeding or controversy.’” *Id.* at 2372. The Court decided that the question or matter
16 must involve a formal exercise of governmental power, and must also be something specific and
17 focused that is “pending” or “may by law be brought” before a public official. *Id.* at 2369. “To
18 qualify as an ‘official act,’ the public official must . . . take an action on that ‘question [or] matter
19 . . . , or agree to do so Setting up a meeting, talking to another official, or organizing an event
20 . . . —without more—does not fit that definition of ‘official act’” and thus cannot be the basis for
21 a bribery prosecution, or any other prosecution, such as under the honest-services statute that is
22 premised on the bribery statute. *Id.* at 2372.

23 This gap in the legal definition of a “bribe” makes it that much more imperative that other
24 mechanisms, such as ethics rules, be used to remove the incentive that public officials may have
25 to provide preferential access to those who provide them with gifts or financial benefits.

26 Another problem with the bribery statute is that proving a quid pro quo exchange of a gift
27 for official action is extremely difficult, and in a criminal case this showing must be made beyond
28 a reasonable doubt.

29 Some other countries deal with this problem by reversing the burden of proof in bribery
30 and corruption cases. For example, Ireland’s Prevention of Corruption Act of 1906 (as amended
31 in 2001), Section 4, reverses the burden of proof in a prosecution in certain circumstances. Section
32 4 provides:

33 Where in any proceedings against a person referred to in subsection 5(b) of section 1
34 (inserted by section 2 of this Act) of the Act of 1906 for an offence under the Public Bodies
35 Corrupt Practices Act, 1889 as amended, or the Act of 1906, as amended, it is proved that:

36 (a) any gift, consideration or advantage has been given to or received by a person

37 (b) the person who gave the gift, consideration or advantage or on whose behalf the
38 gift, consideration or advantage was given had an interest in the discharge by the
39 person of any of the functions specified in this section the gift or consideration or
40 advantage shall be deemed to have been given and received corruptly as an

1 inducement to or reward for the person performing or omitting to perform any of the
2 functions aforesaid unless the contrary is proved.

3 Prevention of Corruption (Amendment) Act, 2001 (Act No. 27/2001) (Ir.), [http://www.](http://www.irishstatutebook.ie/eli/2001/act/27/enacted/en/print)
4 [irishstatutebook.ie/eli/2001/act/27/enacted/en/print](http://www.irishstatutebook.ie/eli/2001/act/27/enacted/en/print).

5 The constitutionality of this language was upheld by the Irish Court of Appeal. See DPP v.
6 Fred Forsey [2016] IECA 233 (Ct. App.) (Ir.).

7 This approach is probably not workable in bribery cases in the United States because of
8 constitutional concerns with reversed or even reduced burdens of proof in criminal cases.

9 State and local governments that opt to supplement criminal statutes with civil corruption
10 proceedings, however, could consider an approach under which some gifts received in violation
11 of gift rules would be presumed in a civil proceeding to have had a corrupting influence on the
12 public official. Although a criminal conviction would not likely result from such a finding of
13 corrupting influence, it could result in required recusal, reversal of a government decision in which
14 the public servant participated, disciplinary action, and other remedial action. An advantage of this
15 rebuttable presumption of corruption in certain circumstances is that it elevates the seriousness of
16 the violation beyond a violation of the gift rules and focuses attention on an important underlying
17 rationale for the gift rules, which is to prohibit transactions that appear to be bribes or gratuities.

18 *Comment c. Disclosure.* Disclosure requirements for gifts are beyond the scope of this
19 Chapter, which focuses instead on which gifts are prohibited and which are permitted.

20 The federal government requires public financial disclosure on U.S. Office of Government
21 Ethics (OGE) Form 278 for senior executive-branch officials as well as candidates for President.
22 Certain other officials are required to file confidential disclosure OGE Form 450. This disclosure
23 regime is administered by agency ethics lawyers and the OGE. Form 278 requires disclosure of
24 gifts in excess of \$385, with the exception of gifts from family members.

25 Similar disclosure forms are required of members of Congress.

26 Many state and local governments require financial disclosure that includes disclosure of
27 gifts. For example, in Florida, all elected state and local public officers are required to file a
28 financial-disclosure form and many appointed board members also are required to file. Certain
29 state and local employees are also subject to the disclosure filing requirement because of the
30 positions they hold or because they have purchasing authority that exceeds \$20,000. See FLA.
31 STAT. ANN. § 112.3144 (West) (“An officer who is required by s. 8, Art. II of the State Constitution
32 to file a full and public disclosure of his or her financial interests for any calendar or fiscal year
33 shall file that disclosure with the Florida Commission on Ethics”) and § 112.3145 (list of additional
34 persons who must file).

35 Florida’s Form 9, Quarterly Gift Disclosure, is filed with the Florida Commission on Ethics
36 on the last day of any calendar quarter following the calendar quarter in which a public official
37 received a gift worth more than \$100, with some exceptions, including gifts from relatives and
38 gifts primarily associated with the public official’s business or employment. Information to be
39 disclosed includes a description of the gift and its value, the name and address of the donor, the

1 date of the gift, and a copy of any receipt for the gift provided by the donor. FLA. STAT. ANN.
2 § 112.3148 (West).

3 In Maryland, annual financial disclosure is required of more than 14,000 state employees,
4 including elected officials, candidates for state elected offices, state agency managers, regulators
5 and purchasing staff, and some appointed members of boards and commissions. The financial-
6 disclosure forms require the filer to identify real-estate interests, equity interests, and other
7 relationships, such as employment, debts, and gifts. The State Ethics Commission administers the
8 financial disclosure program. Established in 1979, the State Ethics Commission replaced the
9 Maryland Public Disclosure Advisory Board and the State Board of Ethics. See Maryland Public
10 Ethics Law, MD. CODE ANN., General Provisions (§§ 5-101 through 5-1001) (effective October 1,
11 2015) in the General Provisions Article, Title 5.

12 Some states, such as South Dakota, Minnesota, and Wyoming, do not require disclosure of
13 gifts to public officials, even though they do prohibit receipt of some gifts with rules similar in
14 some respects to the rules set forth in this Chapter.

15 Supplementing rules prohibiting certain gifts with a robust disclosure regime for other gifts
16 has significant advantages.

17 First, the filer of a disclosure statement is certifying that he or she is disclosing all gifts
18 above the reporting threshold. Undisclosed gifts above that threshold are a violation of the
19 disclosure rules and are potentially in violation of the gift rules. In many jurisdictions, including
20 under federal law, a knowing misstatement in a disclosure report is a criminal offense. See 18
21 U.S.C. § 1001 (false statements). This arrangement makes an undisclosed violation of the gift rules
22 in many instances a criminal offense, as is failure to disclose a gift that fits within an exception to
23 the gift rules.

24 Second, a public servant who knows that he or she will have to disclose a gift may be more
25 likely to err on the side of caution if the gift is arguably in violation of the gift rules. Gifts that are
26 close to the line may not be accepted, and if they are accepted, they will be the subject of public
27 scrutiny.

28 Third, disclosure of gifts gives supervisors, state ethics officials, legislative-oversight
29 committees, and the public a perspective on which exceptions to gift prohibitions are being used
30 by which officials and how often. This information could lead to changes in gift rules, demands
31 that certain public servants recuse themselves from certain official matters involving persons and
32 entities that gave them gifts, or, in some cases, the removal of or refusal of voters to reelect a public
33 official who has participated in official matters involving persons or entities that have given the
34 official substantial gifts.

PART B
SPECIFIC PROVISIONS

§ 211. Definitions

(a) Gift. A gift means anything of more than nominal value in any form that is given to the public servant or to anyone else at the public servant's request unless there is an exception set forth in these Principles or the public servant has promptly paid fair market value for it.

(b) Nominal Value. Nominal value means a value that is sufficiently low that a reasonable person would not believe that the gift would influence the public servant in performance of official duties.

(c) Prohibited Source. A prohibited source means an individual or entity as well as an individual or entity acting, or in the business of acting, on behalf of another individual or entity:

(1) that is doing business or seeking to do business with the public servant's agency or department;

(2) that is conducting or seeking to conduct activities, other than ordinary activities conducted by the general population, that are regulated by the public servant's agency or department;

(3) that is seeking or intends to seek official action or to influence official action by the public servant's agency or department;

(4) that is substantially affected in a manner different from the effect on the general public by the official actions of the public servant's agency or department;

(5) that the ethics authority has designated as a prohibited source;

(6) (if an individual) whose spouse or dependent child is described in any of subsections (c)(1) through (c)(5); or

(7) (if an entity):

(A) the majority of whose members, shareholders, partners, trustees, officers or directors or control persons, are described in any of subsections (c)(1) through (c)(5), or

(B) that is controlled by or is under common control with one or more entities or individuals described in any of subsections (c)(1) through (c)(5).

(d) **Financial Transaction or Financial Relationship.** A financial transaction or financial relationship is a transaction or relationship in which one party provides goods, services, a permanent or temporary interest in property, an investment opportunity, or something else of more than nominal value to the other party whether or not consideration is provided therefor. A person is deemed to be a party to a financial transaction or financial relationship if the public servant knows or reasonably should know that the person has control over a party to the transaction or relationship or significant influence over the terms of the transaction or relationship.

(e) **Acceptance of a Gift.** A gift is accepted by a public servant if the public servant personally receives the gift or derives a personal benefit from the gift that is not shared among a substantial group of persons who are not public servants.

(f) **Solicitation of a Gift.** A gift is solicited by a public servant if the public servant personally or through another requests or suggests that the gift be made.

Comment:

a. Definition of “gift”—any form. A gift can occur in any form, including, but not limited to: money, services, loans, travel, lodging, meals, refreshments, entertainment, discounts, or a forbearance of an obligation or a promise that has a monetary value. Favors that arguably have monetary value—such as preferential reservations at a restaurant or a sporting event, preferential access to medical services, and favorable action by a college or university on an admission application—should be treated as gifts for purposes of these Principles in circumstances in which a reasonable person could conclude that such favors could influence the public servant’s performance of official duties.

b. Definition of “prohibited source.” The definition of “prohibited source” is quite broad and includes some close family members of prohibited sources as well as corporate affiliates of prohibited sources. The definition includes any person or entity affected in a manner different from the effect on the general public by the actions of the public servant’s agency or department. A somewhat more precise, if arguably narrower, way to define a prohibited source would be “persons or entities that are part of a discreet and identifiable class of persons or entities affected by particular matters in which the public servant’s agency is participating or is expected to

1 participate.” Some agencies and departments may want to add additional categories of persons and
2 entities to the list, for example, relatives, business associates, and employees of persons and
3 entities under investigation. A few agencies and departments—for example, police departments—
4 may choose to designate everyone in the general public as a prohibited source to avoid the
5 appearance of inequity when gifts can be received from some people and not others. These
6 determinations are best made at the agency and department level or by the legislature enacting
7 rules for particular agencies and departments.

8 *c. Ethics authority.* Subsection (c)(5) indicates that an ethics authority may designate
9 additional individuals and entities as prohibited sources. The ethics authority could be an ethics
10 official within the public servant’s agency or could be an independent ethics regulatory agency.
11 The role of ethics authorities is considered more fully in Chapter 6.

12 *d. Acceptance.* A gift is accepted if a public servant willingly accepts the gift or a personal
13 benefit from the gift unless a large group of people who are not public servants shares the same
14 benefit from the gift.

15 **Illustrations:**

16 1. A public servant belongs to a social club. Most of the club’s members are not
17 public servants. Another member of the club who is a prohibited source for the public
18 servant contributes a substantial sum of money to bail the club out of financial difficulty,
19 allowing the club to avoid imposing an assessment and dues increase on the other members.
20 This is not considered a gift to the public servant if the public servant’s benefit from the
21 gift is no more or less than that of other members.

22 2. A social club with a large number of members has reduced dues for persons
23 working in the public sector. A group of other members who are also lobbyists makes an
24 annual voluntary contribution to the club for the specific purpose of keeping this reduced-
25 dues policy in place. This is considered a gift to the public servants who belong to the club
26 and pay reduced dues. The gift is paid for by a prohibited source (the group of lobbyists)
27 and the value of the gift for each public servant is the reduction of dues for that public
28 servant (because the lobbyists raised the money collectively the value of the gift is not
29 divided by the total number of lobbyists contributing to the gift).

1 *e. Solicitation.* Solicitation of gifts in some circumstances should be subject to restrictions
2 that are even stricter than restrictions on acceptance of gifts. For example, some gifts from personal
3 friends of a public servant might be permitted under § 215, but a public servant should be
4 prohibited from soliciting such gifts if the friend is also a prohibited source.

5 *f. Nominal value.* A jurisdiction may choose to impose a specific maximum dollar amount
6 on the value of a thing of value from a prohibited source and/or on the cumulative value of things
7 of value received from the same prohibited source over a calendar year.

8 *g. Timing.* If a person or entity becomes a prohibited source at any time before the delivery
9 of a gift is complete or—if the gift is travel, lodging, a meal, or entertainment—at any time before
10 the gift is concluded, then that person or entity is a prohibited source. If a party to an ongoing
11 financial relationship with a public servant becomes a prohibited source, the public servant should
12 consult with the ethics authority to ensure that he or she takes appropriate remedial measures, such
13 as recusal. See Chapter 3.

14 **§ 211A. Gift Solicited Because of Official Position**

15 **Subject to the specific exemptions set forth in §§ 217 and 218, a public servant should**
16 **not solicit a gift from any person if the public servant intends or suggests that the gift be**
17 **given because of the public servant’s official position.**

18 **Comment:**

19 *a. Gift solicited because of official position.* A public servant should not solicit a gift or
20 any advantage in a transaction in circumstances in which a reasonable person could infer that
21 the gift or transaction is motivated by the public servant’s official position. This principle applies
22 regardless of whether the gift is given by a “prohibited source.” Some jurisdictions may choose to
23 prohibit acceptance of these gifts even if the public servant does not solicit them, although doing
24 so involves a subjective inquiry into the intent of the gift-giver. The approach used in these
25 Principles is to focus on whether the public servant uses his or her official position to solicit the
26 gift. This approach would not generally require an inquiry into the intent of the gift-giver.

27 *b. No exception for solicitation of gifts from family and friends or for solicitation of gifts*
28 *of free attendance at widely attended gatherings.* Although, under §§ 215 and 216, a public servant
29 can sometimes accept gifts from family and friends or gifts of free attendance at widely attended

gatherings, the public servant should not use his or her official position to solicit such gifts, for example by suggesting that a gift should be given to the public servant because of his or her official position.

§ 212. Gift from a Prohibited Source

Subject to the specific exemptions set forth in §§ 215 through 218, a public servant should not solicit or accept a gift from a prohibited source or a gift that the public servant knows or should know is paid for in full or in part by a prohibited source. A public servant should make reasonable efforts to inquire as to whether a gift offered to the public servant is from a prohibited source or paid for in full or in part by a prohibited source.

Comment:

a. Purpose. The restriction on gifts from prohibited sources has several purposes, including avoiding the appearance of impropriety, avoiding actual influence upon the discretionary decisionmaking of public servants, and protecting public servants from allegations that they have violated criminal prohibitions on accepting or soliciting bribes and gratuities.

b. Prohibition regardless of whether gift influences public servant. These Principles use an objective standard and prohibit all gifts of more than nominal value from prohibited sources, subject to specific exceptions, without regard to subjective analysis of whether the gift actually influences the public servant. Some states apply a subjective analysis that may allow some gifts and prohibit others regardless of whether the gifts are from a prohibited source. New York is one such jurisdiction. See Reporters' Note to § 201, Comment *a* (discussing the New York provisions incorporating subjective criteria). One problem with this subjective approach is that state officials may believe one thing about their own intentions and those of the donor while the public believes another. An objective standard is easier to administer, more consistent with protecting public confidence in government, and addresses the fact that a gift tends to make the donee more favorably disposed to the donor whether or not the donor subjectively intends to influence the donee. At the same time, subjective criteria, as well as objective criteria, are embodied in the definition of a "prohibited source." Whether or not the person giving the gift is a person who benefits from official action, that person, if giving the gift with the intent to influence the public servant, is deemed to be seeking official action and is thus a prohibited source. The fact that the desired official action benefits a third party is irrelevant.

1 *c. Bribes and gratuities.* This restriction on gifts from prohibited sources is separate from
2 prohibitions, usually in criminal statutes, on soliciting or accepting bribes and gratuities. Bribes
3 are generally gifts given in exchange for official action by a public servant, and gratuities are
4 generally gifts given to thank a public servant for official action. Gifts that are not prohibited under
5 these rules may still violate bribery and gratuity statutes if the elements of those statutes are met.
6 See Reporters' Note to § 201, Comment *b* (discussing criminal statutes on bribes and gratuities).

7 *d. Disclosure.* This restriction on gifts from prohibited sources is separate from financial-
8 disclosure rules that may require a public servant to disclose certain gifts, whether or not those
9 gifts are permitted. For example, some gifts from personal friends may still have to be disclosed
10 on a public or confidential financial-disclosure filing. If disclosure of a gift is required, a public
11 servant who fails to disclose commits a separate violation of disclosure rules. See Reporters' Note
12 to § 201, Comment *c* (discussing disclosure rules).

13 *e. Gifts paid for by a prohibited source.* A public servant should not accept a gift from
14 someone who is not a prohibited source if the public servant knows (or reasonably should know)
15 that a prohibited source paid for the gift.

16 **Illustrations:**

17 1. A public servant works for the state banking commission. State Bank
18 Corporation is a prohibited source. The public servant is invited by a friend, who is a
19 lawyer, to sit with him in the State Bank Corporation's sky box at a professional sporting
20 event. The lawyer is not a prohibited source, but the public servant may not accept the
21 invitation because State Bank Corporation, which is a prohibited source, originally paid for
22 the seats in the sky box.

23 2. Same facts as Illustration 1, but the person inviting the public servant is the public
24 servant's brother, who is not a prohibited source and does not work for State Bank
25 Corporation. The public servant still may not accept the invitation, because State Bank
26 Corporation, which is a prohibited source, originally paid for the seats in the sky box. The
27 exception for gifts from family members and close personal friends in § 215 does not apply
28 unless the family member or personal friend has paid for the gift.

29 3. A public servant accepts a gift of theater tickets valued at \$100 from a person
30 who is not a prohibited source. The person giving the theater tickets to the public servant
31 purchased them for \$100 from a person who is a prohibited source. The public servant may

1 accept the tickets because they were paid for at full market value by the same person who
2 gave him the gift, and that person is not a prohibited source.

3 4. Same facts as Illustration 3, but the person giving the theater tickets to the public
4 servant was given them for free by the person who is the prohibited source who had
5 previously bought the tickets. The public servant may not accept the tickets, because the
6 public servant knows or should know that the tickets were paid for by the person who is
7 the prohibited source. The public servant also has a duty to inquire as to the source of the
8 tickets if the facts suggest that the person giving the tickets to the public servant did not
9 pay for them.

10 5. A public servant receives a gift of theater tickets from a prohibited source, but
11 the prohibited source received the tickets as a gift from a person who is not a prohibited
12 source and who originally paid for the tickets. The public servant still may not accept the
13 tickets, because they are from a prohibited source.

14 *f. Partial payment to reduce the value of a gift.* If the gift is of more than nominal value,
15 the public servant may not make a partial payment in order to lower the net value to less than
16 nominal value. Full payment is required.

17 **Illustrations:**

18 6. A public servant is asked by a lobbyist for a prohibited source to join him for
19 lunch. The public servant may join the lobbyist for lunch only if the public servant pays
20 for his own lunch at the time of the lunch or shortly thereafter. If the ethics authority has
21 set the nominal value at \$20 and the cost of the lunch was \$30, the public servant must pay
22 \$30 for the lunch, because that is the fair market value. The public servant may not pay
23 only \$10 if the gift was of more than nominal value.

24 7. Same facts as Illustration 6, but the lunch is at a private club where the public
25 servant is not a member and the public servant does not know the value of the lunch. The
26 public servant must still promptly reimburse the lobbyist for the lunch after making
27 reasonable efforts to ascertain the cost of the lunch.

28 *g. Duty to inquire.* The public servant's duty to inquire into the source of a gift depends
29 upon what is reasonable under the circumstances. For example a public servant ordinarily should

1 inquire about who is paying for, or reimbursing the cost of, a gift given by a personal friend or
2 family member who is also a lobbyist or who works for a prohibited source.

3 **§ 212A. Solicitation of Charitable Gift from a Prohibited Source**

4 **A public servant should not solicit prohibited sources to make gifts to charities, relief**
5 **efforts, and similar causes benefiting third persons if there is a substantial personal benefit**
6 **also for the public servant.**

7 **Comment:**

8 *a. Substantial personal benefit for the public servant bars solicitation of the gift.* A public
9 servant may not solicit a gift to a charity if that gift would also provide the public servant with a
10 substantial personal benefit. Such a substantial personal benefit could involve the public servant's
11 name or that of a family member being associated with the charity, a family relationship or a close
12 personal friendship between the public servant and an individual who is an officer or employee of
13 the charity, or a similar circumstance. A substantial personal benefit could include the public
14 servant's ownership of private property that will increase in value because of the gift, for example
15 a gift of funds to beautify a public space near to the public servant's residence.

16 The relevant inquiry is whether there is a benefit to the public servant that is
17 disproportionate to the benefit to the larger group of people who are the intended beneficiaries of
18 the gift. For example, the fact that the public servant's children are among hundreds of children
19 who might use new playground equipment donated to a public park near the public servant's home
20 would not prohibit the public servant from soliciting the gift. If, however, the gift was substantial
21 enough that it would likely increase the value of the public servant's home, solicitation of the gift
22 would not be permitted.

23 *b. No use of public resources even for a permitted charitable solicitation.* Even when a
24 charitable solicitation is permissible, the public servant may not use public resources—including
25 but not limited to the public servant's official title, official letterhead, government computer
26 system, or email accounts—for such solicitation unless the charitable solicitation is officially
27 authorized by the public servant's jurisdiction.

Illustrations:

1. A public servant living near Central Park in New York City solicits a prohibited source to contribute to a fund for the beautification of the Park. This solicitation in most circumstances would be permitted under these Principles provided that the public servant has not used her official title, letterhead, or government email account in making that solicitation, unless such solicitation was authorized by the city government.

2. A public servant living near Gramercy Park in New York City, a private park accessible only with a key held by surrounding property owners and tenants, solicits a prohibited source to contribute to a fund for the beautification of the Park. This solicitation in most circumstances would not be permitted under these Principles.

§ 213. Financial Transaction or Financial Relationship with a Prohibited Source

(a) A public servant should not enter into a financial transaction or financial relationship with a prohibited source unless:

(1) the terms of such a transaction or relationship are the same as would have been arrived at in an arm's-length financial transaction or financial relationship between the prohibited source and a member of the public who is not a public servant; and

(2) in the case of a loan from a prohibited source to a public servant, the prohibited source ordinarily is in the business of loaning money to consumers.

(b) When negotiating the terms of a financial transaction or financial relationship, the public servant should not discuss his or her official position except to the extent necessary to notify the other party that this Section applies to such transaction or relationship, to convey and obtain information needed to comply with this Section, and to answer questions that the other party asks in the normal course of business about employment history, salary, and other criteria that may be relevant to such transaction or relationship.

(c) A public servant should not accept forbearance with respect to an existing debt or other transaction with a prohibited source in circumstances in which these Principles would prohibit the public servant from entering into a transaction with the prohibited source.

Comment:

a. Purpose. When a public servant engages in a financial transaction or financial relationship with a prohibited source, the public may reasonably be concerned that the transaction or relationship has been made available to the public servant in order to sow good will. The concern that can arise is similar to the concern that can arise when a public servant receives a gift from a prohibited source. This Section seeks to allay that concern by permitting such transactions and relationships only when the public servant can show that the transaction or relationship was on terms generally available to members of the public rather than in order to curry favor with the public servant.

b. Loans. Loans, probably even more than gifts, are likely to put a public servant in a position of being beholden to the prohibited source. Personal indebtedness, particularly if excessive, can also lead public servants to make errors in judgment, including violation of ethics rules, and a prohibited source that does not ordinarily lend money to the public should not be permitted to put a public servant in that position. Allowing public servants to obtain loans from prohibited sources that are unconventional sources of credit also invites evasion of gift rules. If loans were allowed, gifts secretly received in violation of gift rules could be characterized as loans after they are detected. Loans also become gifts if not repaid. Bona fide loans could be made to a public servant while he or she is in office, but those loans could later be forgiven when the public servant leaves office and is no longer subject to the gift rules. The loan—and the possibility of forgiveness—creates the appearance, if not the reality, that the public servant is beholden to the lender. Despite all of these concerns with loans from prohibited sources, public servants should be permitted to obtain credit on terms similar to the terms available to the general public from organizations that provide credit to the general public.

A public servant who is a state bank regulator may be prohibited under state laws or regulations from personally borrowing more than a certain amount from any one financial institution regulated by the public servant's agency or department. If so, the public servant must comply with such laws or regulations regardless of whether the borrowing is on terms normally available to other similarly situated borrowers and otherwise conforms to these Principles.

Illustrations:

1. A public servant in the state banking agency applies for a mortgage from a bank regulated by the agency. The bank is a prohibited source. The public servant may obtain a

1 mortgage from this bank as long as the public servant can show that the terms of the
2 mortgage are the same as those offered to other similarly situated borrowers who are not
3 public servants. In order to ensure that the public servant is not using public office for
4 private gain, the public servant should not discuss her employment with the lender except
5 to the extent necessary to answer inquiries about employment history and income.

6 2. A public servant is offered a personal loan by a company that is a prohibited
7 source. The company from time to time makes loans to its own executives and to business
8 owners who are its customers, but the company does not offer loans to the public. The
9 public servant may not accept this loan, because the public servant cannot show that its
10 terms are the same as those that would have been arrived at with a member of the public
11 who is not a public servant. .

12 *c. Professional services and employment relationships.* Professional services provided by
13 or to a public servant should be provided at fair market value. Otherwise such services could
14 constitute a gift to the public servant. A continuous employment relationship between a public
15 servant and a prohibited source is another type of financial relationship that is subject to this
16 provision's "arm's-length bargaining" standard. Some jurisdictions may wish to impose an even
17 stricter rule prohibiting ongoing employment relationships between public servants and prohibited
18 sources.

19 *d. Professional services by part-time legislators.* In many jurisdictions, legislators serve on
20 a part-time basis and are permitted to provide professional services, including legal representation,
21 to private clients. A legislator who is hired by a prohibited source to provide legal representation
22 on compliance with a law voted upon by the legislator, or regulatory action taken at the urging of
23 the legislator, does not comply with this Section if the causal link between official action and the
24 paid engagement is such that the lawyer-legislator provides services that are different in nature, or
25 is compensated at a different rate, than would a lawyer who was not also a legislator. In such a
26 case, the terms of the lawyer-client relationship are not the same as those that would have been
27 arrived at in an arm's-length relationship between the prohibited source and another lawyer.
28 However, if the relationship only involves routine legal representation, for example on tax
29 compliance or a criminal representation, the lawyer-legislator would not be precluded from
30 representing the client under this Section solely because he or she voted on a comprehensive bill
31 that included some of the provisions about which the client seeks legal representation.

Furthermore, a legislator who represents private clients may be required to recuse himself or herself from participating in certain official actions that could affect the subject matter of those representations. The role of recusal in dealing with conflicts of interest is considered more fully in Chapter 3 of these Principles. Legislatures that permit their members to engage in private employment may choose to go further and prohibit members from representing clients that have business with the legislature or regulatory agencies; limit the amount of compensation that a member can accept from any such client; or cap the total amount of such outside income that the member can receive from all clients that have business with the legislature or the government.

Other businesses owned by public servants pose similar difficulties, for example, consulting firms, investment-advisory firms, and real-estate brokerage firms. Arm's-length transactions in which the public servant's firm is paid the same amount and on the same terms as would a service provider who was not a public servant are generally permitted under these rules. Transactions involving premium pricing, special terms, and/or an implication that the public servant or his or her firm was hired because of the public servant's official position, are prohibited. Some jurisdictions may impose additional, more specific restrictions on a public servant's ownership of a political-consulting firm, lobbying firm, or other business entity that seeks to influence the government. For example, under 18 U.S.C. § 203, a federal-government official is prohibited from receiving any portion of monies earned by anyone for lobbying the federal government.

Illustration:

3. A public servant who is a part-time member of the state legislature also practices law. A prohibited source retains the public servant as a lawyer and they negotiate a total fee of \$50,000. If the public servant can establish that the prohibited source would have paid \$50,000 to a lawyer who was not a public servant, then the transaction does not violate this Section provided there is no intent by the prohibited source to use the lawyer-client relationship to influence legislation or other government action by the legislature and provided the lawyer-client relationship was not entered into because of legislation or other government action in which the legislator had a role.

e. Forbearance. A public servant who has a preexisting financial transaction with a prohibited source, such as a loan, should not accept forbearance or any other material alteration of

the transaction terms that confers a benefit on the public servant without payment by the public servant to the prohibited source of commensurate consideration. A prohibited source declining to collect a debt owed by a public servant and other adjustments to transaction terms favoring the public servant are deemed to be a gift from the prohibited source.

f. Relationship with conflict-of-interest restrictions. When a public servant engages in a financial transaction with a prohibited source, that transaction may create a conflict of interest, as addressed in Chapter 3 of these Principles.

Illustrations:

4. A public servant rents for two weeks a vacation home owned by a prohibited source. The rental value of a similar home in the same location at the same time of year is \$750 per week. The value of the use of the home for two weeks is \$1,500. The public servant must pay the prohibited source \$1,500 to rent the home in order for the rental not to be considered a prohibited financial transaction.

5. A prohibited source offers to rent a public servant's vacation property for \$2,000 per week. If the fair rental value of the property is \$1,800 per week, the public servant may not rent the vacation property to the prohibited source for more than \$1,800 per week.

6. A prohibited source buys a car from a public servant for \$500 over the Blue Book value. The car has low mileage and is in excellent shape. If the public servant can show that the purchase price was the same as if the seller had not been a public servant (i.e., the fair market value in light of the condition of the car), then this transaction is permitted.

7. A closely held company that is a prohibited source offers a legislator an opportunity to invest in its stock without paying for the stock upon receiving the shares and deferring payment to a later date, while other shareholders (who are not legislators) are required to pay for the stock upon receiving the shares. The legislator is not permitted to accept this offer, because the legislator cannot show that the transaction is the same as would have been arrived at in an arm's-length transaction between the prohibited source and persons other than the public servant.

8. A broker-dealer firm that is a prohibited source offers a public servant the opportunity to buy shares in a closely held company for \$40 per share. Other investors have paid \$50 per share when investing in the same company. Unless the public servant can

1 provide a persuasive economic explanation for the price differential (such as that the
2 investors paying \$50 per share received a controlling interest in the company), the public
3 servant may not accept the offer. Even if there is no price differential, the public servant
4 cannot participate in the investment unless the same opportunity is made available to
5 similarly situated investors who are not public servants.

6 9. The public servant in Illustration 8 buys the stock directly from the company,
7 which is not a prohibited source. The public servant knows, however, that the broker-
8 dealer, which is a prohibited source, is advising the company on the terms upon which the
9 company raises capital from investors. Because the public servant knows that a prohibited
10 source has significant influence over the terms of the transaction, this transaction is deemed
11 to be a transaction between the public servant and that prohibited source and is not
12 permitted unless the public servant can provide a persuasive economic explanation for the
13 price differential (such as that the investors paying \$50 per share received a controlling
14 interest in the company). If the public servant knows that the prohibited source is involved
15 with the transaction, the public servant also has a duty, prior to making the investment, to
16 inquire as to the specifics of the prohibited source's influence over the terms of the
17 transaction.

18 10. Company A is not a prohibited source, but Company B, which is a prohibited
19 source, owns a controlling interest in Company A. A public servant is offered an
20 opportunity to invest in the stock of Company A for a purchase price paid to Company A
21 of \$40 per share, while other investors are paying \$50 per share. The public servant may
22 not accept this offer, because it is deemed to be an offer from Company B and has not been
23 made available on the same terms to others who are not public servants.

24 11. Company A is not a prohibited source, but Company B, which is a prohibited
25 source, owns a controlling interest in Company A. A public servant is offered an
26 opportunity to invest in the stock of Company A for a purchase price paid to Company A
27 of \$50 per share (the same price as other investors), but unlike other investors, is not
28 required to pay for his stock upon making the investment. The public servant may not
29 accept this offer, because it has not been made available on the same terms to others who
30 are not public servants.

REPORTERS' NOTE

Comment b. Loans. In many ways a public servant who owes money to a prohibited source may be more vulnerable to corruption than one who receives gifts from the prohibited source. Debts, once incurred, must be repaid, forcing the public servant into an ongoing financial relationship with the prohibited source, and the possibility of future gifts through forbearance on or forgiveness of the loan.

Senator Daniel Webster in the 1830s was deeply indebted, and according to some scholars it was personal debts to wealthy financiers and banks that proved to be his ethical undoing. “What ultimately undermined Webster was not the money he earned, however tainted, but the money he borrowed.” Robert W. Gordon, *The Devil and Daniel Webster*, 94 YALE L.J. 445, 456 (1984).

Although any substantial indebtedness, particularly if it exceeds the ability to repay, can compromise the integrity of public officials, indebtedness to prohibited sources is particularly problematic. State and local governments vary in their approach to this problem, many not addressing the indebtedness problem at all and others only partially. Some jurisdictions prohibit loans between government employees and loans to government employees and government contractors.

For example, California prohibits certain loans to public officials:

Limitations on Loans from Agency Officials, Consultants, and Contractors

If you are an official specified in Section 87200 (see page 2) or you are exempt from the state civil service system pursuant to subdivisions (c), (d), (e), (f), or (g) of Section 4 of Article VII of the Constitution, you may not receive a personal loan that exceeds \$250 at any given time from an officer, employee, member, or consultant of your government agency or an agency over which your agency exercises direction and control. (Section 87460(a) and (b).)

In addition, you may not receive a personal loan that exceeds \$250 at any given time from any individual or entity that has a contract with your government agency or an agency over which your agency exercises direction and control. This limitation does not apply to loans received from banks or other financial institutions, and retail or credit card transactions, made in the normal course of business on terms available to members of the public without regard to your official status. (Section 87460(c) and (d).)

Loan Terms Applicable Only to Elected Officials

In addition to the limitations above, if you are an elected official, you may not receive a personal loan of \$500 or more unless the loan is made in writing and clearly states the terms of the loan. The loan document must include the names of the parties to the loan agreement, as well as the date, amount, interest rate, and term of the loan. The loan document must also include the date or dates when payments are due and the amount of the payments. (Section 87461.)

CALIFORNIA FAIR POLITICAL PRACTICES COMM’N, LIMITATIONS AND RESTRICTIONS ON GIFTS, HONORARIA, TRAVEL AND LOANS 13 (2015) (summary citing various provisions of the California Political Reform Act contained in Government Code Sections 81000 through 91014 and

1 regulations of the Fair Political Practices Commission are contained in Sections 18110 through
2 18997 of Title 2 of the California Code of Regulations).

3 California also provides that under certain circumstances a loan to the public official
4 becomes a gift to the official:

5 Under the following circumstances, a personal loan received by **any** public official
6 (elected and other officials specified in Section 87200, as well as any other state official
7 or employee required to file statements of economic interests) may become a gift and
8 subject to gift reporting and limitations:

9 1. If the loan has a defined date or dates for repayment and has not been repaid, the
10 loan will become a gift when the statute of limitations for filing an action for default
11 has expired.

12 2. If the loan has no defined date or dates for repayment, the loan will become a
13 gift if it remains unpaid when one year has elapsed from the later of:

14 The date the loan was made;

15 The date the last payment of \$100 or more was made on the loan; or

16 The date upon which you have made payments aggregating to less than \$250 during
17 the previous 12 months. (Section 87462.).

18 Id. at 13-14.

19 *Comment c. Professional services and employment relationships.* A public servant who
20 practices law or provides other professional services on the side is vulnerable to corruption if
21 payments for these services are in excess of their value, if the client would not have hired the
22 public servant but for his or her official position, or if the public servant becomes dependent upon
23 fees from the client relationship to meet personal financial obligations.

24 For these reasons, jurisdictions may want to consider limitations or prohibitions on outside
25 earned income, either in the aggregate or from particular sources.

26 Many state-government officials, particularly elected officials, however, are only paid for
27 part-time work and earn the remainder of their income from outside employment, often as
28 professional-service providers. These include real-estate agents, doctors, accountants, consultants,
29 and lawyers. Prohibited sources who could not legally give a gift to the public servant may instead
30 hire the public servant as a service provider. In extreme circumstances, these arrangements can
31 lead to bribery convictions, although these convictions can be difficult to sustain on appeal because
32 of the U.S. Supreme Court's narrow definition of "bribery."

33 Formerly, even U.S. Senators and Representatives worked part time and engaged in law
34 practice and other employment on the side. There too was a potential for corruption. One of the
35 most famous examples of a public official charging a prohibited source for professional services
36 was Daniel Webster, who, while a U.S. Senator, charged substantial fees for legal services he
37 provided to the Second Bank of the United States in the 1830s. This was at the same time that the
38 bank had its charter up for renewal in Congress, and stood in a precarious position in the face of
39 President Andrew Jackson's efforts to shut it down. See Gordon, *The Devil and Daniel Webster*,
40 *supra*, at 456-458; Richard W. Painter, *Ethics and Corruption in Business and Government*:

1 *Lessons from the South Sea Bubble and the Bank of the United States* (published by the University
 2 of Chicago Law School) (2006 Maurice and Muriel Fulton Lecture in Legal History) (discussing
 3 how the bank's perceived efforts to corrupt Webster and other members of Congress undermined
 4 it in the public eye and aided President Jackson's efforts to destroy it).

5 Jurisdictions have taken a range of approaches to this problem, from complete prohibition
 6 of income from outside businesses, to dollar limits, to restrictions only on providing professional
 7 services to prohibited sources or on business relationships that entail fiduciary duties to clients, to
 8 a disclosure requirement but no substantive restrictions. The approach taken by these Principles is
 9 a relatively limited one of permitting public servants to provide paid professional services to
 10 prohibited sources but also specifying that a fee paid to a public servant for professional services
 11 is a "gift" from the client to the public servant *unless* the fee is based upon a fair price for the
 12 services *and* the professional engagement is not based upon the public servant's official position.
 13 The former is an objective test, although determining a fair fee in some instances (for example a
 14 contingent fee in litigation) can be difficult. Prevailing fees charged by other similarly situated
 15 professionals who are not public servants should be the operative measure to the extent those fees
 16 can be determined. The second is a subjective test to the extent it requires inquiry into what
 17 motivates the client to hire the public servant for professional services. If the client would not hire
 18 a professional who was not also a public servant, the engagement is motivated by the public
 19 servant's official position and it is for this reason viewed as a gift to the public servant even if the
 20 professional services are worth what was paid for them. All jurisdictions should go at least this far
 21 in restricting outside income-generating activities. They may certainly choose to go further.

22 Some professionals, including lawyers, are paid not only for their own work but are also
 23 paid "finders' fees"—flat fees or percentages paid in return for generating business for other
 24 professionals. (Lawyers are only allowed to share their fees with other lawyers, but in most
 25 jurisdictions lawyers need not be paid in proportion to work they do on a matter; see MODEL RULES
 26 OF PROF'L CONDUCT r. 1.5 and 5.4 (AM. BAR ASS'N 1983).) Professionals in partnerships such as
 27 law firms also often share in each other's fees. These arrangements raise the prospect of public
 28 officials being paid for work they do not do on the premise that they help other professionals—
 29 inside or outside their firms—generate business. Jurisdictions may want to prohibit public servants
 30 from sharing in any fees paid for work that they do not themselves actually perform, or adopt other
 31 restrictions to address this aspect of the problem.

32 **§ 214. Gifts and Financial Transactions between Prohibited Sources and Family Members** 33 **of a Public Servant**

34 (a) A public servant should make reasonable efforts to ascertain when a spouse or
 35 dependent has accepted or intends to accept a gift from a prohibited source and should
 36 discourage a spouse or dependent from accepting or retaining the gift unless the

1 circumstances are such that it would be unreasonable for the public servant to discourage
2 the gift. When a public servant knows that a spouse or dependent has received a gift from a
3 prohibited source, the public servant should notify the ethics authority of the gift and comply
4 with the remedial measures directed by the ethics authority.

5 (b) A public servant should make reasonable efforts to ascertain when a spouse or
6 dependent has entered into or intends to enter into a financial transaction or financial
7 relationship with a prohibited source and should discourage the spouse or dependent from
8 entering into the transaction or relationship unless the circumstances are such that it would
9 be unreasonable for the public servant to discourage the financial transaction or financial
10 relationship. When a public servant knows that a spouse or dependent has entered into a
11 financial transaction or financial relationship with a prohibited source, the public servant
12 should notify the ethics authority of the financial transaction or financial relationship and
13 should comply with the remedial measures directed by the ethics authority.

14 (c) A public servant who knows of gifts or financial transactions or financial
15 relationships involving prohibited sources and other close family members of the public
16 servant should consider whether under the circumstances a reasonable person could
17 question the impartiality of the public servant in the conduct of official business; if so, the
18 public servant should notify the ethics authority of the financial transaction or financial
19 relationship and comply with the remedial measures requested by the ethics authority.

20 (d) A public servant who is in a long-term relationship with a person other than a
21 spouse or dependent of the public servant should comply with this Section to the extent a
22 reasonable person would expect the public servant to do so under the circumstances.

23 (e) A public servant who currently has, or in the past has had, a role in the
24 administration of a foundation established by the public servant or by a member of his or
25 her family should comply with this Section to the extent a reasonable person would expect
26 the public servant to do so under the circumstances.

27 **Comment:**

28 *a. Discouraging gifts and financial transactions by spouses and dependents.* In situations
29 in which a public servant has custodial or other control over decisions made by or on behalf of a
30 dependent, the public servant should ensure that the gift or other advantage is not accepted by the
31 dependent. When the public servant does not have custodial control, in most circumstances a

1 public servant should attempt to persuade a spouse or dependent not to accept a gift or enter into
2 a transaction or other relationship with a prohibited source. There may be circumstances—
3 particularly involving financial transactions and financial relationships—in which the spouse’s or
4 dependent’s personal or professional interest in the matter is so strong that such persuasion is
5 unlikely to succeed and could be harmful to family relationships. In these situations, the public
6 servant should disclose the gift or financial transaction or financial relationship to his or her agency
7 or department to determine what other course of action, such as recusal, is required.

8 *b. Long-term relationships.* These Principles provide that persons with whom a public
9 servant is in a long-term relationship should be treated similarly to spouses and dependents of the
10 public servant in circumstances in which a reasonable observer would expect a public servant to
11 do so. Relevant factors include the length of the relationship and whether the public servant and
12 the other person are sharing finances.

13 *c. Other family members.* The public servant is not obligated to attempt to persuade other
14 family members, such as parents, siblings, and grown children, not to accept a gift or enter into a
15 transaction or other relationship with a prohibited source. On the other hand, a substantial gift or
16 financial transaction or financial relationship could cause a reasonable person to question the
17 impartiality of the public servant in the conduct of official business. In these situations, the public
18 servant should consult with his or her agency or department about appropriate remedial action,
19 including recusal.

20 *d. Trusts and similar entities.* Gifts to trusts and similar entities that include among their
21 beneficiaries the spouse or dependents of the public servant should be treated in the same manner
22 as gifts given directly to the spouse or dependents.

23 **Illustrations:**

24 1. The dependent daughter of a powerful state senator is given a scholarship at a
25 private college that relies heavily on various state subsidies, including state-funded
26 scholarship money for its students. Regular appropriations by the state legislature are
27 needed for these subsidies to continue. The daughter’s scholarship from the college is more
28 generous than the scholarship that the daughter would receive based on the criteria usually
29 applied by the college in awarding scholarships (financial need, academics, diversity,
30 athletics, etc.). The state senator should try to persuade the daughter not to accept that
31 portion of the scholarship that exceeds the scholarship support that a similarly situated

1 student would likely receive from the same college if the student were not related to a state
2 legislator. If such efforts are unsuccessful, or if it is difficult to determine what portion of
3 the scholarship could have been motivated by the state senator's official position as
4 opposed to other criteria, the state senator should consult with legislative ethics officials to
5 determine an appropriate course of action. Recusal from voting on appropriations that
6 could affect the college might be an appropriate course of action.

7 2. A state energy regulator's spouse wants to engage in a business transaction with
8 a company owned in part by persons who work for the energy industry. The transaction is
9 on very favorable terms and the public servant believes that a transaction on the same terms
10 is not available to other persons. The public servant should discourage the spouse from
11 entering into the transaction, but if such efforts are unsuccessful, the public servant should
12 consult with ethics officials in the relevant agency or department to determine if disclosure
13 and/or recusal from certain official matters are warranted.

14 3. The spouse or fiancée of a public servant who works for a state energy regulator
15 is given an expensive diamond necklace by the CEO of an oil company. The public servant
16 should strongly urge the spouse or fiancée to return the necklace. If this effort fails, the
17 public servant must disclose the gift to his agency or department so a plan can be
18 implemented to avoid any actual or apparent impropriety arising from the gift. The public
19 servant's recusal from some or all matters affecting the oil company might be required.

20 4. The sister of the public servant in Illustration 3 receives the necklace. The public
21 servant could consider trying to persuade the sister not to accept the necklace but is not
22 required to try to dissuade her. If the circumstances could lead a reasonable person to
23 question the public servant's impartiality because of the gift—for example the public
24 servant and his sister have financial dealings or exchange valuable gifts with each other—
25 the public servant should disclose his knowledge of the gift to his agency or department so
26 appropriate action can be taken.

27 5. The adult son of a public servant working in the state department of education is
28 approached by a high-school textbook publisher with a business proposal. The proposal is
29 that the son will help sell textbooks to school districts in the same state and be compensated
30 with a very generous commission. The state department of education has an important role
31 in recommending criteria that school districts use in selecting textbooks. The public servant

1 could consider trying to persuade the son not to enter into this business relationship but is
2 not required to try to dissuade him. If the son proceeds with this business relationship,
3 however, the public servant should disclose it to the department of education so a plan can
4 be worked out for him to recuse himself from some or all matters that affect the textbook
5 publisher.

6 **§ 215. Prohibited Sources Who Are Also Family Members or Personal Friends of Public**
7 **Servants**

8 (a) The prohibition on gifts from or financial transactions or financial relationships
9 with prohibited sources does not apply to any gift from or any financial transaction or
10 financial relationship with a family member of the public servant under circumstances in
11 which a reasonable person would infer that the gift, financial transaction, or financial
12 relationship was primarily motivated by the family relationship. For purposes of this Section,
13 a “family member” of the public servant is a spouse; a person in a legally recognized domestic
14 partnership with the public servant; or a child, stepchild, parent, stepparent, sibling,
15 grandparent, great-grandparent, grandchild, great-grandchild, or first cousin of the public
16 servant or of the public servant’s spouse; or any trust or similar instrument or entity
17 established by any such person.

18 (b) The prohibition on gifts from or financial transactions or financial relationships
19 with prohibited sources does not apply to any gift from or any financial transaction or
20 financial relationship with someone who is a personal friend of the public servant under
21 circumstances in which a reasonable person would infer that the gift or financial transaction
22 or financial relationship was primarily motivated by the friendship. If, however, that person
23 is not also a family member of the public servant, this exception does not apply to any gift,
24 financial transaction, or financial relationship that has a substantial market value unless
25 such gift is:

26 (1) from a person who is engaged to be married to or in a legally recognized
27 domestic partnership with the public servant or with the public servant’s dependent;

28 (2) payment of living expenses for the public servant if the person paying the
29 expenses resides in the same household as the public servant; or

1 **(3) to the public servant’s spouse or minor child and is consistent with a**
2 **pattern of gift-giving established by the gift-giver before becoming a prohibited**
3 **source for the public servant.**

4 **(c) In determining whether a reasonable person would infer that the gift, financial**
5 **transaction, or financial relationship was primarily motivated by a family relationship or**
6 **friendship, the factors to be considered include but are not limited to the history and nature**
7 **of the relationship between the individual offering the gift or entering into the financial**
8 **transaction or financial relationship and the public servant, including whether gifts have**
9 **previously been exchanged; whether there is reciprocity; and whether the parties have**
10 **previously entered into a financial transaction or financial relationship. A gift is not likely to**
11 **be motivated by family relationship or friendship if the individual offering the gift at or about**
12 **the same time gave similar items to other public servants. Another relevant factor is whether**
13 **official government business was discussed at or about the same time the gift was given,**
14 **which would suggest motives for the gift other than the family or personal relationship. A**
15 **gift is presumed not to be motivated by family relationship or friendship if the public servant**
16 **is at or about the same time participating in deciding a particular matter, such as a**
17 **government contract or investigation, in which the gift-giver has a substantial interest.**

18 **(d) In determining whether a gift from a person who is not a family member of the**
19 **public servant has substantial market value for purposes of subsection (b), the factors to be**
20 **considered include, but are not limited to, the likelihood that the value of the gift could lead**
21 **a reasonable person to question the motivations of the donor, the likelihood that the value of**
22 **the gift could lead a reasonable person to question the judgment of the public servant in**
23 **official government business relating to the donor, the likelihood that the gift could create a**
24 **dependency relationship between the donor and the public servant, and any other factor that**
25 **could lead a reasonable person to believe the gift to be improper.**

26 **(e) A gift is not covered by this exemption if the family member or friend giving the**
27 **gift did not personally pay for the gift or previously own the gift in a personal capacity, or if**
28 **the person giving the gift seeks to charge or deduct the value of the gift as a business expense**
29 **or seeks reimbursement from any other person or organization.**

Comment:

a. Rationale: gifts from family members. This Section allows public servants to receive gifts of unlimited value from family members, even if those family members also fit within the definition of “prohibited sources” in § 211 of these Principles, when a reasonable person would infer that the gift is motivated by the family relationship. Gifts within families are common and should not be precluded because of a family member’s public service and another family member’s status as a prohibited source.

b. Rationale: limitation on gifts from personal friends. This Section also allows public servants to receive some gifts from personal friends who are not family members even if those personal friends also fit within the definition of “prohibited sources” in § 211. However, such gifts are limited to avoid abuse of the “personal friend” exception to accommodate extravagant gifts, particularly when personal and professional relationships are often intertwined. Given the subjective criteria used to define both the personal relationship and the motivations for the gift, some objective criteria are needed to impose reasonable limits on the value of gifts from persons who are not family members. Jurisdictions could impose specific dollar limits, or use the more open-ended approach here of prohibiting most gifts that are of “substantial” value. Some jurisdictions may set a dollar limit to define “substantial” value. Other jurisdictions may choose to ban all gifts from prohibited sources who are not family members or at least prospective family members through marriage.

c. Disclosure may be required. A jurisdiction may choose to require disclosure of permissible gifts from family and personal friends. Indeed, such disclosure may be needed in order to justify having such an exception in its gift rules. Without disclosure, the public would have no way of knowing which “friends” are giving gifts of substantial value to government officials. The disclosure requirement could be tied to the position of the official or the size of the gift.

d. The gift must be paid for by the family member or friend. A prohibited source might attempt to take advantage of another’s family or personal connection with a public servant to advance an interest with the government. Thus, it is critical that the gift actually be paid for by the family member or friend, or the gift will be considered to be from the person who paid for it.

Illustrations:

1. A public servant who works for the state banking commission is invited by a friend to join him in attending a professional football game. The friend, a government-

1 affairs representative of a bank, is given approximately 20 tickets to professional sporting
2 events per year by his employer and will use two of them for this game. The factual
3 circumstances here—a bank rarely if ever compensates an employee with multiple tickets
4 to professional sporting events solely for personal use, and this particular bank employee
5 works in government affairs—indicate strongly that the employee does not own the tickets
6 in his personal capacity, but is instead expected to use them to entertain guests on behalf
7 of the bank. The tickets are considered a gift to the public servant from the bank, a
8 prohibited source.

9 2. A lobbyist who is a prohibited source is part owner of a restaurant and invites
10 several public servants who are his personal friends to join him for dinner at the restaurant
11 without paying the restaurant. This gift is not allowed under this exception because the
12 lobbyist himself did not personally pay for the gift, the restaurant paid for the cost of the
13 gift, and the public servant is not a friend of the restaurant. The restaurant has other owners
14 who may be prohibited sources for the public servant. There is another reason the gift might
15 not be allowed even if the lobbyist paid for the gift out of his own pocket: the fact that
16 several public servants were invited to the dinner at the same time may suggest that the gift
17 is motivated by something other than personal friendship. (See Comment *e.*)

18 *e. The gift must appear to a reasonable person to be motivated primarily by the family*
19 *relationship or other personal relationship.* If the relevant facts suggest that the gift was motivated
20 in whole or in part by anything connected with the public servant's official functions, this
21 exception does not apply. A gift of exceptional magnitude compared with past gifts would be a
22 relevant factor for making this determination, as would the setting in which the gift is given and
23 the content of conversations that accompany the gift.

24 **Illustrations:**

25 3. A first cousin of the public servant is a prohibited source because he is a lobbyist
26 and wants the public servant to take certain official action that will help the cousin's client.
27 He takes the public servant out to dinner and the matter is discussed and he offers to pay
28 for the dinner. The public servant may not accept this gift and must pay for his own dinner,
29 because a reasonable person would infer that the gift was motivated by factors other than
30 the family relationship.

1 4. The public servant's father-in-law takes him to an expensive restaurant for dinner
2 and offers to pay for the dinner. During the dinner, the father-in-law asks the public servant
3 extensive questions about his duties as a public servant. Although the father-in-law works
4 for a company that is a prohibited source, he does not discuss issues specific to that
5 company's business or its relationship with the public servant's agency. A reasonable
6 person could conclude that the discussion was motivated by the father-in-law's interest in
7 his son-in-law's career. Under these circumstances, the gift of dinner at the restaurant falls
8 within the exception and is permitted.

9 5. The father-in-law in Illustration 4, after he pays the check, tells his son-in-law
10 not to worry because he is reimbursed by the company he works for. At this point the
11 exception no longer applies and the son-in-law is required to pay for his share of the dinner.
12 The gift is not from the father-in-law, but from the company. (See Comment *d.*)

13 6. A public servant's college roommate, a lobbyist, has been a close personal friend
14 for years, but the lobbyist friend has never before given the public servant a gift of
15 significant value and when they have gone out they have each paid their own way. The
16 lobbyist friend then starts lobbying the public servant's agency for official action and at or
17 about the same time starts offering the public servant free tickets to sporting events. The
18 public servant must refuse the tickets or pay for them.

19 7. A lawyer who wants the state to retain him on a contingent-fee basis for
20 consumer-fraud litigation has lunch with a personal friend of his from law school who
21 works in the attorney general's office. They do not discuss this particular matter at lunch
22 or at any other time, but they both know that the lawyer wants the appointment and that the
23 friend will advise the attorney general on which lawyer to hire for the appointment.
24 Because this is a particular party matter that the public servant is participating in, it should
25 be presumed that any gift given to the public servant, including the cost of the lunch, is
26 motivated by the lawyer's desire to get the appointment and not by personal friendship.

27 *f. Gifts of substantial value from friends who are not family generally prohibited.* While
28 there is some justification for allowing gifts from personal friends, gifts of substantial value from
29 friends who are not family members, and who are also prohibited sources, involve many of the
30 same risks as gifts from other prohibited sources and are generally prohibited.

Illustrations:

8. A public servant's daughter is getting married and the public servant has already promised the couple that she will pay for their wedding at an expensive country club. A personal friend of the public servant, who is a prohibited source because he is seeking official action from the public servant's agency, sends the country club a \$10,000 check to pay for half of the cost of the wedding. This gift is not permitted because it is clearly of substantial value. A \$500 contribution to the cost of the wedding from a friend who also attended the wedding, on the other hand, might not be of substantial value, and might be permitted. The public servant's jurisdiction might choose to impose a monetary limit on such gifts from persons who are not family members of the public servant, and, if so, such limits must be observed.

9. A bank president allows an old college friend who is a bank regulator to spend two weeks free of charge at his lake house each summer. The bank regulator must turn down this gift because it is of substantial value and the bank president is not a family member. A single overnight stay in the lake house, on the other hand, would be permissible if it were not deemed to be of substantial value.

g. Appearances can be problematic. Even with a permissible gift, a public servant needs to be cognizant of the poor appearance that can result from a large gift and the possible perceived connection between the gift and the public servant's official responsibilities. The public servant can address these concerns by turning down a large gift or by recusing from government functions that have a direct and predictable impact on the donor of the gift.

§ 216. Gifts of Complimentary Attendance at Events

(a) In the circumstances described in this subsection, a public servant may accept from prohibited sources the gift of complimentary attendance:

(1) offered by the sponsor of an event organized with the principal objective of raising money for a charity or for one or more individuals in need, provided the public servant obtains prior consent from his or her agency or department and attendance is in the best interests of the agency or department;

1 (2) at an event organized with the principal objective of raising money for or
2 supporting a political candidate or political party, provided the public servant
3 accepting the free attendance is an elected official or a candidate for elected office;

4 (3) offered by the sponsor of a widely attended event for which no attendees
5 are charged admission, provided the public servant obtains prior consent from his or
6 her agency or department and attendance is in the best interests of the agency or
7 department; or

8 (4) at an event at which the public servant accompanies his or her spouse who
9 is attending the event as part of his or her employment or volunteer activities that do
10 not involve seeking to influence the public servant's agency or department, and the
11 spouse's employer or volunteer organization pays the cost of the public servant
12 attending the event.

13 (b) For the purposes of this Section:

14 (1) A "widely attended event" is one:

15 (A) that is attended—or that the sponsor in good faith believes will be
16 attended—by at least 20 individuals (or a number of a similar order of
17 magnitude as determined by the public servant's jurisdiction) who are not:

18 (i) members, officers, or employees of the agency or department
19 in which the public servant serves, or

20 (ii) members, officers, or employees of the sponsor of the event;

21 and

22 (B) at which the sponsor intends to promote social interactions among
23 the attendees.

24 A public servant may accept complimentary attendance at the widely attended
25 event under this exception only if his or her agency or department determines that
26 such attendance is in its best interests. This "widely attended event" exception shall
27 not apply to events for which attendees other than the public servant are charged
28 admission.

29 (2) "Complimentary attendance" means the waiver of all or part of a
30 registration or admission fee, or waiver of all or part of a fee or charge for the
31 provision of food, beverages, entertainment, access to facilities, instruction, or

1 materials to the public servant and to a spouse accompanying the public servant.
2 Complimentary attendance includes the awarding of continuing-education credits or
3 certification for attendance at a program, provided that such credits or certification
4 are offered to all attendees. Complimentary attendance does not include travel,
5 lodging, or items of more than nominal value. Complimentary attendance includes
6 food and beverages only if such food and beverages are available on the same terms
7 to all participants in the event.

8 (3) The sponsor of an event is the person or entity that organizes the event,
9 pays the costs associated with the event, and collects any revenues from the event.
10 Other persons or entities are not sponsors of the event even if the sponsor designates
11 them as sponsors or cosponsors for its own purposes.

12 **Comment:**

13 a. *Rationale for the event exception.* Public servants will sometimes be invited to events
14 free of charge by the sponsors that organize those events and should in certain circumstances be
15 permitted to accept those invitations. One rationale for this exception is that it allows public
16 servants to mingle with people outside their workplace and hear opinions that may be different
17 from their own in a context in which the value of the gift of free attendance is likely to be relatively
18 modest.

19 b. *Charitable fundraisers.* Charitable fundraisers that charge most attendees for admission
20 may invite certain public officials to attend free of charge, often as a way to attract paying
21 attendees. Public officials are permitted to accept these invitations, even if the event sponsor is a
22 prohibited source. The event sponsor could be the charity seeking to raise funds or a third person
23 or entity that organizes the event in order to raise funds for the charity. There is no requirement
24 that these events be widely attended, because it is often difficult to predict how many people will
25 actually attend, and cancellation of a scheduled appearance by a prominent public servant because
26 of low attendance can cause considerable embarrassment. Some states and municipalities,
27 however, may wish to impose limits on either the amount of money raised from attendees or on
28 the cost of the complimentary food, beverages, and entertainment provided to the public servant
29 at fundraisers that are not widely attended. Such limits would respond to the concern that small
30 gatherings involving substantial amounts of expenditures or revenues create an appearance of
31 impropriety.

1 *c. Political fundraisers.* For elected public servants, the exception for charitable fundraisers
2 also extends to complimentary attendance at political fundraisers and other political events with a
3 paid admission price. This exception does not apply unless a public servant holds elected office.
4 An appointed official may attend such events but may not allow a prohibited source—including a
5 political party or candidate who is a prohibited source—to cover the cost of admission.

6 *d. The gift must be from the event sponsor, not from a third party that pays or donates to*
7 *the event sponsor.* These Principles do not allow for third-party, non-sponsor invitations whereby
8 someone else pays for the public servant’s admission to fundraisers—for example, a company that
9 buys a table at the fundraiser and then invites public officials to sit at the table.

10 **Illustration:**

11 1. A public servant in the state transportation department is asked by an old friend
12 who is not a prohibited source to sit with him at a 12-person table at a charity dinner that
13 was purchased by the Acme Construction Company in return for a \$6,000 donation by
14 Acme to the charity. Acme contracts with the state for road repairs and is a prohibited
15 source. If Acme pays for the public servant’s seat, the fact that the friend invited the public
16 servant is irrelevant. Furthermore, Acme is not the sponsor of the event; the charity is the
17 sponsor of the event, and the charity does not provide the public servant with
18 complimentary attendance. The exception for complimentary attendance at a charitable
19 event does not apply, and the public servant must decline the invitation or reimburse Acme
20 the value of the ticket, which is \$500.

21 *e. Widely attended events.* A professional or college sporting event, movie screening,
22 concert, or other event principally focused on entertainment rather than social interaction among
23 participants is not a widely attended event. A golf outing or other event at which participants
24 engage in an activity together may be a widely attended event, if the criteria in this Section are met
25 and a significant portion of participants’ time is spent on conversation in addition to the activity.
26 Complimentary attendance at trade-association receptions and dinners, industry trade shows, and
27 conferences is permitted when they qualify as widely attended events. A trade association could
28 meet this requirement if the requisite number of attendees is employed by member companies but
29 not by the association itself. A lobbying firm could meet this requirement by inviting its clients to
30 attend the event. This exception, however, would not be available for an event sponsored by a

single firm or company for its own employees exclusively to mingle with the public servant and other public servants from his or her agency. This exception also does not apply to events for which other attendees are charged admission.

Illustrations:

2. A public servant is invited by the chief executive officer of a company that is a prohibited source to join him with two other friends for a round of golf at a country club. This is not a widely attended event, and the public servant cannot accept the invitation unless the public servant pays his share of the cost of the golf outing.

3. Same facts as in Illustration 2, but the event is a golf outing sponsored by the company for its clients, and more than 20 people attend who are not employed by the company or by the public servant's agency. The public servant may attend because this would be a widely attended event, provided that a significant amount of time is spent on social interaction among the participants as well as playing golf, and the public servant's agency or department determines that it is in the interests of the agency or department that the public servant attend.

4. A public servant is invited by the chief executive officer of a company that is a prohibited source to join him in the company's skybox at a professional football game. This is not a widely attended event.

f. Spousal invitations. A public servant may accompany his or her spouse to an event at which the spouse's employer or volunteer organization (a prohibited source) is the sponsor, such as a firm holiday dinner, a company golf outing, or similar event. This exception, however, would not apply to situations in which it appears that the public servant is being treated differently from other spouses, for example if spouses of other employees or volunteers for the organization are not also invited to attend or pay their own way. In those situations, the public servant would have to pay his or her own way or decline the invitation.

g. No special treatment of public servants at the event. The definition of "complimentary attendance" does not include food, beverages, or other services not provided to all attendees at the event.

Illustration:

5. A public servant is invited to a widely attended event at which some attendees including the public servant, but not other attendees, are invited into a VIP room where higher-priced drinks and food are served. The public servant may not go into the VIP room and still use this exception to the gift principles.

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Comment c. Political fundraisers. The federal gift rules do not limit the “widely attended event” exception for attendance at political events to elected public officials, see 5 C.F.R. § 2635.204(g)(2) (“widely attended gathering” exception applies to all such functions with no exclusion for political events); many states do not so limit the exception either. There has been considerable public criticism of this practice. Two core problems are the potential for political contributors to use fundraisers to lobby government officials and the appearance that a political candidate or party is using a fundraiser to sell preferential access to government officials. These problems cannot be fully addressed by gift rules and require more comprehensive solutions. But these problems should not be exacerbated by permissive gift rules either. Gift rules should allow only public servants who depend for their own election upon political parties or the efforts of other candidates to receive complimentary attendance at political fundraisers.

Invitations from non-sponsors. The Standards of Conduct for federal employees permit acceptance of such third-party invitations by non-sponsors who are prohibited sources if the ticket price was less than \$385 in 2016 (a number that is adjusted for inflation), an exception that is not made in these Principles. Charities and political fundraisers benefit from this exception, which helps them sell tables to prohibited sources who can then invite public servants to sit with them at the event, but the downside is that the public servant becomes a captive audience for lobbying by the prohibited source who invited him or her to sit at the prohibited source’s table.

§ 217. Payments for Travel, Meals, and Lodging

(a) The following gifts from prohibited sources are permissible, provided that the public servant’s agency or department authorizes them in advance and determines in writing that the public servant’s acceptance is in the best interests of the agency:

(1) Payment or reimbursement for transportation, meals, beverages, and lodging for a public servant who is, or is a staff member accompanying a public servant who is, an attendee, panelist, or speaker at a conference, symposium, panel discussion, debate, or other informational event when such reimbursement or payment is made by a prohibited source that is a governmental entity; a professional

1 association that is authorized by state law to sponsor continuing-education programs
2 for members of a profession and the event complies with such law; or an accredited
3 public or private institution of higher education that hosts the event. This exception
4 also applies to reimbursement or payment by such governmental entities, professional
5 associations, or institutions of higher education outside the United States if the agency
6 or department publicly discloses the identity of the public servant, the dates and
7 places of the travel, and the purpose of the travel. “Informational event” means an
8 event or meeting, the primary purpose of which is to provide information about a
9 subject or subjects related to a public servant’s official responsibilities.

10 (2) Reimbursement of the cost of transportation, meals, beverages, and
11 lodging in connection with attending a meeting, inspecting a facility, or performing
12 other official duties.

13 (b) A public servant who is an elected official or a political candidate may accept
14 payment or reimbursement from a political candidate or political organization for
15 transportation, meals, and accommodations when such costs are incurred by the public
16 servant in the course of engaging in political activity on behalf of the political candidate or
17 political organization. “Political candidate” means any individual running for elected public
18 office. “Political organization” means any entity that is affiliated with or is a subsidiary of a
19 political party, including, without limitation, a partisan political club or committee, or a
20 campaign or fundraising committee for a political party or for a political candidate. An
21 organization that is not required by law to disclose its donors is not a political organization
22 for purposes of this subsection.

23 (c) The cost of meals and lodging provided to a public servant pursuant to this Section
24 should be reasonable under the circumstances.

25 **Comment:**

26 *a. Rationale for the travel and lodging exception.* Public servants are sometimes invited to
27 conferences and other meetings for which not only meals and registration fees but also travel and
28 lodging are paid for or reimbursed by the event sponsor. Government agencies and departments
29 often cannot afford to send their employees to these conferences and meetings, so in many
30 instances the public servant would not be able to attend if he or she could not accept a gift of travel
31 and lodging from the event sponsor. On the other hand, there are legitimate concerns that event

sponsors that pay for such travel and lodging, particularly to popular travel destinations, get preferential access to government officials.

b. Scope. This Section addresses free attendance at a conference, meeting, or other event that relates to the public servant's official duties. Participation in such events should be approved by a supervisor or an agency ethics official. Waiver of fees and other charges, including for meals, as well as payment for transportation and lodging, is a gift from the person or organization absorbing the cost to the public servant's agency—i.e., a gift to the government. Government agencies may have their own rules for accepting such invitations and allowing outside organizations to pay for associated travel expenses. Those rules are distinct from this Section, which only exempts such payments from the gift rules.

c. Government entities, accredited colleges and universities, and professional associations are allowed to pay for travel, meals, and lodging. Subsection (a)(1) allows acceptance of the gift of transportation, meals, beverages, and lodging from three categories of sponsors: governmental entities, accredited colleges and universities, and professional associations that sponsor continuing-education programs. Other organizations, such as trade associations, industry groups, think tanks, religious groups, news organizations, and private businesses, are not included on this list. Some jurisdictions may choose to include these types of sponsors as well if they believe that the benefits outweigh the appearance that access to public servants is obtained with offers of free travel and lodging. An alternative approach would be to add to the list any entity organized under § 501(c)(3) of the Internal Revenue Code.

d. Other entities allowed to pay for travel, meals, and lodging. Subsection (a)(2) allows acceptance of transportation, meals, beverages, and lodging from other categories of sponsors of meetings, inspections of facilities, or other functions that involve official duties, provided the public servant's agency or department authorizes them in advance and determines in writing that the public servant's acceptance is in the best interests of the agency or department.

e. Costs must be reasonable. Although the cost of travel, meals, and lodging may exceed the expenses normally allowable for government travel, the agency should take into account the class of travel, and expense of meals and lodging, in determining whether acceptance of these gifts on behalf of the agency is appropriate.

f. Political candidate and party reimbursement. The exception for expenses paid for or reimbursed by a political candidate or political party applies to public servants participating in

1 their own campaigns for elected office and to public servants who are elected officials or
2 candidates participating in the campaigns of other candidates. Public servants who are not elected
3 officials or candidates should not be discouraged from participating in partisan political activity in
4 their personal capacity, but should do so at their own expense. This approach is stricter than that
5 of the federal government, which allows for gifts of travel in connection with political activities.
6 See 5 C.F.R. § 2635.204(f) (exception for reimbursement of travel expenses in connection with
7 activities permitted by the Hatch Act). The stricter rule is justified because of the risk that paid
8 political expenses may encourage public servants to allow their offices to be used for the advantage
9 of a candidate or party. This provision pertains only to the question of whether the gift of travel
10 and lodging can be accepted by the public servant; it does not address the legality of the political
11 activity in question. State and federal laws, including the Hatch Act, prohibit certain categories of
12 political activity by public officials. (The Hatch Act covers some state and local officials as well
13 as federal employees.) See 5 U.S.C. § 7323 (political activities authorized, prohibitions), 5 U.S.C.
14 §§ 1501-1508 (political activity of certain state and local officials).

15 **Illustrations:**

16 1. A senior employee of the state banking commission, who is not an elected
17 official or a political candidate, is invited by her political party to participate in a strategy
18 session at a hotel that is 300 miles away from her home. The public servant cannot accept
19 the party's offer of travel and lodging but the public servant can attend the event at her own
20 expense provided the public servant complies with other applicable laws governing
21 personal-capacity political activity by state employees. (If the public servant administers a
22 state or local program funded by the federal government, this could include the Hatch Act.
23 See 5 U.S.C. §§ 1501-1598).

24 2. An elected state treasurer is invited to speak at a state political party fundraiser.
25 The party offers to pay for airfare and hotel for one night. The state treasurer may accept
26 this invitation.

27 3. The state treasurer in Illustration 2 is ill and the chief of staff for the state
28 treasurer, who is not an elected official or a candidate for elected office, is asked to
29 substitute for the state treasurer at the political-party fundraiser. The chief of staff cannot
30 accept the offer of free travel and lodging in connection with the fundraiser.

1 *g. Persons and entities that are not prohibited sources may pay for travel, meals, and*
2 *lodging.* As with other scenarios, if the person or entity paying for a public servant's travel and
3 lodging is not a prohibited source, then the public servant may accept the gift. Some government
4 entities may have separate rules for approval and reporting of travel funded by an outside source.
5 Such rules must be complied with regardless of whether the payment for travel and lodging
6 qualifies as an exception under general gift principles. The allowed costs are not subject to the
7 same limitations that would apply to official travel paid for by the public servant's agency or
8 department, but the costs must be reasonable. Excessively luxurious accommodation, first-class
9 air travel, and other amenities should not be approved by the public servant's agency or
10 department.

11 **Illustrations:**

12 4. A business school that is not otherwise a prohibited source pays to fly a public
13 servant first-class to an alumni event at a luxury resort to discuss public-policy issues with
14 alumni. The public servant may accept only if the event was not organized for the purpose
15 of influencing the public servant or his agency in the performance of their official duties.
16 However, an organization is a prohibited source if the majority of its members are
17 prohibited sources, so an event organized by a subset of a business school's alumni (e.g.,
18 alumni in banking, minority or women alumni, etc.) might in some circumstances be a
19 prohibited source for some public servants (e.g., banking regulators, public servants whose
20 agencies administer contracts for women- and minority-owned businesses, etc.). In these
21 situations, the group of alumni organizing the event is a prohibited source, and that group
22 is giving the gift even if it is paid for by the business school out of its general funds.

23 5. A university receives funding from several large companies and trade
24 associations to organize a program on the economic impact of environmental regulation.
25 Public servants working for several state agencies are invited to speak at and attend the
26 program, which is held at a luxury resort. In this situation, the university is a prohibited
27 source because the event appears to be organized by the university and its financial
28 backers to influence official action by the public servants' agencies or departments. The
29 public servants can accept the university's offer to cover the cost of attendance only if the
30 cost of lodging and meals paid for by the university is reasonable. The lavishness of the

1 resort is a factor that the public servant's agency or department should consider in
2 deciding whether the invitation should be accepted.

3 6. Same facts as in Illustration 5, but the university itself is not a prohibited source
4 because, among other things, there is no evidence that the event is organized to present a
5 particular viewpoint to influence official action by the public servant's agency or
6 department. Funding is from the university's endowment or general budget rather than
7 from corporate sponsors, and the program contains a wide range of viewpoints on
8 environmental regulation. In this situation, there is no gift from a prohibited source.
9 Because there is no prohibition of the gift to begin with, application of the exception in this
10 Section is not necessary.

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11 *Political fundraisers.* Political fundraisers often give the appearance of preferential access
12 to public officials being provided in return for donations. Ethics codes should not encourage this
13 type of exchange by exempting paid travel, lodging, and meals in connection with attendance at
14 political fundraisers from gift rules unless the public servant is an elected official or candidate for
15 elected office for whom attending such events is a standard part of the electoral process. Other
16 public servants may attend such political events, but at their own expense. These Principles are not
17 designed to address the conflicts of interest and other problems inherent in political fundraising,
18 but gift rules should not encourage involvement of public servants in political fundraising by
19 creating unnecessary exemptions for receipt of travel, meals, and lodging.

§ 218. Other Exceptions

21 **The following are not considered gifts from prohibited sources unless prohibited**
22 **under other laws or regulations:**

23 **(a) Anything for which the government has paid or that has been secured by**
24 **government contract.**

25 **(b) Rewards or prizes given to competitors in contests or events (including**
26 **random drawings) offered to the general public or a segment of the general public**
27 **defined on a basis other than status as a public servant.**

28 **(c) Awards, plaques, and other ceremonial items of the type customarily**
29 **bestowed in connection with similar ceremonies and otherwise reasonable under the**
30 **circumstances.**

1 (d) Honorary degrees bestowed upon a public servant by a public or private
2 college or university. This exception, however, does not apply to any benefits
3 accompanying the honorary degree except benefits made available on similar terms
4 and conditions to all degree holders from the college or university.

5 (e) Promotional items having no substantial resale value—such as pens, mugs,
6 calendars, hats, and t-shirts—that bear an entity’s name, logo, or message in a
7 manner that promotes the entity’s cause.

8 (f) Goods and services, or discounts for goods and services, offered to the
9 general public or a segment of the general public defined on a basis other than status
10 as a public servant and offered on the same terms and conditions as the goods and
11 services are offered to the general public or a broad category thereof.
12 Notwithstanding the foregoing, discounts made available to all public servants
13 working for the same state or municipality fall within this exclusion. Similarly,
14 discounts made available to all public servants working for the same agency or
15 department of the same state or municipality fall within this exclusion if approved by
16 the head of the agency or department after public disclosure.

17 (g) Gifts received by a spouse of the public servant solely as a result of his or
18 her own employment, volunteer activities, or personal relationships, provided the gift
19 is not re-gifted by the spouse to the public servant and provided that the public
20 servant complies with any requirements adopted by his or her jurisdiction or agency
21 to report any such gifts from a prohibited source above a threshold level set by the
22 jurisdiction or agency.

23 (h) Gifts of food or beverages that are donated to charity, or are promptly
24 distributed or made available for shared consumption on a nondiscriminatory basis
25 to other public servants in the same office as the public servant receiving the gift and
26 that are consumed within that same office shortly after receipt of the gift, provided
27 that no one public servant consumes a portion of the gift in excess of nominal value
28 and provided such consumption within the office is not prohibited by other laws or
29 regulations.

1 **(i) Modest hospitality such as dinner and drinks provided on a social occasion**
2 **to the public servant in a personal residence other than the public servant’s own**
3 **home.**

4 **(j) Benefits from legal-defense funds and discounted legal services if in**
5 **accordance with § 221 of these Principles.**

6 **Comment:**

7 *a. Rationale.* These exceptions apply to situations in which the public servant is not being
8 given anything more than members of the general public, in which there is a relatively low risk of
9 a gift influencing a public servant’s official actions, and/or in which exceptions are needed because
10 of practical considerations. Other applicable laws and regulations may affect how some of these
11 situations are handled—for example the exception in subsection (h) that allows consumption in
12 the public servant’s office of food and beverages would likely not apply to alcoholic beverages
13 that are not allowed to be consumed on government property.

14 *b. Discounts for broad categories of persons.* Some providers of goods and services offer
15 special discounts to specific categories of individuals such as teachers, social workers, veterans,
16 police officers, and members of the state national guard (often in conjunction with a discount for
17 U.S. military personnel). Such discounts may or may not be appropriate under the circumstances.
18 Discounts for police officers, for example, might encourage more police presence in the
19 establishments that offer those discounts, arguably at the expense of public safety in
20 neighborhoods where such discounts are less prevalent. On the other hand, the discounts may help
21 improve police and community relations. Discounts offered to teachers may help make up for the
22 fact that in some school districts teachers have to purchase classroom supplies at their own expense
23 and some teachers go so far as to purchase personal items such as clothing for students in need.
24 Rather than categorically prohibit such discounts, these Principles provide that they should be
25 publicly disclosed and approved by the public servant’s agency or department.

26 **Illustrations:**

27 1. A public servant who is an employee of the state banking commission
28 participates in a random drawing at her local bank, where a blank card is given to each
29 customer, who then may write his or her name on the card and put it in a box in the bank
30 lobby. There is a public drawing of one of the cards, and the person named on that card

1 wins a new automobile paid for by the bank. The public servant may participate in the
2 drawing. If, instead of using the blank card, each customer is allowed to put his or her
3 business card into the box, and the public servant uses a business card identifying the state
4 banking commission as her employer, additional questions might need to be asked about
5 the procedures used in the drawing to make sure the public servant did not win the car
6 because of her official position.

7 2. The Chamber of Commerce bestows an annual award for public service on a
8 career civil servant. The Governor usually attends the award ceremony and has his picture
9 taken with the awardee. The framed photograph—valued at \$100 with the frame—is then
10 mailed to the awardee a week later. Although the framed photograph is not given to the
11 public servant at the ceremony, it is clearly in connection with the ceremony and may be
12 accepted even if the Chamber of Commerce is a prohibited source. If, however, one year
13 the Chamber of Commerce decides to substitute for the usual photograph a framed vintage
14 photograph taken by a well-known photographer and valued at \$500, this would not be
15 permitted because it is not the customary award for this ceremony and goes beyond what
16 is appropriate under the circumstances. Also, if the Chamber of Commerce’s annual award
17 for public service includes a cash stipend covering anything other than travel expenses, that
18 would have to be turned down.

19 3. A public servant in an agency that awards research funding to a private university
20 is awarded an honorary degree by that university. The public servant may accept the degree.
21 The university also gives all holders of its honorary degrees free use of a golf course owned
22 by the university. Other degree holders are given a modest discount of the fees charged to
23 the public for use of the golf course. The public servant cannot accept free use of the golf
24 course but can accept benefits identical to those made available to all degree holders on the
25 same terms and conditions, such as the discount on golf-course fees. Other similar benefits
26 might include credit cards offered to alumni of a particular college or university, the
27 opportunity to join a club or other alumni association, or the opportunity to participate in
28 alumni association vacations or to rent certain vacation property, provided these same
29 benefits are made available to all other degree holders able to meet financial and other
30 conditions for such benefits.

1 4. An oil company gives a public servant in the state energy department a glass
2 cube with the logo of the oil company engraved on it. The oil company paid \$60 for the
3 item. The public servant may accept it. If, however, the oil company gives the public
4 servant a large glass bowl from a famous glassmaker, valued at \$600, with the company
5 logo on it, the gift cannot be accepted because its resale value is surely more than a nominal
6 amount.

7 5. A police officer is an alumnus of XYZ University. A sporting-goods store offers
8 a 20 percent discount on selected merchandise to alumni of XYZ University but not to the
9 general public. The police officer may take advantage of the discount. A local restaurant
10 offers a 20 percent discount to all employees of the municipality that employs the police
11 officer. The police officer may take advantage of that discount as well. A local coffee shop
12 offers a 20 percent discount on coffee and baked goods to all police officers in the same
13 municipality but not to other municipal employees. The police officer may take advantage
14 of this discount if the head of the police department approves and publicly discloses that
15 police officers will be allowed to take advantage of the discount.

16 6. A public servant in the health department is married to a doctor who works in a
17 hospital that is a prohibited source for the health department. The hospital gives the doctor
18 two gifts in appreciation for service to the hospital: a Waterford glass bowl valued at \$600
19 and an all-expenses-paid trip for two to Hawaii. If the hospital gave these gifts to the doctor
20 exclusively because of the doctor's relationship with the hospital, the doctor's receipt of
21 the gifts is not presumed to be a gift to the public servant, provided the public servant
22 complies with any applicable requirement. The doctor could take another family member
23 or a friend on the trip, but if the public servant goes on the trip to Hawaii, the public servant
24 should do so at the public servant's own expense unless the gift of travel for two was
25 unquestionably given to the doctor only because of the doctor's service to the hospital (for
26 example there is a precedent of the hospital similarly rewarding other doctors who are not
27 married to public servants). Otherwise the gift of the free trip to the public servant is a gift
28 to the public servant, not a gift to the spouse. The doctor spouse cannot re-gift a portion of
29 the gift to the public servant spouse if the public servant spouse cannot accept the gift
30 directly.

7. A restaurant offers food at half price to on-duty and off-duty police officers, in part to show support for the police but also to have more police officers present and make other patrons feel more secure. A police department should not allow officers to accept this discount unless it is certain that on-duty conduct by officers, including decisions about where to take short lunch or coffee breaks while on duty, are not affected by this discount.

§ 219. Agency Specific Variations

Any agency or department may adopt or implement its own rules, regulations, or procedures that are more restrictive than these Principles.

Comment:

a. Rationale. These Principles set forth standards for gifts that should apply in all state and local agencies and departments as well as in the legislative branch. Individual agencies and departments, however, will sometimes have good reason to impose additional restrictions on gifts just as they might impose additional restrictions in other areas such as conflicts of interest. Law-enforcement and ethics agencies, for example, may take a more restrictive approach to reduce still further any appearance of impropriety. Some agencies, for example, might prohibit employees from attending all or most widely attended events hosted by a prohibited source. Other agencies might prohibit all or most official travel funded by a prohibited source, including travel and lodging in connection with conferences or meetings, even if it is permitted under § 217 of these Principles. Other agencies might choose to designate additional entities and persons as prohibited sources, for example, family members and business associates and employees of persons under investigation.

§ 220. Gifts, Financial Transactions, and Financial Relationships between Public Servants

(a) A gift from one public servant to another or a financial transaction or financial relationship between public servants should be treated as similar to a gift or financial transaction or financial relationship involving a prohibited source if a public servant who receives the gift or is a party to the financial transaction or financial relationship supervises or has significant influence over the terms and conditions of employment of the other public servant.

1 **(b) Unless the public servant giving the gift or entering into a financial transaction or**
2 **financial relationship is a family member of the other public servant, as defined in § 215, the**
3 **exception in § 215 allowing gifts from and financial transactions and financial relationships**
4 **with prohibited sources having a personal relationship with the public servant does not apply**
5 **to gifts subject to subsection (a) of this Section.**

6 **(c) The exceptions for payments for travel, meals, and lodging in § 217 do not apply**
7 **to gifts subject to subsection (a) of this Section.**

8 **(d) Notwithstanding subsection (a), the following gifts between public servants are**
9 **permitted: gifts of value commensurate with the value of gifts given by other guests who are**
10 **not public servants in connection with the birth of a child, weddings, and other ceremonial**
11 **events, and departure or retirement gifts given to public servants by other employees**
12 **collectively shortly before or after they end their employment with the agency or department.**

13 **Comment:**

14 *a. Rationale.* This Section is intended to prevent situations in which public servants use
15 gifts to curry favor with superiors, feel pressure to give gifts to superiors, and/or take advantage
16 of their position to solicit or receive gifts from subordinates. The same definitions apply as for
17 gifts from other prohibited sources. The core rationale is the same as that underlying other gift
18 restrictions: actual or apparent influence that gifts can have on official decisionmaking. In addition,
19 gift-giving between public servants can give rise to perceptions of favoritism within an agency or
20 department that can undermine office morale.

21 *b. Scope.* Restrictions on gifts between employees work most effectively in conjunction
22 with other rules designed to discourage favoritism and distorted decisionmaking within agencies
23 and departments. These include civil-service rules governing hiring, promotion, and employee
24 discipline; rules about appropriate boundaries between political and official functions; rules about
25 appropriate boundaries with respect to sexual and romantic relationships between employees; and
26 anti-nepotism rules.

27 *c. Lower nominal value may be appropriate.* Because of the ongoing relationship between
28 a superior and a subordinate, a jurisdiction could choose to set a lower permitted maximum value
29 for a gift by a subordinate to a superior than for gifts from outside prohibited sources.

Illustration:

1. A public servant in an agency or department buys a one-dollar cup of coffee for his boss in the same agency or department. The boss may accept the coffee once or twice, but even a very small gift of this nature would be problematic if it were to become more frequent.

d. Personal-friend exception should not apply. Even if gift rules have a generally applicable exception for gifts from personal friends, this exception is problematic for gifts between employees in an agency or department. First, employees in an office often form friendships, so the exception would dominate the rule. Second, situations in which some employees but not others are deemed to be “friends” of their superiors for purposes of office policies are generally inappropriate. Personal friends who enter into a subordinate–superior relationship with each other in a government agency or department are expected to have a relationship similar to other similarly situated public servants. Friendship between superiors and subordinates should not be grounds for exceptions to government-ethics rules or any other government policy.

e. Exception for travel, meals, and lodging should not apply. Even in situations in which a prohibited source is permitted to pay for a public servant’s travel, meals, and lodging, it is inappropriate for government employees to pay for a superior’s travel, meals, and lodging, whether on official business or personal travel. The exception therefore should not apply.

Illustration:

2. A public servant and his boss travel to a conference hosted by a company that is a prohibited source. The company pays for the cost of transportation, meals, and lodging. The public servant, however, uses his credit card for certain incidental expenses for both of them, such as snacks, beverages, and other minor expenses, hoping to be reimbursed by the government agency or by the company sponsoring the conference. There is, however, no reimbursement from either the company or the government. The public servant should ask his boss to reimburse him for his share of the incidental expenses, and the boss should reimburse the subordinate whether or not requested to do so.

f. Retirement gifts. Gifts upon retirement from an agency or department should only be given a short period before or after the retirement and should be collective. Because retiring public

servants sometimes make decisions about promotions and job assignments to address needs arising from their own departure, individual employees should not give their superiors retirement gifts of significant value until after the retirement has actually occurred.

g. Gifts at ceremonial events permitted. This exception applies only to ceremonial events and not to holiday parties and other events that are not connected with a particular ceremony. The ceremony may be religious or secular in nature, but the gift is permitted only if other guests attending the same ceremony also gave gifts of roughly equal value.

Illustration:

3. A public servant attends a high-school graduation party for his boss's son. He gives the son a brand new smartphone valued at \$600. A gift to a dependent of a public servant is in most cases treated the same as a gift to the public servant. See § 214. The party, if held at or about the time of the graduation, is a ceremonial event, but this gift is still not permitted unless most of the persons attending the graduation party gave gifts of similar value.

§ 221. Gifts to Legal-Defense Funds for Public Servants; Gifts of Legal Services to Public Servants

(a) A gift from a prohibited source to a legal-defense fund established for the purpose of paying personal legal expenses incurred by a public servant is considered a gift to the public servant.

(b) A public servant should conduct reasonable due diligence with respect to a legal-defense fund before receiving any benefit from the fund. This includes reasonable efforts to ascertain the identities of persons and entities involved in establishment, administration, and solicitation on behalf of the fund, as well as reasonable efforts to identify its donors. A public servant who discovers that a prohibited source has contributed to a legal-defense fund used by the public servant must return the contribution to the prohibited source unless the fund returns the contribution to the prohibited source.

(c) A public servant may not receive any benefit from a legal-defense fund that does not publicly disclose the names of its donors, the names of persons or entities establishing the fund, and the names of individuals authorized to solicit contributions on behalf of the fund.

1 **(d) A jurisdiction may choose to permit a public servant to accept discounted legal**
2 **services from a lawyer or law firm for a legal representation that arises out of the public**
3 **servant’s official position provided that such lawyer or law firm is not a prohibited source.**
4 **Alternatively, a jurisdiction may choose to bar such discounted legal services, even when not**
5 **from a prohibited source, if the discounted rate is provided because of the public servant’s**
6 **official position.**

7 **Comment:**

8 *a. Rationale.* This Section is designed to avoid improper gifts to public servants through
9 payment of personal legal expenses. The core rationale for this Section relates to the same actual
10 or apparent influence that gifts can have on official decisionmaking that underlies other gift
11 principles. The risk of actual or apparent undue influence may be particularly acute when a public
12 official who is in the difficult and unusual situation of being subject to investigation or litigation
13 is dependent upon outside donors to pay for his or her legal defense.

14 *b. Scope.* Restrictions on receipt of benefits from legal-defense funds are in addition to
15 other laws that apply to such funds and to persons, including lawyers, who receive money from
16 these funds. These include tax laws, lawyers’ professional-conduct rules, anti-bribery laws,
17 restrictions on receipt of benefits from foreign governments, and other rules.

18 *c. Anonymous donors not appropriate.* Because it is unlikely that donors to legal-defense
19 funds could ever truly be anonymous, and because of the appearance of impropriety that ordinarily
20 accompanies secrecy, anonymous donations to legal-defense funds for public servants should be
21 prohibited. A legal-defense fund should publicly disclose the names of all of its donors.

22 *d. Higher nominal value may be appropriate.* Because of the high cost of legal services,
23 the pooling of donations, and the fact that legal-defense funds often have many donors, it may be
24 appropriate to allow a higher nominal value for gifts to the fund from prohibited sources. Because
25 these payments are gifts, however, if a jurisdiction wants to make provision for contributions to
26 legal-defense funds from otherwise prohibited sources, it needs to do so with a specific exception,
27 otherwise applicable gift restrictions would apply. The permitted nominal value of a contribution
28 to a legal-defense fund could be an absolute dollar amount and/or a limit on the percentage of a
29 fund that could come from any one prohibited source. For example, a jurisdiction could prohibit
30 donations from a prohibited source that exceed the lesser of (a) \$500 or (b) one percent of the total
31 amount paid into the fund.

1 *e. Includes legal-defense funds in which prohibited sources have a significant role.* As with
2 gift principles generally, this particular principle on legal-defense funds applies not only when
3 gifts are paid for by prohibited sources but also when prohibited sources are involved with
4 soliciting a gift from a donor or offering the gift to the public servant. Thus, a public servant may
5 not receive any benefit from a legal-defense fund if the public servant knows that a prohibited
6 source has solicited contributions to the fund from third parties. A public servant also may not
7 receive any benefit from a legal-defense fund if the public servant knows that a prohibited source
8 has solicited contributions to the fund from third parties. Some jurisdictions take a more restrictive
9 approach and prohibit not only gifts from prohibited sources but gifts given by anyone because of
10 a public servant's official position. In these situations, gifts from persons other than family
11 members and friends are usually highly suspect. Contributions to legal-defense funds from non-
12 prohibited sources seem particularly likely to be given because of the public servant's official
13 position when the legal-defense fund is intended to defray legal costs arising out of official
14 conduct. These Principles do not prohibit contributions to legal-defense funds from non-prohibited
15 sources, but some jurisdictions may choose to impose such a prohibition

16 *f. Does not apply to payments by the government for legal defense in connection with*
17 *official acts.* This Section does not affect the ability of a governmental unit to cover legal costs for
18 a public servant or to indemnify a public servant for legal costs. Many jurisdictions cover the costs
19 of legal defense of employees sued with respect to their official acts. The legal-defense funds
20 addressed in this Section are private funds that also help defray legal costs incurred by a public
21 servant in connection with litigation or investigations concerning activities that may be connected
22 to official duties but that are not covered by government-provided legal defense.

23 *g. Discounted legal services.* The legal expenses of public servants present a difficult
24 question. Public servants may need legal representation for matters that grow out of the course of
25 their public duties but are not covered by their public employer. Many public servants may also
26 lack the resources to pay for the costs that such legal representation may entail. Discounted legal
27 services would not be a gift within the meaning of these Principles if the lawyer or law firm
28 providing such services is not a prohibited source but would still raise the concern that such legal
29 services are being provided because of the public servant's official position. If a jurisdiction
30 chooses to allow it, a public servant may accept legal services at a rate that is discounted because
31 of the public servant's official position, provided the lawyer and the lawyer's firm are not

1 prohibited sources for the public servant. The public servant also may solicit the discounted rate
 2 in conversations with the lawyer, for example by stating that he or she cannot afford to pay more
 3 than a certain amount for legal services. This exception does not apply if the lawyer or the lawyer's
 4 firm is a prohibited source for the public servant.

REPORTERS' NOTE

5 *Comment b. Scope.* Legal-defense funds can raise issues under other ethics regulations
 6 besides the gift rules. These include public financial-disclosure laws and regulations, lobbyist gift
 7 bans (if different from bans on gifts from other prohibited sources), and prohibitions on
 8 supplementation of government salaries from outside sources. For the federal government, the U.S.
 9 Office of Government Ethics (OGE) has addressed legal-defense funds under the Standards of
 10 Conduct for Employees of the Executive Branch at 5 C.F.R. Part 2635, Subparts B and C; the
 11 criminal conflict-of-interest statutes at 18 U.S.C. §§ 201-209; the public financial-disclosure
 12 requirements in the Ethics in Government Act of 1978, 5 U.S.C. app. § 101 et seq.; and the lobbyist
 13 gift ban in Executive Order 13770, sec. 1, para. 5.

14 For example, many jurisdictions, including the federal government, have statutory
 15 prohibitions on outside sources supplementing government salaries—i.e. paying the public servant
 16 additional compensation for doing his or her official duties. See, e.g., 18 U.S.C. § 209. A question
 17 can arise as to whether disbursements from legal-defense funds violate such laws.

18 OGE has in most circumstances excluded legal-defense fund disbursements from the
 19 federal statutory prohibitions on supplementations of government salary. As OGE explained in
 20 2017:

21 OGE previously issued two informal advisory opinions addressing whether particular
 22 legal defense funds would violate the prohibition against supplementation of salary in
 23 18 U.S.C. § 209. See OGE Inf. Adv. Op. 85x19 (1985); OGE Inf. Adv. Op. 93x21
 24 (1993). In OGE Informal Advisory Opinion 85x19, OGE concluded that section 209
 25 may be implicated by payments made to an employee's legal defense fund. Eight years
 26 later, OGE revisited this issue in light of *Crandon v. United States*, 494 U.S. 152 (1990).
 27 In OGE Informal Advisory Opinion 93x21, OGE significantly narrowed the
 28 circumstances under which a payment to a legal defense fund may implicate section
 29 209. Specifically, OGE found that section 209 was not violated in the particular
 30 situation presented, concluding, “[i]f the employee's defense is not part of his work,
 31 then 2 accepting contributions from a legal defense fund would not be ‘as compensation
 32 for services’ prohibited by section 209. OGE Inf. Adv. Op. 93x21. This conclusion has
 33 not changed.

34 Legal Advisory To A Designated Agency Ethics Officials Clarification Of Past Legal Defense
 35 Fund Guidance Provided In OGE Informal Advisory Opinion 93x21, September 28, 2017, LA-17-
 36 10.

1 *Comment c. Anonymous donors not appropriate.* One often-debated issue is whether gifts
2 to legal-defense funds can come from anonymous sources. One view is that gifts that are truly
3 anonymous cannot corrupt a public servant. Another, probably more realistic, view is that such
4 gifts are not likely to be truly anonymous and that a public servant probably knows who is
5 supporting his or her legal-defense fund. These Principles embrace this latter view and prohibit
6 public servants from accepting funds from legal-defense funds that have anonymous donors.

7 Although the U.S. Office of Government Ethics (OGE) has equivocated on this issue, and
8 appeared to equivocate again in 2017, OGE has stuck to the position that anonymous contributions
9 to legal-defense funds for federal officials are not permitted.

10 OGE Informal Advisory Opinion 93x21 also discussed the idea that the identity of the
11 donors “should” be concealed from the beneficiary of the fund, though not required,
12 because the employee will be unable to favor the anonymous donors. *Id.* Shortly after
13 this guidance was issued, however, OGE recognized that donor anonymity may be
14 difficult to enforce in practice because there is nothing to prevent a donor disclosing to
15 the employee that he or she contributed to the employee’s legal defense fund. See OGE
16 Authorization Act of 1994: Hearing Before the Subcomm. on Admin. Law and Gov’t
17 Rel. of the Comm. on the Judiciary, 103rd Cong. 20-22 (1994) (statement of Stephen
18 J. Potts, Director, Office of Government Ethics). Moreover, OGE also recognized that
19 many of the concerns raised in OGE Informal Advisory Opinion 93x21 about donors
20 currying favors with employees benefiting from the donations are negated by the fact
21 that solicitation and acceptance of contributions from prohibited sources are barred
22 under the gift rules at 5 C.F.R. Part 2635, Subpart B, unless an exception applies.
23 Accordingly, OGE has been advising, and is continuing to advise, that the instruments
24 establishing legal defense funds include a clause stating that “contributions shall not be
25 accepted from anonymous sources.”

26 Legal Advisory To A Designated Agency Ethics Officials Clarification Of Past Legal Defense
27 Fund Guidance Provided In OGE Informal Advisory Opinion 93x21, September 28, 2017, LA-17-
28 10.

29 *Gifts to legal-defense funds because of official position.* The Conflicts of Interest Board of
30 the City of New York has concluded that gifts to public-servant legal-defense funds are gifts
31 because of official position, and thus are subject to the gift restrictions of Chapter 68 of the New
32 York City Charter, the City’s conflicts-of-interest law, and related Board Rules. New York City
33 Conflict of Interest Board Advisory Opinion, Legal Defense Fund, No. 2017-2. The prohibition
34 on gifts over a de minimis amount (\$50 in New York City) applies not only to gifts from prohibited
35 sources but to all gifts from persons other than family members that are presumed to be given
36 because of the public servant’s official position:

37 For contributions from virtually all others—from non-subordinate City employees,
38 constituents, and others who, although not engaged in business dealings with the City,
39 know of a public servant by virtue of his or her City position—the Board will presume
40 that the public servant is being offered contributions only because of his or her City

1 position. This presumption is particularly strong for a high-ranking public servant. As
2 a result, the public servant's acceptance from these persons of a valuable gift, that is, a
3 contribution of \$50.00 or more, would presumably violate Charter Section 2604(b)(3)
4 as a misuse of the public servant's City position.

5 Id. at 5.

6 The Board's strict policy is perhaps appropriate in a city such as New York that usually
7 indemnifies legal expenses incurred in connection with official duties. As the Board notes "[l]egal
8 expenses connected to a public servant's official duties are often paid for, or indemnified by, the
9 City. See New York Public Officers Law § 18; New York General Municipal Law § 50-k." Id. A
10 jurisdiction with a similarly robust indemnification policy may wish to adopt similarly strict
11 prohibitions on legal-defense funds receiving any contributions from persons other than family.
12 Other jurisdictions may choose to allow gifts from up to a certain amount in excess of the usually
13 applicable de minimis amount and/or allow gifts to legal-defense funds that are not from prohibited
14 sources, even if, as the New York City Board points out, it could be argued that these gifts are
15 being made because of the public servant's official position.

CHAPTER 5

POST-GOVERNMENT EMPLOYMENT RESTRICTIONS

Introductory Note: Elected officials may be term-limited out of office, defeated for re-election, or choose to leave politics, and senior appointees holding political positions may lose office following elections or as a result of political decisions. Even long-time civil servants may choose to retire from public service early enough to pursue a private-sector career. In some fields, public service is often just one step in a career ladder that may involve starting in, or returning to, the private sector. In many cases, the post-public-employment work may involve dealing with the public servant's former government agency or department. The public servant may have developed considerable subject-matter expertise in the area in which he or she worked that could be very attractive to a private employer. So, too, the public servant may have valuable inside knowledge concerning the informal workings of his or her former agency or department, and may continue to have personal or social ties to, or enjoy the special respect of, his or her former government coworkers that could prove useful in dealings with that agency or department on behalf of a private client or employer. Some of the very features that make the former public servant appealing to the private sector may be a source of ethical concern, leading to conflicts of interest that may result in a loss of public confidence that government decisions are being taken in the public interest. Indeed, public concern about the impact of the so-called "revolving door" on the ability of government to pursue the public interest has been a major driver of post-employment regulation.

There is, however, a real public interest in the turning of the revolving door. Public service in the United States benefits when government is able to hire talented individuals who wish to work in the public sector for a period of time but thereafter intend to return to the private sector. There are benefits for government as well when experienced former public servants who enter the private sector are able to use their expertise to enable private actors to better understand and comply with government regulations and requirements. The principles governing the revolving door, thus, need to balance the public's interest in preventing the misuse of public office for private benefit and guarding against the appearance of impropriety, on the one hand, with the public's interest in being able to attract public servants who may also want to consider spending part of their careers in the private sector, on the other hand. In other words, post-government employment restrictions must be strong enough to prevent the exploitation of public office for private gain, but

1 not so onerous as to discourage public service or to preclude the former public servant's legitimate
2 use for private interests of the knowledge and expertise about public policy and government gained
3 while in public service.

4 This Chapter addresses the principles that ought to apply when a public servant leaves
5 public employment for a private-sector position. It consists of four Sections. Section 501
6 articulates a set of general principles intended to avoid the conflicts of interest and the appearance
7 of conflicts of interest that may arise when a public servant seeks or accepts private-sector
8 employment; when a former public servant works for a private interest on a matter in which he or
9 she was involved while in public service; and when a former public servant appears before or
10 communicates with his or her former agency or department shortly after leaving public service.
11 Sections 511, 512, and 513 then provide more specific provisions to guide the application of
12 § 501's general principles.

PART A

GENERAL PRINCIPLES

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

14 (a) A public servant should avoid both the possibility of conflict of interest and the
15 appearance of such conflict that would arise if the public servant seeks or accepts an offer of
16 employment from a private individual or organization when the public servant is personally
17 and substantially involved in addressing a particular matter involving the prospective
18 employer.

19 (b) A former public servant should avoid both the possibility of conflict of interest
20 and the appearance of such conflict that would arise if, after leaving government
21 employment, the former public servant works for a private employer on a particular matter
22 in which he or she was personally and substantially involved while in public service.

23 (c) A former public servant should avoid both the possibility of conflict of interest and
24 the appearance of such conflict that would arise if the former public servant appears before
25 or communicates with his or her former government agency or department within a defined
26 period of time after leaving public service.

Comment:

a. Avoidance of conflict of interest on and after leaving public service. The “revolving door” is a basic feature of public service in the United States. Public servants frequently leave public service for the private sector, and new public servants are often hired from the private sector. This can be a source of strength for our governments, allowing the public sector to tap into areas of private expertise and enabling more citizens to participate in government. But the revolving door is also a cause for ethical concerns. These include the dangers that a public servant’s government actions will be influenced by the desire to curry favor with potential future employers; that a former public servant will misuse information acquired while in public service; that a former public servant will take advantage of relationships with former colleagues still in government to improperly influence decisions or to get an unfair advantage over competitors; and that the public will be dismayed by the apparent lack of loyalty of public servants who “switch sides” to represent the private interests they had once regulated. As a result, ethics regulations at all levels of government typically address the revolving door.

The general principles for addressing the revolving door are grounded in the overarching conflicts-of-interest concern to prevent the exploitation of public office for private gain without being so onerous that public service becomes unattractive to people whose work in government would promote the public interest. This has led most jurisdictions to focus on three specific issues: (i) a public servant’s pursuit of private employment with individuals or organizations that have business before the public servant; (ii) the former public servant’s appearance before his or her former agency or department with respect to a particular matter in which he or she was personally and substantially involved while in public service; and (iii) the former public servant’s appearance before his or her former agency or department in the period immediately after leaving public service.

The principle restricting the pursuit of private-sector employment with an entity that has business before the public servant is, in a sense, a special application of the general restriction on the use of government authority for private gain. This principle is implemented by § 511. The two principles dealing with post-government-employment behavior work together. The permanent restriction targets the danger that the former public servant might misuse inside information gained while in government service with respect to a particular matter. It also addresses the appearance of impropriety that occurs when a public servant “switches sides” in a regulatory setting, contract

1 negotiation or implementation, or dispute between the government and a private party. The so-
 2 called “cooling-off” period requirement—which varies from jurisdiction to jurisdiction and with
 3 the nature of the public position, but is most commonly one or two years—addresses the concerns
 4 about misuse of insider knowledge more generally as well as the residual influence the former
 5 public servant may have with recent government coworkers or subordinates. That concern goes
 6 beyond the specific matters the former public servant worked on but is also likely to abate with
 7 the passage of time. These principles are implemented by §§ 512 and 513.

REPORTERS’ NOTE

8 *Comment a. Avoidance of conflict of interest on and after leaving public service.*
 9 “Movement of personnel between government and private industry—and how much to regulate
 10 it—is one of the most controversial issues of government ethics.” RICHARD W. PAINTER, GETTING
 11 THE GOVERNMENT AMERICANS DESERVE: HOW ETHICS REFORMS CAN MAKE A DIFFERENCE 47
 12 (Oxford Univ. Press 2009). Public servants frequently leave public service—whether by choice,
 13 retirement, or for political reasons—for the private sector, and many public servants may view
 14 public service as only one step in a career that involves both public and private employment. This
 15 can be a source of strength for our governments. As President John F. Kennedy put it in 1961,
 16 “[t]oday’s Government needs men and women with a broad range of experience, knowledge, and
 17 ability. . . . [W]e need to draw upon America’s entire reservoir of talent and skill to help conduct
 18 our generation’s most important business, the public’s business.” President John F. Kennedy,
 19 Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in
 20 Government (April 27, 1961). As the American Bar Association’s Committee on Government
 21 Standards has observed, “our country prizes the ability to draw on the skills of citizens who have
 22 been, and will return to be, private sector managers, physical and social scientists, technical
 23 experts, and medical and legal professionals.” ABA Comm. on Gov’t Standards (Cynthia Farina,
 24 Reporter), *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L.
 25 REV. 287, 327 (Summer 1993). The revolving door enables government to obtain the services of
 26 employees it might not otherwise be able to afford and also provides greater opportunities for
 27 citizens to participate in government. See Wenton Zheng, *The Revolving Door*, 90 NOTRE DAME
 28 L. REV. 1265, 1301-1302 (2015). There are benefits for government regulation as well when
 29 experienced former public servants are able to use their expertise to enable private actors to better
 30 understand and comply with government requirements. See Robert H. Mundheim, *Conflict of*
 31 *Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON
 32 L. REV. 707 (1981). Accord, Thomas D. Morgan, *Appropriate Limits on Participation by a Former*
 33 *Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 51-55 (1980) (noting costs in
 34 terms of recruitment of public servants and the loss of their knowledge to subsequent private-sector
 35 employers of unduly restrictive revolving-door rules).

1 The revolving door is also, however, a source of great public anxiety. See, e.g., Revolving
2 Door Working Group, “A Matter of Trust: How the Revolving Door Undermines Confidence in
3 Government—And What to Do About It,” (October 2005), www.revolvingdoor.info; The Project
4 on Government Oversight, “Dangerous Liaison: Revolving Door at SEC Creates Risk of
5 Regulatory Capture,” (Feb. 11, 2013), www.pogo.org. Studies have found that the revolving door
6 triggers a number of ethical concerns, including the possibility that the former public servant will
7 misuse confidential inside government information; that the former public servant will take
8 advantage of relationships with former colleagues still in government to improperly influence
9 decisions or get an unfair advantage over competitors; that while still in government employment
10 the public servant will be influenced to make decisions to curry favor with potential future
11 employers; and that the public will be dismayed by the apparent lack of loyalty of public servants
12 who “switch sides” to represent private interests and by the prospect that government regulators
13 are “captives” of the industries they oversee. See George F. Carpinello & Michael Donaldson,
14 *Postemployment Restrictions on Government Employees: Closing the Revolving Door*, in ETHICAL
15 STANDARDS IN THE PUBLIC SECTOR 35 (Patricia E. Salkin ed., ABA Publishing 2d ed. 2008);
16 Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer’s Guide to Post-Employment*
17 *Restrictions*, 15 REV. LITIG. 525, 527-529 (1996); Ann McBride, *Ethics in Congress: Agenda and*
18 *Action*, 58 GEO. WASH. L. REV. 451, 470 (1990); Morgan, *supra*, 1980 DUKE L.J. at 36-50; Note,
19 *The Fiduciary Duty of Former Government Employees*, 90 YALE L.J. 189 (1980) (emphasizing
20 misuse-of-confidential-information concern); Philip A. Lacovara, *Restricting the Private Law*
21 *Practice of Former Government Lawyers*, 20 ARIZ. L. REV. 369, 385-386 (1978). See also Forti v.
22 New York State Ethics Comm’n, 75 N.Y.2d 596, 605 (1990) (“the purpose of ‘revolving door’
23 provisions . . . is to prevent former government employees from unfairly profiting from or
24 otherwise trading upon the contacts, associations, and special knowledge that they acquired during
25 their tenure as public servants”); *United States v. Medico Indus., Inc.*, 784 F.2d 840, 843 (7th Cir.
26 1986) (expressing concern about “a risk that people who hope to move to the private sector will
27 favor while in public employment those firms they think may offer rewards later, and after these
28 employees switch to the private side they may exercise undue influence over those they leave
29 behind”); *Brown v. District of Columbia Bd. of Zoning Adj.*, 486 A.2d 37, 43-45 (D.C. 1984)
30 (revolving-door cases involve “side-switching,” “preventing misuse of confidential information,”
31 and the concern that “the public must be protected against the possibility that government attorneys
32 in a variety of ways will conduct ‘their offices with an eye toward future private employment.’”).

33 To be sure, some have argued that many of these concerns are exaggerated. See, e.g.,
34 Mundheim, *supra*; Morgan, *supra*. One recent study raised questions about the “currying favor”
35 concern when it found that government lawyers who leave public service for private careers appear
36 to be more aggressive in bringing cases against entities in their jurisdiction than their colleagues.
37 See Ed deHaan, Simi Kedia, Kevin Koh & Shivaram Rajgopal, *The revolving door and the SEC’s*
38 *enforcement outcomes: Initial evidence from civil litigation*, 60 J. ACCT. & ECON. 65 (Nov.-Dec.
39 2015). Indeed, public officials considering departure for the private sector may have incentives to
40 expand agency jurisdiction or increase enforcement. See Zheng, *supra*, at 1280-1300. But there is

1 also general agreement among commentators on the need for some revolving-door rules,
 2 particularly those that prevent the possibility of the misuse of confidential government
 3 information, address the unfairness of former officials' being able to take advantage of personal
 4 contacts and social ties with their former government colleagues, and ameliorate the appearance
 5 of impropriety that occurs when a public servant seems to be switching sides in the same matter.
 6 See, e.g., Lacovara, *supra*, at 373; Morgan, *supra*, at 37-42, 61.

PART B

SPECIFIC PROVISIONS

§ 511. Seeking Post-Government Employment

(a) Except as provided in subsections (b), (c), and (d), a public servant may not seek,
 negotiate for, or accept any offer of employment from a private individual, organization, or
 firm if:

(1) such individual, organization, or firm is directly affected by a particular
 matter pending before the public servant's government; and

(2) the public servant is personally and substantially involved in the disposition
 of the matter.

(b) The restriction in subsection (a) may be waived if:

(1) the public servant informs the head of his or her agency or department
 before seeking, negotiating for, or accepting an offer of employment from an
 individual, organization, or firm covered by subsection (a); and

(2) the agency or department head and the jurisdiction's ethics agency agree
 that the public servant may continue to seek, negotiate for, or accept such an offer of
 employment provided that the public servant immediately recuses from all further
 involvement in any matter that individual, organization, or firm has with the public
 servant's government;

(3) provided further, however, the head of the public servant's agency or
 department, with the approval of the jurisdiction's ethics agency, may permit the
 public servant to continue to work on matters involving such individual, organization,
 or firm if the agency or department head and the ethics agency conclude that is in the
 best interests of the public servant's government.

1 (c) The restriction in subsection (a) shall not apply to a public servant who seeks,
2 negotiates for, or accepts an offer of employment from another agency or department in the
3 public servant's government.

4 (d) An elected official may seek, negotiate for, or accept an offer of employment from
5 a private individual, organization, or firm only if, immediately upon contacting or being
6 contacted by the prospective employer with respect to such employment, the elected official:

7 (1) recuses from participation in the consideration of, including the casting of
8 any votes on, any particular matter affecting the prospective employer, and

9 (2) notifies the ethics agency that has jurisdiction over the elected official with
10 respect to his or her seeking, negotiating for, or accepting the offer, for any further
11 recommendations it deems appropriate to prevent a conflict of interest. The elected
12 official should give any such recommendation serious consideration.

13 **Comment:**

14 *a. General principle restricting dealings with potential future employers.* A public
15 servant's pursuit or consideration of future private-sector employment with an individual,
16 organization, or firm that has an interest that may be affected by the public servant's official actions
17 presents a clear case of conflict of interest. When a public servant has a financial interest in a
18 potential future employer's favorable evaluation of the public servant and the potential future
19 employer has an interest that may be affected by the public servant's official actions, there is the
20 real possibility that the public servant's actions will be influenced by the prospect of future
21 employment, and there is certainly the possibility that this will appear to the public to be a conflict
22 of interest.

23 *b. Scope of the restriction.* Approaches to the regulation of the pursuit of post-government
24 employment vary. A few jurisdictions broadly prohibit seeking or accepting employment with any
25 entity that does business with or is subject to regulation by the employee's agency or department.
26 More commonly, regulation is focused more tightly on situations in which the employee is directly
27 involved in a particular matter involving the potential future employer. This Section takes the
28 narrower approach. There may be some fields in which most potential future employers are subject
29 to regulation by the public servant's agency, so that such a broad "agency" approach would make
30 it very difficult for the public servant to find employment in that field. Tying the restriction to the
31 public servant's direct involvement in a particular matter affecting the potential future employer

1 focuses tightly on the core conflicts-of-interest concern—the possibility that a specific action may
2 be affected by future employment—without unduly constraining the public servant’s future
3 employment options.

4 The key questions then become what constitutes a “particular matter” and what does it
5 mean for the public servant to be “personally and substantially involved” in the disposition of that
6 matter. These are terms that have been used frequently in the federal, state, and local laws dealing
7 with post-government-employment restrictions and are also central to the lifetime “matter” ban
8 provided in § 512. These terms are considered more fully in the Principles governing conflicts of
9 interest in Chapter 3, particularly § 311.

10 “Particular matter” includes a case, proceeding, adjudication, application, request for a
11 ruling or determination, contract, claim, controversy, charge, accusation, arrest, investigation, or
12 other similar action that is focused on the interests of a specific party or parties, or a discrete and
13 identifiable class of persons. It may include the consideration or adoption of a rule, regulation, or
14 law if the measure is narrowly focused on the interests of a specific party or parties or a discrete
15 and identifiable class of individuals or firms but not if the measure is of broad applicability. The
16 meaning of “particular matter” is addressed more fully in the Comments to § 311.

17 **Illustrations:**

18 1. Alan is on the staff of the City Planning Commission (“CPC”). His work involves
19 analyzing and making a recommendation to the Commission concerning the proposal of
20 Dandy Development for a variance that would allow the company to build a taller building
21 on the site than current zoning would allow. The variance request is a particular matter
22 because it deals with the interests of a specific company.

23 2. Brenda is another member of the CPC staff. She is heading the team that is
24 preparing the “green roofs” amendment to the City Zoning Code that would require all
25 future construction projects in the City to use their roofs to ameliorate climate change.
26 Many developers and landowners in the City have submitted comments to her team
27 concerning the proposal. The “green roofs” amendment is not a particular matter because
28 it would affect all future construction projects in the City.

29 3. Charles is also on the CPC staff. His project is drafting a Special East Midtown
30 Zoning Amendment, which would allow landowners in a defined multi-block area to sell
31 their air rights to any other developer in the district, thus allowing them to build much taller

1 buildings than would otherwise be allowed. This is most likely a particular matter because
2 it is targeted on a specific district, although if the area covered by the amendment were
3 enlarged significantly to include much of the City it would probably no longer be a
4 particular matter.

5 “Personal and substantial involvement” requires that the public servant be directly involved
6 in the matter, not simply be employed in or in charge of the office handling the matter. A public
7 servant nominally supervising other public servants directly involved in the matter is not
8 personally involved, but a public servant exercising active supervision, including monitoring and
9 review of the work, would be personally involved. “Substantial involvement” means any
10 discretionary action that could affect the disposition of the matter through research, analysis,
11 investigation, providing advice, making a recommendation, or participating in the decision.
12 Participation may be substantial even if the public servant’s role is small in relation to the entire
13 matter and even if the public servant’s action does not determine the final outcome, as when a staff
14 member recommends the rejection of a request for a permit and is overruled by a supervisor.
15 However, actions that are largely ministerial—such as a staff lawyer’s review of a contract for
16 form, but without the authority to recommend substantive changes—would not be substantial. The
17 meaning of “substantial involvement” is also further addressed in the Comments to § 311.

18 *c. Actions restricted.* Many restrictions on the pursuit of post-government employment
19 apply only to negotiations. This has led to questions concerning when a preliminary discussion
20 with a potential employer constitutes a negotiation. The proposed rule takes a broader approach
21 and applies as soon as the public servant begins to seek post-government employment. A more
22 difficult question is presented when the potential future employer initiates the process. This raises
23 the danger that the employer is using the offer to influence the public servant’s decision. The
24 improper-influence danger would be dissipated if the public servant rejects the unsolicited offer.
25 If the public servant desires to discuss the offer with the private employer, that should be treated
26 as a negotiation, and the public servant would have to first seek a waiver pursuant to subsection
27 (b). Alternatively, the public servant might neither reject the offer nor seek to discuss it with the
28 offeror while the offeror’s business is pending before the public servant. That would not violate
29 the rule, but the public servant should alert his or her superiors within the agency or department
30 about the offer so that they may take appropriate measures. If the negotiations terminate without
31 an offer, the public servant should notify his or her superior, and/or, for higher-level public

servants, the appropriate ethics agency, to determine whether the public servant may resume work on the matter affecting the private employer.

It is also worth noting that the restriction applies only when the public servant is in public service. After leaving public office, the public servant is free to seek, negotiate, or accept an offer from a private employer that had a matter before the public servant when the public servant was in government, subject to the restrictions in §§ 512 and 513 and any additional restrictions the jurisdiction may apply to departing public servants who held certain types of positions.

Illustration:

4. Dandy Development contacts Alan, the city planner in Illustration 1, to let him know they have an opening in their city-planning department and to ask him to consider applying for the position. Alan writes back that, as he is currently working on their variance request, he cannot consider the Dandy job “at this time.” Alan should let his agency head know about the offer so that the agency head can decide whether it would be appropriate for Alan to continue working on the variance.

d. Prohibition versus recusal. Restrictions on the pursuit of post-public-service employment generally take one of two forms—either a ban on pursuing a position with an employer who has a matter pending before the public servant, or a requirement that the public servant, once he or she begins the post-employment job search, recuse from all matters involving employers that are part of that job search. This rule draws together both concepts. The basic rule is one of prohibition. That is the most effective way of preventing a conflict of interest from arising. But in some situations—such as when contact is initiated by the potential future employer, or the public servant has a particular need to find future employment because the public servant’s position is linked to an elected official whose term is nearing its conclusion—the absolute ban may prove too harsh. Subsection (b) gives the public servant the alternative of pursuing a position with a potential employer who has a matter before the public servant’s agency or department in which the public servant is personally and substantially involved, contingent on the public servant’s advising the agency or department head, obtaining the consents of the agency or department head and the jurisdiction’s ethics agency, and recusing from the matter. This alternative should provide adequate protection against the public servant’s possible misuse of his or her public office to advance the interests of the potential future employer.

1 *e. Waiver.* This Section also provides for the possibility that there may be some situations
2 in which the head of the public servant's agency or department and the jurisdiction's ethics agency
3 conclude that it would be in the best interests of the jurisdiction for the public servant to continue
4 to work on the potential future employer's matter. This could occur, for example, when the public
5 servant has great technical expertise relevant to the matter that would be very difficult to replace.
6 It could also occur when the relationship between the government agency or department and the
7 potential future employer is collaborative, such as may occur when the potential future employer
8 is a not-for-profit organization working closely with the government agency or department as a
9 partner on a social-services program, such as one addressing homelessness, drug addiction, or
10 recidivism.

11 If the public servant seeking or considering private-sector employment is an agency or
12 department head or is a member of a multi-member board or commission that collectively heads
13 the agency or department, that person would need the approval of the head of the branch of
14 government to which the agency or department belongs, or that person's delegate, as well as the
15 consent of the ethics agency.

16 *f. Future government employment.* The danger of conflict of interest is greatly reduced
17 when the public servant is seeking, considering, or negotiating for a position with another agency
18 or department of the same government. It may also be reduced when a public servant takes a
19 position with another government. This Section takes the narrower approach of limiting the
20 exclusion so that it applies only to future employment with another agency or department of the
21 same government, but a jurisdiction could decide to exempt the pursuit of all public-sector
22 positions from its restrictions.

23 *g. Elected officials.* Elected officials present special issues. All elected officials hold office
24 for fixed terms. Some are subject to term limits; some may be defeated for reelection to an
25 additional term; some may announce at some point during the term in office that they will not seek
26 another term. These officials may wish to consider or act on their post-government employment
27 options while still in office. Waiver upon the consent of an agency or department head is not
28 possible since the elected official will either be the agency or department head or a legislator who
29 has no agency or department head. As a result, this Section treats them slightly differently. The
30 elected official may seek, negotiate for, or accept post-government employment provided that as
31 soon as he or she contacts or is contacted by the prospective employer concerning such

1 employment the elected official recuses from all particular matters affecting the prospective
 2 employer—including the casting of votes concerning particular matters of the employer—and
 3 advises the relevant ethics agency that he or she is in contact with the prospective employer
 4 concerning employment. Due to the special nature of elected office, including possible separation-
 5 of-powers and other constitutional concerns, the ethics agency’s approval for considering,
 6 negotiating, and accepting private-sector employment is not required, but the agency should be
 7 given the opportunity to provide advice to minimize the danger of a conflict of interest, which the
 8 elected official should seriously consider. This would likely include recommending public
 9 disclosure of the pendency of the private-employment possibility. Public disclosure would be
 10 particularly appropriate once the public servant has accepted an offer of post-government
 11 employment.

12 *h. Part-time or advisory positions.* This Section does not exempt public servants who are
 13 in part-time or advisory positions. If such a public servant holds a position that enables the public
 14 servant to exercise discretion that can affect the disposition of a matter a potential future employer
 15 has before the government, then the restriction ought to apply even if the public servant is also
 16 simultaneously holding a private-sector job. However, there may be situations in which that part-
 17 time or advisory position has only a modest or attenuated role in resolving the particular matters
 18 that come before it, or in which the government has decided as a matter of policy to provide for
 19 the participation of representatives of certain groups, interests, organizations, or industries with a
 20 stake in the disposition of certain matters despite the potential for a conflict of interest. In those
 21 situations it might make sense to provide an exemption from these restrictions, as in that context
 22 the pursuit of post-government employment would also be essentially the pursuit of a change in
 23 private-sector employment. The jurisdiction’s ethics agency may also choose to adopt special
 24 waiver rules for such part-time or advisory public servants.

REPORTERS’ NOTE

25 Restrictions on the pursuit of post-government employment are common, including at the
 26 federal level, 18 U.S.C. § 208, 5 C.F.R. § 2635.601 et seq.; the state level, see, e.g., FLA. STAT.
 27 ANN. § 112.313(2); N.J. UNIF. ETHICS CODE § VIII; ORE. REV. STAT. § 244.040(3); R.I. STAT.
 28 § 36-14-5(g); and the municipal level, see, e.g., CODE OF ETHICS, CITY OF BUFFALO, § 12-12; CITY
 29 OF CHICAGO MUN. CODE § 2-156-111(c); CITY OF LOS ANGELES MUN. CODE § 49.5.12; N.Y.C.
 30 CHARTER, § 2604(d)(1). See also S. SELECT COMM. ON ETHICS, SENATE CODE OF OFFICIAL
 31 CONDUCT, 114th Cong., 1st Sess., R. XXXVII, cl. 14 (2015); H. COMM. ON STANDARDS OF

1 OFFICIAL CONDUCT, HOUSE ETHICS MANUAL, 110th Cong., 2d Sess. 208-211 (2008). The federal
2 rule governing the pursuit of post-government employment is rooted in the general federal
3 regulation concerning acts affecting a personal financial interest. Other jurisdictions more
4 expressly target the pursuit of post-government employment.

5 Many of these restrictions are narrower than the principle in this Section and focus more
6 specifically on negotiations for future employment or soliciting or accepting a promise of future
7 employment “based on any understanding” that an official action of the public servant “would be
8 influenced thereby.” See FLA. STAT. ANN. § 112.313(2), *supra*; ORE. STAT. ANN., § 244.040(3),
9 *supra*; R.I. STAT. § 36-14-5(g). This seems too limited an approach. Some rules do, however, apply
10 more broadly. The New Jersey Uniform Ethics Code, for example, prohibits state officers or
11 employees “who have direct and substantial contact with any interested parties” from “circulating
12 resumes or in any manner seeking employment with those individuals or entities while still in State
13 service.” See N.J. UNIF. ETHICS CODE, *supra*, at 10 (Feb. 2011). The United States Office of
14 Government Ethics has expansively interpreted the provision in 18 U.S.C. § 208(a) restricting
15 dealings between a public servant and “any person or organization with whom he is negotiating or
16 has any arrangement concerning prospective employment” by finding that “negotiations means
17 discussion or communication with another person, or such person’s agent or intermediary,
18 mutually conducted with a view toward reaching an agreement regarding possible employment
19 with that person. The term is not limited to discussions of specific terms and conditions of
20 employment in a specific position.” 5 C.F.R. § 2635.603(b)(i). Jurisdictions also disagree as to
21 whether the pursuit of employment with an individual or entity that has business before the public
22 servant is always barred or whether the public servant may pursue such a position upon recusal
23 from the particular matter in which the prospective employer is interested. Compare N.Y.C.
24 CHARTER, § 2604(d) (prohibition), CHICAGO MUN. CODE § 2-156-111 (same), LOS ANGELES MUN.
25 CODE § 49.5.12 (same) with 18 U.S.C. § 208(a) (recusal). The New York City Charter provides
26 that the restrictions may be waived only with the consent of both the public servant’s agency and
27 the City’s Conflicts of Interest Board. See N.Y.C. CHARTER § 2604(e). New York City also
28 exempts from restriction the pursuit of any position with any federal, state, or local agency. N.Y.C.
29 CHARTER, § 2604(d)(6).

30 Some codes exempt or have special provisions with respect to elected officials. The New
31 Jersey Uniform Ethics Code, for example, does not apply to members of the legislature. By
32 contrast, the New York City, Los Angeles, and Chicago restrictions all apply to both elected and
33 non-elected officials. In the federal government, the U.S. Senate bars a Senator from negotiating
34 or making any arrangement concerning prospective private-sector employment “until after his or
35 her successor has been elected” unless the Member files a signed statement with the Secretary of
36 the Senate, for public disclosure, regarding such negotiations or arrangements “not later than 3
37 business days after the commencement of such negotiation or arrangement.” STANDING RULES OF
38 THE SENATE, R. XXXVII, cl. 14(a), (b). The disclosure must indicate the name of the private entity
39 or entities involved and the date the negotiations or arrangement began. If the future employment
40 will involve lobbying the Senate, the ban on negotiation or arrangements until after a successor

has been elected is absolute. The Rules of the House of Representatives address disclosure to the House Ethics Committee and recusal requirements for members seeking outside employment. RULES OF THE HOUSE OF REPRESENTATIVES, R. XXVII, cl. 1. Senate and House Rules also apply special disclosure and recusal requirements to staffers paid above a certain level who are seeking private-sector employment. For some governments, separation-of-powers or other constitutional concerns may preclude granting the ethics agency the power to directly restrict the ability of an elected official to pursue private-sector employment or to require recusal. Consequently, this Section focuses on giving the ethics agency the opportunity to advise elected officials concerning the conflict-of-interest implications of their actions, which may include recommending public disclosure.

§ 512. Restriction on Post-Employment Participation in Particular Matters with Which the Former Public Servant Was Engaged as a Public Servant

(a) Except as provided in subsection (b), a former public servant may not appear before or communicate with that public servant's former government agency or department on behalf of another person or entity, or assist any other person or entity appearing before or communicating with such agency or department, in order to influence any action of such agency or department with respect to any particular matter in which the former public servant was personally and substantially involved while in government service.

(b) The prohibition in subsection (a) shall not apply if:

(1) the former public servant's agency or department head determines, and the jurisdiction's ethics agency agrees, that waiving the restriction in subsection (a) in whole or in part is in the best interests of the jurisdiction; or

(2) the former public servant was an elected official and the jurisdiction's ethics agency finds that waiving the restriction in subsection (a) is in the best interests of the jurisdiction; or

(3) the former public servant's action is pursuant to an order of a court with jurisdiction over the matter; or

(4) the former public servant is employed by and acting on behalf of another agency or department of the same government.

Comment:

a. Purpose and Scope. The classic “revolving door” concerns about misuse of confidential information acquired while in government service and the impact on public confidence in government resulting from a public servant “switching sides” are most acute when the former public servant appears before his or her former agency or department, communicates with that agency or department, or assists with an appearance or communication with respect to a particular matter in which the former public servant was personally and substantially involved while in government service. As a result, the “particular matter” ban is a lifetime ban, and it applies regardless of whether the former public servant is compensated. As the misuse-of-information and switching-sides concerns are also triggered by behind-the-scenes assistance, the restriction on participation in particular matters applies not just to the former public servant’s appearances before or communications with his or her former agency or department but also to “behind the scenes” assistance to someone else who is directly appearing before or communicating with the agency or department.

b. Personal and substantial involvement. As with § 511’s restrictions on the pursuit of post-government employment, the restriction in this Section applies only when the former public servant was personally and substantially involved while in government service with the particular matter that is the subject of the appearance or communication. As with § 511, “personal and substantial involvement” requires (i) that the public servant was directly involved in the matter, not simply that he or she was employed in the office that handled the matter, and (ii) that the public servant, while in government service, took some discretionary action that could have affected the disposition of the matter, whether through research, analysis, investigation, providing advice, making a recommendation, or participating in the decision, or otherwise. Participation may be substantial even if the public servant’s role is small in relation to the entire matter and even if the public servant’s action does not determine the final outcome. However, ministerial actions—such as a staff lawyer’s review of a contract for form, but without the authority to recommend substantive changes—would not be substantial. So, too, a post-government service involvement in a matter that is ministerial and does not itself serve to influence the action or decision of a government agency or department would not be subject to restriction. The scope of this Section is broader than that of § 511 because this Section would apply to work for a private-sector employer

1 that was not involved with the particular matter at the time that the public servant was involved
2 with that matter while in government service.

3 **Illustrations:**

4 1. Egbert was the engineer in the State Highway Department who drafted the
5 specifications for letting the contract for the repair of Route 17. The contract was then
6 awarded to Ginormous Construction. Egbert recently retired from state service and was
7 hired by Ginormous. Although Egbert was not involved in the decision to give the repair
8 contract to Ginormous, he cannot work on the Route 17 project because he was personally
9 and substantially involved in the matter when he worked for the state.

10 2. Francine was in charge of payroll for the State Highway Department throughout
11 the time the Route 17 contract was prepared, put out for bid, and awarded to Ginormous.
12 She has since left the Highway Department and has been hired by Ginormous in part
13 because of her expertise in handling the special issues posed by engineers' payroll.
14 Although she was in some sense involved in the letting of the Route 17 contract, she had
15 no role in any of the discretionary decisions affecting the contract, and so she may provide
16 payroll services to Ginormous in connection with the contract.

17 3. Glen, another Highway Department engineer who worked with Egbert on the
18 specifications for the Route 17 contract, recently retired. He has been approached by a
19 group of "Citizens Concerned About Route 17"—who believe that the Route 17 repairs are
20 causing unnecessary noise and disruption to their neighborhood—to help them with the
21 memorandum they are writing summarizing their concerns, which they intend to bring to
22 a meeting with Highway Department representatives. Even though Glen would be
23 uncompensated for this service and would not attend the meeting, he may not work with
24 the group on the memo as that could involve his use of information he obtained in
25 connection with the development of the Route 17 contract specifications.

26 *c. Particular matter.* As with § 511, "particular matter" is defined broadly to include a case,
27 proceeding, adjudication, application, request for a ruling or determination, contract, claim,
28 controversy, charge, accusation, arrest, or other similar action that is focused on the interests of a
29 specific party or parties or a discrete and identifiable class of parties. It may include the adoption
30 of a rule, regulation, or law if the measure is narrowly focused on the interests of a specific party

1 or parties or a discrete and identifiable class of parties but not if the measure is of broad
2 applicability. However, because of the permanent nature of the particular-matter restriction,
3 legislation or rulemaking would be a “particular matter” only with respect to the enactment or
4 adoption of the law or rule in question, not to the interpretation or application of the law or rule
5 after its adoption, or to its subsequent amendment. In other words, a member of the Highway
6 Department’s legal staff who drafted the notice of proposed rulemaking and the proposed rules
7 intended to govern future highway-procurement policy who then left state service and joined a
8 private law firm could not prepare comments on or objections to those rules on behalf of a private
9 client, and would be barred from doing so even if the rulemaking process extended long past the
10 state’s “cooling off” period barring appearances before a former agency or department. However,
11 once the highway-procurement policy rulemaking is concluded and rules have been finally
12 adopted, the former public servant can appear before the highway department in proceedings
13 concerning the application or interpretation of those rules.

14 This Section applies only when the former public servant’s post-government employment
15 work involves the same particular matter that the public servant worked on while in government
16 service. The determination of whether the government service and post-government-service
17 employment involve the same particular matter is inevitably contextual and will involve the
18 “extent to which the matters involve the same facts, related issues, the same or related parties, time
19 elapsed, the same confidential information, and the continuing existence of a government interest.”
20 5 C.F.R. § 2641.201(h)(5)(i). A matter may pass through different stages and still be considered
21 the same particular matter. “For example, an agency’s attempt to address an issue informally may
22 constitute the same particular matter as a formal investigation or proceeding involving that issue.
23 Similarly, different stages of an application or proceeding typically will be considered part of the
24 same particular matter.” Keith R. Szeliga, *Watch Your Step: A Contractor’s Guide to Revolving-*
25 *Door Restrictions*, 36 Pub. Cont. L.J. 519, 543 (2007). In the government-contracts context, “the
26 general rule is that a procurement, the resulting contract and any modifications to that contract are
27 the same particular matter. . . . On the other hand, separate contracts ordinarily are considered to
28 be separate particular matters. Thus, a ‘follow on’ contract involving changed technology and
29 personnel would not be the same particular matter as the original contract.” Id. at 543-544. Accord
30 5 C.F.R. § 2641.201(h)(5)(ii).

Illustrations:

4. Hanna was an investigator who worked for the City’s Human Rights Agency. On behalf of the Agency, she conducted a preliminary investigation into a claim of employment discrimination at Mega Retail, a local department store. After she submitted her report, which included factual findings but no recommendation, she left public service. She has since been hired by a civil-rights public-interest group. When the Human Rights Agency declined to bring a case against Mega Retail, the public-interest group announced it would open its own investigation. Hanna may not communicate back to the Agency or make an appearance before it on behalf of the public-interest group in connection with the alleged discrimination of Mega Retail. But she may investigate employment-discrimination complaints concerning other employers, including other department stores, and appear before or communicate with the Agency with respect to any cases that grow out of those investigations.

5. While Isaac was on the staff of the City’s Department of Environmental Protection (“DEP”) he was part of the team that reviewed the environmental-impact statement (“EIS”) submitted by Reality Realty as part of its proposal for a large mixed retail and housing development—“Project I”—on an abandoned industrial site. Several years passed, and construction of Project I was completed. Isaac now works for Reality Realty, which is considering whether to acquire adjacent property in order to expand the development—“Project II.” Reality would like to use Isaac to do the initial research for the new EIS and, if the project goes forward, to be part of the team presenting it to DEP. Although not free from doubt, this would probably not be considered the same particular matter as Project I. If Project II were in another part of town it would clearly be a different particular matter. The fact that it is adjacent to Project I raises the possibility that the two would be considered two different phases of the same project. But the likelihood that the new site will involve the consideration of the environmental impact of different facts plus the passage of time suggests that this is a different matter.

6. Jill was an employee in the City’s Department of Public Works (“DPW”) who worked on the specifications for a contract for the construction of a new municipal wastewater-treatment facility. She now works at Ginormous Construction, which is the prime contractor on the project. The project has been underway for some years and unexpected

1 complications have arisen. Ginormous would like to ask Jill to work on the team
2 developing a list of contract modifications to be submitted to the DPW. She may not do so.
3 Contract modifications are part of the same particular matter as the preparation of the
4 specifications for the original letting of the contract.

5 7. Kevin was an attorney on the staff of a member of the City Board of Health who
6 worked on a regulation that would limit the size of the servings in which sugary drinks
7 could be sold. When he left his Board position, the regulation was still being debated and
8 subject to amendment. He has now been retained by the Soft Drink Council, a trade
9 association, to represent them in negotiations with the Board of Health over the proposed
10 regulation. Kevin's work for the Soft Drink Council with respect to this regulation would
11 violate this Section.

12 8. Louise was a member of the City Council who played a leading role in drafting
13 and pushing for the adoption of the City's new lobbyist-regulation ordinance. She has now
14 been hired by one of the City's lobbying firms to help the firm and its members comply
15 with the law. As her work will involve interpretation and advice concerning compliance
16 with the law and not efforts to influence its enactment, it is not subject to the particular-
17 matter ban. However, any appearance by Louise before or communication with the City
18 Council would be subject to the cooling-off-period provision in § 513.

19 *d. Waiver.* The restriction imposed by this Section may be waived upon the application of
20 the former public servant's agency or department with the approval of the jurisdiction's ethics
21 agency if they both agree that such waiver would be in the best interests of the jurisdiction. Such
22 waivers should be rarely granted and reserved for situations such as when the former public servant
23 has unusual skills or knowledge that would benefit the public, or the former public servant's
24 private-sector employer is a partner or collaborator with the jurisdiction. Waiver should be limited
25 to situations in which there is little danger of risk to the public interest. As with § 511, if the former
26 public servant had been an agency or department head, the consent of the head of the branch of
27 government of which the agency or department is a part would have to be sought. For former
28 elected officials, the waiver of the ban on post-government involvement in "particular matters"—
29 unlike the waiver of the restriction on pursuing post-government employment—would require the
30 approval of, and not just notice to, the relevant ethics agency. At this point, the elected official is

no longer in office so that any issue concerning the ability of the ethics agency to veto the actions of elected officials would not apply.

Illustration:

9. Magnus was an assistant in the Department of Education of Gotham City who spent considerable time developing a program for recruiting and training middle-school teachers to become principals. Gotham City has contracted with the Education Leadership Academy, a national not-for-profit organization funded by foundation grants, to run the City's training program. The Education Leadership Academy would like to hire Magnus to manage its Gotham City training program. The restriction on representing a private employer concerning a particular matter before the agency or department with which the former public servant was involved would apply. However, if Magnus applies for a waiver that would allow him to appear before and communicate with his former agency concerning the training program, and the head of the Department of Education approves, the ethics agency should take into account his special knowledge of Gotham's needs concerning the recruitment and training of principals and the collaborative relationship that will likely exist between the Education Department and the Academy when it considers the waiver request. The ethics agency should also consider whether there are other organizations that would like to compete with the Education Leadership Academy for the Gotham City training program so that granting the waiver would give the Academy an unfair competitive advantage.

REPORTERS' NOTE

According to the ABA Committee on Government Standards, the particular-matter ban "must form the centerpiece of effective post-employment regulation." ABA Comm. on Gov't Standards (Cynthia Farina, Reporter), *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 329 (Summer 1993). Most jurisdictions have some version of the "particular matter" ban's prohibition on the former public servant acting on behalf of a private client or employer with respect to a particular matter that the public servant had been directly involved with while in government service. See, e.g., 18 U.S.C. § 207(a)(1); Allen B. Coe, 18 U.S.C. § 207(a)(1) "Lifetime Representation Ban" *Opinions: A Lifetime's Work for Agency Ethics Officials and Advisors*, 63 AIR FORCE L. REV. 129 (2009); George F. Carpinello & Michael Donaldson, *Postemployment Restrictions on Government Employees: Closing the Revolving Door*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR 41-45 (Patricia E. Salkin ed., ABA Publishing 2d

ed. 2008); Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525, 534 (1996); ARK. CODE ANN. § 21.8.102(b); NEV. REV. STAT. § 281A.10; N.Y. PUB. OFF. L. § 73(8)(a)(ii); WIS. STAT. ANN. § 19.45(8); CITY OF BUFFALO, MUN. CODE § 12-13; N.Y.C. CHARTER § 2604(d)(4); CITY OF LOS ANGELES MUN. CODE § 49-5-11; DENVER REV. MUN. CODE § 2-64; PHILA. CODE § 20-603. These measures vary considerably in scope, with some of the state and local restrictions applying only for a limited period of time. Others apply only to certain agencies or departments, or only to appearances before or communications with the former agency or department and not to behind-the-scenes assistance to those who so appear or communicate. Some are limited to compensated work. Some regulations do incorporate many of the expansive features of this Section. See, e.g., IND. CODE ANN. § 4-2-6-11(c) (applies to assistance as well as representation, and to uncompensated activities, albeit subject to a time limit); MD. CODE ANN. § 5-504(d)(1) (applies to assistance, and has no time limit, but only applies to compensated work); NEV. REV. STAT. § 281A.10 (applies to counseling as well as representing a private person “concerning an issue under consideration by the agency during the public officer’s or employee’s service”); LOS ANGELES MUN. CODE § 49-5-11 (applies to compensated assistance as well as representations; no time limit). Case law interpreting these provisions of ethics codes is scarce, but the decision of the District of Columbia Court of Appeals interpreting the comparable revolving door restriction in the District’s Rules of Professional Conduct in a case involving a high-level government lawyer’s post-public-service acceptance of a private representation is instructive. See *In re Sofaer*, 728 A.2d 625, 627-629 (D.C. 1999) (analyzing the meanings of “particular matter” and “personal and substantial” participation in the matter, and noting that the Rule’s inclusion of a matter “substantially related” to the matter in which the government lawyer participated while in office “is meant to induce a former government lawyer considering a representation to err well on the side of caution”).

The broader approach taken here of including behind-the-scenes assistance as well as direct communications or appearances and uncompensated as well as compensated work, and of not limiting the particular-matter ban to a specific time is more consistent with meeting the underlying conflict-of-interest concerns of preventing misuse of confidential information acquired while in government service and preventing the appearance of impropriety resulting from switching sides. These conflicts can arise from behind-the-scenes assistance and from uncompensated work as well as from paid direct appearances and communications. Given the length of time it takes for some matters to be fully resolved, conflicts can also arise after almost any defined statutory period has expired, particularly the relatively limited six-month to two-year periods that most statutes that apply time-limited particular-matter restrictions employ. See, e.g., *Matter of Gormley v. N.Y.S. Ethics Comm’n*, 46 A.D.3d 1078, 847 N.Y.S.2d 707 (N.Y. App. Div. 2007), *aff’d*, 11 N.Y.3d 423, 900 N.E.2d 943 (N.Y. 2008) (applying lifetime particular-matter ban to former employee retained in challenge to a rule he had been involved in promulgating more than 20 years earlier). The danger that a lifetime restriction will discourage public service or unduly limit the post-employment options of public servants or the availability of their knowledge or skills to interested employers is ameliorated by applying the restriction only to particular matters in which the former public

servant was personally and substantially involved. In addition, the former public servant can seek a waiver if he or she can show that the passage of time has dissipated any risk of danger to the public interest from his or her work on the matter for a private employer.

Some “particular matter” bans have been subject to challenges on the theory that the terms “particular matter” or “personally and substantially involved” in statutes imposing criminal penalties for their violation are unconstitutionally vague and violate due process. These claims have generally been rejected. See, e.g., *United States v. Nasser*, 476 F.2d 1111, 1115 (7th Cir. 1973) (invoking “common understanding and practice” and finding the federal statute “proscribes as precisely as possible an unethical practice that can manifest itself in infinite forms”); *State v. Nipps*, 419 N.E.2d 1128, 1133 (Ohio Ct. App. 1979) (the language in the Ohio revolving-door-matter ban—including the terms “directly concerned” and “personally participated” “is not so vague that it fails to provide adequate notice of what conduct is prohibited by a former public official or employee”). The standard of review is likely to be more relaxed for an ethics code that does not impose criminal sanctions.

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

(a) Except as provided in subsections (b), (c), and (d), a public servant who has left public service shall not appear before or communicate with the agency or department that employed the public servant with the intent to influence any decision or action of such agency or department on behalf of any firm, organization, or other person for a period of one year after leaving such agency or department.

(b) For public servants who held high-level positions, the restriction in subsection (a) applies to any unit within the agency or department that reported to or was subject to the public servant’s authority and shall apply for two years. All agency or department heads and elected officials and the members of the personal staffs of agency or department heads and elected officials shall be considered to hold high-level positions.

(c) The restrictions in subsections (a) and (b) shall not apply to:

(1) any uncompensated appearance in any public hearing conducted by any agency or legislative committee;

(2) any appearance or communication on behalf of any government agency; or

(3) any appearance or communication required by an agency or court of appropriate jurisdiction.

(d) With respect to the public servants covered by subsection (a) only, the restriction in subsection (a) may be waived by the jurisdiction's ethics agency, on the request of the head of the former public servant's agency or department, if the ethics agency finds that such waiver is in the best interests of the jurisdiction.

Comment:

a. Purpose and scope. The restriction on appearances before or communications with the former public servant's former agency or department addresses the concerns that a former public servant's relationships with his or her former colleagues, government-workplace friends, or subordinates still in government will affect the decisions of those who remain in government to the detriment of the public interest and to the disadvantage of private interests in competition with those represented by the former public servant. This favoritism may result from respect for the former public servant's expertise, the sense of camaraderie that results from a period of working together, or social ties. The concern about the possibility of such favoritism goes beyond the particular matters the former public servant handled while in office. As a result, this restriction is not limited to particular matters and applies to all representations and interests. On the other hand, the effect of the special relationships between the former public servant and his or her former colleagues, government-workplace friends, or subordinates is likely to decline over time. As a result, the restriction on appearances and communications applies for only a limited time period—what has become known in the many jurisdictions that impose such a rule as the “cooling off” period.

The limitation of the restriction to appearances or communications on behalf of a firm, organization, or another person is intended to allow a public servant to appear or communicate on his or her own behalf on matters involving his or her personal interest. A former employee of the department of motor vehicles should be able to apply for the renewal of his or her driving license just as other state residents do, even within the cooling-off period, and, similarly, a former employee of the department of buildings should be able to apply to the department for a permit to renovate his or her home. However, the restriction would apply if the former public servant is appearing or communicating on behalf of his or her own business—that would be a “firm” within the meaning of this Section even if it is wholly owned by the former public servant.

b. Appearance or communication. In addition to the time period, the restriction imposed by this Section is more limited than that provided by § 512 in a second respect. It is limited to

1 appearances before or communications with the former public servant's former agencies or
2 departments, and does not cover assistance to others who so appear or communicate. That is
3 because the focus of this restriction is on preventing the favoritism that may result from the
4 exploitation of the special relationships that may continue between a former public servant and his
5 or her former colleagues, government-workplace friends, or subordinates, and the appearance of
6 such favoritism. Those concerns are likely to be triggered only when it is apparent to the
7 government agency or department or the public that the former public servant is involved in
8 seeking to influence the agency's or department's decision, and that is likely to occur only when
9 the former public servant is appearing before or communicating with the agency or department,
10 and not when the former public servant's involvement is solely behind the scenes.

11 Appearance or communication is to be defined broadly consistent with this goal, including
12 all modes—making telephone calls, sending emails, writing letters, submitting memoranda,
13 attending meetings—in which appearance or communication can occur. Behind-the-scenes
14 research or advice to those actually appearing before or communicating with an agency or
15 department is not restricted by this Section, unlike § 512 which deals with particular matters on
16 which the former public servant worked.

17 **Illustrations:**

18 1. Nora, the former commissioner of the Department of Public Works ("DPW") for
19 Gotham City, now works for Ginormous Construction. A few months after leaving her City
20 job, she became part of the Ginormous team that responded to the City's request for
21 proposals ("RFP") on a new bridge-repair project. She advised Ginormous on how the City
22 is likely to weight the different factors outlined in the RFP, and participated in various
23 strategy and drafting sessions. However, she did not attend any of Ginormous's meetings
24 with DPW staff to discuss the project and did not contact any of her former colleagues at
25 DPW concerning the RFP or Ginormous's bid, and her name was not used in any
26 submissions by Ginormous to the DPW. Nora has not violated this Section.

27 2. Orlando, a former deputy commissioner of the State Department of Health
28 ("DOH"), has now gone to work for Humongous Health, a healthcare conglomerate that
29 operates multiple hospitals and other facilities in the state. DOH has just notified

1 Humongous that it is contesting some of its claims for reimbursement. Orlando is not part
2 of the Humongous team that is negotiating with DOH. However, drawing on his DOH
3 experience with reimbursement issues, he has prepared a detailed memorandum analyzing
4 the application of the reimbursement formula to Humongous's claims and defending its
5 actions. Humongous sends Orlando's memo to DOH with a cover letter indicating that the
6 memo is being sent "so you can better understand the reasoning behind our position." If
7 Orlando's name is on the memo or he is indicated as the author, that would be a
8 communication during the cooling off period prohibited by this Section.

9 *c. Duration of the restriction.* There is no obviously right length for the cooling-off period.
10 As the American Bar Association's Committee on Government Standards put it, "[j]ust how short
11 the 'no contact' period should be in order to dissipate the worst effects of personal influence
12 without unduly burdening government employment is a vexatious question." ABA Comm. on
13 Gov't Standards (Cynthia Farina, Reporter), *Keeping Faith: Government Ethics & Government*
14 *Ethics Regulation*, 45 ADMIN. L. REV. 287, 331 (Summer 1993). Many jurisdictions have adopted
15 a cooling-off-period requirement, with the periods ranging from six months to five years, with one
16 year the most common. Some jurisdictions have multiple periods depending on the position held
17 by the former public servant and whether the public servant has become a lobbyist. This Section
18 adopts two different cooling-off periods. For most public servants, the period is one year. This can
19 be criticized as too short. Social ties with former coworkers, the sense of camaraderie, or deference
20 to the expertise of the former employee all may last well beyond one year. However, the impact
21 of these relationships is debatable and surely erodes over time, and one year is the most common
22 restriction. "[R]ecognizing that the choice of any particular time period will inevitably be
23 somewhat arbitrary," *id.* at 332, the key element of this Section is the adoption of a cooling-off-
24 period requirement, not the specific period provided. Note that the cooling-off requirement applies
25 to all agencies or departments the official worked for during the one year before leaving
26 government service. If the former public servant spent the first six months of her last year in
27 government working for one agency, and the next six months working for another, she would be
28 barred from appearing before or communicating with the first agency for six months after leaving
29 public service and barred from appearing before or communicating with the second agency for one
30 year after leaving public service.

1 For high-level officials, including but not limited to agency or department heads, elected
2 officials, and their staffs, the cooling-off period is two years. This is appropriate since these
3 officials surely had more influence over a much wider range of issues and decisions than other
4 public servants while in office, and are likely to be perceived by the public as having had more
5 influence. Indeed, a number of state laws imposing cooling-off periods are focused primarily on
6 elected officials or the lobbying of the legislature by former legislators or legislative staff. Some
7 jurisdictions have adopted such a two-year rule. U.S. Senators and senior Senate staff are currently
8 barred by Senate rules from lobbying the Senate for two years after leaving office.

9 With respect to high-level officials, the restriction applies not only to appearances before
10 their own former office, agency, or department, but to any unit of government that was subject to
11 the authority of their former agency or department. For the most senior positions, such as governor,
12 mayor, city manager, or member of a legislature with authority over the entire jurisdiction, this
13 would extend to the entire government. A jurisdiction might consider extending the scope of the
14 restriction for certain senior officials, such as agency or department heads, beyond their specific
15 agency or department to the government as a whole. This might depend on the size of the
16 government and the likelihood that the former head of one department might have, or might be
17 seen as having, influence with officials in other departments.

18 *d. Exemptions and waivers.* This Section exempts actions taken on behalf of government
19 agencies and actions required by an order of a court of appropriate jurisdiction. The exclusion of
20 “any government agency or department” includes the former public servant’s own agency or
21 department. This would permit the agency or department to hire the former public servant as a
22 consultant if the agency or department concludes that the former public servant’s services would
23 be valuable. The restriction also exempts uncompensated appearances at a public hearing
24 conducted by a legislative committee or agency. One federal district court has held that a state’s
25 one-year ban on former legislators appearing before the legislature is unconstitutional when
26 applied to uncompensated lobbying. *Brinkman v. Budish*, 692 F. Supp. 2d 855, 863 (S.D. Ohio
27 2010). The decision is not well reasoned and does not address the unfair advantages even
28 uncompensated representation may give to interests represented by former legislators over
29 interests that do not obtain such representation. However, the decision does serve as a reminder
30 that appearances before and communications with government agencies are protected by the First
31 Amendment and, so, should be narrowly drawn. There is likely to be less favoritism and less

1 danger of the appearance of favoritism when the former public servant's representation of a private
2 interest both occurs in a public proceeding and is uncompensated.

3 Again, as with § 512, this Section provides for a waiver, which would require a finding by
4 both the former public servant's agency or department and the jurisdiction's ethics agency that
5 such waiver would be in the best interests of the jurisdiction. Such waivers should be rarely granted
6 and should be reserved for situations in which the former public servant has unusual skills or
7 knowledge or the former public servant's private-sector employer is a partner or collaborator with
8 the jurisdiction. As with § 512, waiver should be limited to situations in which there is little danger
9 of risk to the public interest. Waiver is not authorized for former high-level officials or their staff.
10 The dangers of favoritism, and of public concern about the appearance of favoritism, seem too
11 great when it comes to these public servants.

REPORTERS' NOTE

12 Cooling-off periods that limit the ability of former public servants to appear before or
13 communicate with their former government agencies or departments on behalf of their new
14 employers or clients are widespread. Although some of these are tied to representations concerning
15 specific matters with which the former public servant was involved, others apply to all appearances
16 before or communications with the former agency or department. See, e.g., 18 U.S.C. § 207; ALA.
17 CODE § 36.25.13; CAL. GOV'T CODE § 87406; COLO. CONST. Art. 29 § 4; FLA. CONST. Art. 2
18 § 8(c); LA. REV. STAT. ANN. § 42:1121(B)(1); N.H. REV. STAT. § 21-G:26; 52 N.J. STAT. ANN.
19 § 13C-21.4; WIS. STAT. ANN. § 19.45; N.Y.C. CHARTER § 2604(d)(2); LOS ANGELES MUN. CODE
20 § 49.5.11.D, E. There is reason to believe that cooling-off periods can be effective in addressing
21 some of the problems posed by the revolving door. When Congress increased the cooling-off
22 period for former members and senior staff, the hiring as lobbyists of those covered by the
23 restriction dropped, and it dropped more sharply for former Senate staff members, who were
24 subject to a longer cooling-off period than for staff to the House of Representatives. See Bruce E.
25 Cain & Lee Drutman, *Congressional Staff and the Revolving Door: The Impact of Regulatory*
26 *Change*, 13 ELEC. L.J. 27 (2014).

27 Jurisdictions differ with respect to length of the cooling-off period, the agencies or
28 departments affected, whether or not elected officials are included, whether the restriction applies
29 to behind-the-scenes activities, and whether uncompensated activity is restricted. See, e.g., George
30 F. Carpinello & Michael Donaldson, *Postemployment Restrictions on Government Employees:*
31 *Closing the Revolving Door*, in ETHICAL STANDARDS IN THE PUBLIC SECTOR 36-40 (Patricia E.
32 Salkin ed., ABA Publishing 2d ed. 2008); Rachel E. Boehm, *Caught in the Revolving Door: A*
33 *State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525, 527-529 (1996). Rules
34 specifically aimed at preventing legislators from lobbying are particularly widespread. A survey
35 by the National Conference of State Legislatures determined that at least 34 states have some kind

1 of revolving-door rule that covers lobbying by former legislators. See Nat'l Conf. of State Legs.,
 2 "Rules Against Legislators Lobbying State Government After They Leave Office," [http://](http://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx)
 3 www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx (Jan. 18, 2017).
 4 Restrictions range from Maryland's prohibition on lobbying until the conclusion of the next
 5 legislative session to bans in Alabama, Colorado, Florida, Iowa, Kentucky, Louisiana, Montana,
 6 and New York that last for two years. *Id.* See also Thomas D. Morgan, *Appropriate Limits on*
 7 *Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 63
 8 (1980) (supporting one-year cooling-off period for "personal advocacy by former high-ranking
 9 personnel before their former agencies" but only if limited to "personal attempts to influence the
 10 agency, and not acts of aiding or advising private colleagues or clients"); RICHARD W. PAINTER,
 11 GETTING THE GOVERNMENT AMERICANS DESERVE: HOW ETHICS REFORMS CAN MAKE A
 12 DIFFERENCE 58 (Oxford Univ. Press 2009) (expressing doubt about the sufficiency of a one-year
 13 cooling-off period and calling for a two-year period at least for former public servants who take
 14 private-sector jobs requiring them to register as lobbyists). The federal government imposes a one-
 15 year cooling-off period for a defined class of executive branch "senior officials" and for public
 16 servants who engaged in trade or treaty negotiations, and a two-year cooling-off period for "very
 17 senior officials." See 18 U.S.C. § 207(b), (c), (d). The U.S. Senate bars a member who becomes a
 18 lobbyist from lobbying the Senate to influence the passage of legislation for a period of two years
 19 after leaving office. STANDING RULES OF THE SENATE, R. XXXVII, cl. 8. Accord 18 U.S.C.
 20 § 207(e)(1)(A). But members of the House of Representatives, and Senate and House staff are
 21 subject to just a one-year cooling-off period for lobbying. 18 U.S.C. § 207(e)(1)(B), (2)-(6).

22 Case law has been generally supportive of these restrictions. Courts have determined, *inter*
 23 *alia*, that the restriction on appearances may be applied to the submission of documents, see, e.g.,
 24 *Kelly v. N.Y.S. Ethics Comm'n*, 614 N.Y.S.2d 996 (N.Y. Sup. Ct. 1994), appeal dismissed, 229
 25 A.D.2d 848, 645 N.Y.S.2d 930 (N.Y. App. Div. 1996); and to a former state senator's mere
 26 attendance at a meeting with legislators at which pending legislation was discussed, see *DiLuglio*
 27 *v. Rhode Island Ethics Comm'n*, 1996 WL 936891 (R.I. Super. Feb. 14, 1996). As previously
 28 noted, the federal district court in *Brinkman v. Budish*, 692 F. Supp. 2d 855, 863 (S.D. Ohio 2010),
 29 held that Ohio's revolving-door law could not constitutionally be applied to a former state
 30 legislator who lobbied on behalf of an ideological interest group within one year after leaving
 31 office. The court agreed that revolving-door restrictions can be justified by the interest in
 32 promoting public confidence in the integrity of state government but concluded that such interest
 33 was not advanced by restricting uncompensated lobbying. *Id.* at 861. The court rejected the idea
 34 that lobbying by former legislators could be curtailed to "prevent unequal access to the General
 35 Assembly by outside organizations by virtue of any significant relationships with current and
 36 former public officials who may be in a position to influence government policy." *Id.* at 862-864.
 37 The court found that the U.S. Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310
 38 (2010), rejecting equalization of influence as a justification for limiting corporate or union
 39 election-campaign spending ruled out the unequal-access justification. That is an unjustified over-
 40 reading of *Citizens United*, which was focused entirely on election spending. Cooling-off-period

1 requirements do not limit how much any individual or interest can spend on lobbying or seek to
2 equalize lobbying efforts. Instead, they seek to rule out, for a limited time only, one potentially
3 unfair source of influence. *Brinkman*'s reading of *Citizens United* has not been followed by any
4 other court; nor has any other court questioned the constitutionality of cooling-off-period laws.

APPENDIX A
BLACK LETTER OF TENTATIVE DRAFT NO. 2

§ 201. Restrictions on Gifts, Financial Transactions, and Financial Relationships

A public servant should not solicit or accept any gift or engage in any financial transaction or financial relationship under circumstances in which a reasonable person would infer that the gift or transaction could affect the public servant's performance of official duties.

§ 211. Definitions

(a) **Gift.** A gift means anything of more than nominal value in any form that is given to the public servant or to anyone else at the public servant's request unless there is an exception set forth in these Principles or the public servant has promptly paid fair market value for it.

(b) **Nominal Value.** Nominal value means a value that is sufficiently low that a reasonable person would not believe that the gift would influence the public servant in performance of official duties.

(c) **Prohibited Source.** A prohibited source means an individual or entity as well as an individual or entity acting, or in the business of acting, on behalf of another individual or entity:

(1) that is doing business or seeking to do business with the public servant's agency or department;

(2) that is conducting or seeking to conduct activities, other than ordinary activities conducted by the general population, that are regulated by the public servant's agency or department;

(3) that is seeking or intends to seek official action or to influence official action by the public servant's agency or department;

(4) that is substantially affected in a manner different from the effect on the general public by the official actions of the public servant's agency or department;

(5) that the ethics authority has designated as a prohibited source;
(6) (if an individual) whose spouse or dependent child is described in any of subsections (c)(1) through (c)(5); or

(7) (if an entity):

(A) the majority of whose members, shareholders, partners, trustees, officers or directors or control persons, are described in any of subsections (c)(1) through (c)(5), or

(B) that is controlled by or is under common control with one or more entities or individuals described in any of subsections (c)(1) through (c)(5).

(d) **Financial Transaction or Financial Relationship.** A financial transaction or financial relationship is a transaction or relationship in which one party provides goods, services, a permanent or temporary interest in property, an investment opportunity, or something else of more than nominal value to the other party whether or not consideration is provided therefor. A person is deemed to be a party to a financial transaction or financial relationship if the public servant knows or reasonably should know that the person has control over a party to the transaction or relationship or significant influence over the terms of the transaction or relationship.

(e) **Acceptance of a Gift.** A gift is accepted by a public servant if the public servant personally receives the gift or derives a personal benefit from the gift that is not shared among a substantial group of persons who are not public servants.

(f) **Solicitation of a Gift.** A gift is solicited by a public servant if the public servant personally or through another requests or suggests that the gift be made.

§ 211A. Gift Solicited Because of Official Position

Subject to the specific exemptions set forth in §§ 217 and 218, a public servant should not solicit a gift from any person if the public servant intends or suggests that the gift be given because of the public servant's official position.

§ 212. Gift from a Prohibited Source

Subject to the specific exemptions set forth in §§ 215 through 218, a public servant should not solicit or accept a gift from a prohibited source or a gift that the public servant knows or should know is paid for in full or in part by a prohibited source. A public servant should make reasonable efforts to inquire as to whether a gift offered to the public servant is from a prohibited source or paid for in full or in part by a prohibited source.

§ 212A. Solicitation of Charitable Gift from a Prohibited Source

A public servant should not solicit prohibited sources to make gifts to charities, relief efforts, and similar causes benefiting third persons if there is a substantial personal benefit also for the public servant.

§ 213. Financial Transaction or Financial Relationship with a Prohibited Source

(a) A public servant should not enter into a financial transaction or financial relationship with a prohibited source unless:

(1) the terms of such a transaction or relationship are the same as would have been arrived at in an arm's-length financial transaction or financial relationship between the prohibited source and a member of the public who is not a public servant; and

(2) in the case of a loan from a prohibited source to a public servant, the prohibited source ordinarily is in the business of loaning money to consumers.

(b) When negotiating the terms of a financial transaction or financial relationship, the public servant should not discuss his or her official position except to the extent necessary to notify the other party that this Section applies to such transaction or relationship, to convey and obtain information needed to comply with this Section, and to answer questions that the other party asks in the normal course of business about employment history, salary, and other criteria that may be relevant to such transaction or relationship.

(c) A public servant should not accept forbearance with respect to an existing debt or other transaction with a prohibited source in circumstances in which these Principles would prohibit the public servant from entering into a transaction with the prohibited source.

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

(a) A public servant should make reasonable efforts to ascertain when a spouse or dependent has accepted or intends to accept a gift from a prohibited source and should discourage a spouse or dependent from accepting or retaining the gift unless the circumstances are such that it would be unreasonable for the public servant to discourage the gift. When a public servant knows that a spouse or dependent has received a gift from a prohibited source, the public servant should notify the ethics authority of the gift and comply with the remedial measures directed by the ethics authority.

(b) A public servant should make reasonable efforts to ascertain when a spouse or dependent has entered into or intends to enter into a financial transaction or financial relationship with a prohibited source and should discourage the spouse or dependent from entering into the transaction or relationship unless the circumstances are such that it would be unreasonable for the public servant to discourage the financial transaction or financial relationship. When a public servant knows that a spouse or dependent has entered into a financial transaction or financial relationship with a prohibited source, the public servant should notify the ethics authority of the financial transaction or financial relationship and should comply with the remedial measures directed by the ethics authority.

(c) A public servant who knows of gifts or financial transactions or financial relationships involving prohibited sources and other close family members of the public servant should consider whether under the circumstances a reasonable person could question the impartiality of the public servant in the conduct of official business; if so, the public servant should notify the ethics authority of the financial transaction or financial relationship and comply with the remedial measures requested by the ethics authority.

(d) A public servant who is in a long-term relationship with a person other than a spouse or dependent of the public servant should comply with this Section to the extent a reasonable person would expect the public servant to do so under the circumstances.

(e) A public servant who currently has, or in the past has had, a role in the administration of a foundation established by the public servant or by a member of his or her family should comply with this Section to the extent a reasonable person would expect the public servant to do so under the circumstances.

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

(a) The prohibition on gifts from or financial transactions or financial relationships with prohibited sources does not apply to any gift from or any financial transaction or financial relationship with a family member of the public servant under circumstances in which a reasonable person would infer that the gift, financial transaction, or financial relationship was primarily motivated by the family relationship. For purposes of this Section, a “family member” of the public servant is a spouse; a person in a legally recognized domestic partnership with the public servant; or a child, stepchild, parent, stepparent, sibling, grandparent, great-grandparent, grandchild, great-grandchild, or first cousin of the public servant or of the public servant’s spouse; or any trust or similar instrument or entity established by any such person.

(b) The prohibition on gifts from or financial transactions or financial relationships with prohibited sources does not apply to any gift from or any financial transaction or financial relationship with someone who is a personal friend of the public servant under circumstances in which a reasonable person would infer that the gift or financial transaction or financial relationship was primarily motivated by the friendship. If, however, that person is not also a family member of the public servant, this exception does not apply to any gift, financial transaction, or financial relationship that has a substantial market value unless such gift is:

(1) from a person who is engaged to be married to or in a legally recognized domestic partnership with the public servant or with the public servant’s dependent;

(2) payment of living expenses for the public servant if the person paying the expenses resides in the same household as the public servant; or

(3) to the public servant’s spouse or minor child and is consistent with a pattern of gift-giving established by the gift-giver before becoming a prohibited source for the public servant.

(c) In determining whether a reasonable person would infer that the gift, financial transaction, or financial relationship was primarily motivated by a family relationship or friendship, the factors to be considered include but are not limited to the history and nature of the relationship between the individual offering the gift or entering into the financial

transaction or financial relationship and the public servant, including whether gifts have previously been exchanged; whether there is reciprocity; and whether the parties have previously entered into a financial transaction or financial relationship. A gift is not likely to be motivated by family relationship or friendship if the individual offering the gift at or about the same time gave similar items to other public servants. Another relevant factor is whether official government business was discussed at or about the same time the gift was given, which would suggest motives for the gift other than the family or personal relationship. A gift is presumed not to be motivated by family relationship or friendship if the public servant is at or about the same time participating in deciding a particular matter, such as a government contract or investigation, in which the gift-giver has a substantial interest.

(d) In determining whether a gift from a person who is not a family member of the public servant has substantial market value for purposes of subsection (b), the factors to be considered include, but are not limited to, the likelihood that the value of the gift could lead a reasonable person to question the motivations of the donor, the likelihood that the value of the gift could lead a reasonable person to question the judgment of the public servant in official government business relating to the donor, the likelihood that the gift could create a dependency relationship between the donor and the public servant, and any other factor that could lead a reasonable person to believe the gift to be improper.

(e) A gift is not covered by this exemption if the family member or friend giving the gift did not personally pay for the gift or previously own the gift in a personal capacity, or if the person giving the gift seeks to charge or deduct the value of the gift as a business expense or seeks reimbursement from any other person or organization.

§ 216. Gifts of Complimentary Attendance at Events

(a) In the circumstances described in this subsection, a public servant may accept from prohibited sources the gift of complimentary attendance:

(1) offered by the sponsor of an event organized with the principal objective of raising money for a charity or for one or more individuals in need, provided the public servant obtains prior consent from his or her agency or department and attendance is in the best interests of the agency or department;

(2) at an event organized with the principal objective of raising money for or supporting a political candidate or political party, provided the public servant accepting the free attendance is an elected official or a candidate for elected office;

(3) offered by the sponsor of a widely attended event for which no attendees are charged admission, provided the public servant obtains prior consent from his or her agency or department and attendance is in the best interests of the agency or department; or

(4) at an event at which the public servant accompanies his or her spouse who is attending the event as part of his or her employment or volunteer activities that do not involve seeking to influence the public servant's agency or department, and the spouse's employer or volunteer organization pays the cost of the public servant attending the event.

(b) For the purposes of this Section:

(1) A "widely attended event" is one:

(A) that is attended—or that the sponsor in good faith believes will be attended—by at least 20 individuals (or a number of a similar order of magnitude as determined by the public servant's jurisdiction) who are not:

(i) members, officers, or employees of the agency or department in which the public servant serves, or

(ii) members, officers, or employees of the sponsor of the event;

and

(B) at which the sponsor intends to promote social interactions among the attendees.

A public servant may accept complimentary attendance at the widely attended event under this exception only if his or her agency or department determines that such attendance is in its best interests. This "widely attended event" exception shall not apply to events for which attendees other than the public servant are charged admission.

(2) "Complimentary attendance" means the waiver of all or part of a registration or admission fee, or waiver of all or part of a fee or charge for the provision of food, beverages, entertainment, access to facilities, instruction, or

materials to the public servant and to a spouse accompanying the public servant. Complimentary attendance includes the awarding of continuing-education credits or certification for attendance at a program, provided that such credits or certification are offered to all attendees. Complimentary attendance does not include travel, lodging, or items of more than nominal value. Complimentary attendance includes food and beverages only if such food and beverages are available on the same terms to all participants in the event.

(3) The sponsor of an event is the person or entity that organizes the event, pays the costs associated with the event, and collects any revenues from the event. Other persons or entities are not sponsors of the event even if the sponsor designates them as sponsors or cosponsors for its own purposes.

§ 217. Payments for Travel, Meals, and Lodging

(a) The following gifts from prohibited sources are permissible, provided that the public servant's agency or department authorizes them in advance and determines in writing that the public servant's acceptance is in the best interests of the agency:

(1) Payment or reimbursement for transportation, meals, beverages, and lodging for a public servant who is, or is a staff member accompanying a public servant who is, an attendee, panelist, or speaker at a conference, symposium, panel discussion, debate, or other informational event when such reimbursement or payment is made by a prohibited source that is a governmental entity; a professional association that is authorized by state law to sponsor continuing-education programs for members of a profession and the event complies with such law; or an accredited public or private institution of higher education that hosts the event. This exception also applies to reimbursement or payment by such governmental entities, professional associations, or institutions of higher education outside the United States if the agency or department publicly discloses the identity of the public servant, the dates and places of the travel, and the purpose of the travel. "Informational event" means an event or meeting, the primary purpose of which is to provide information about a subject or subjects related to a public servant's official responsibilities.

(2) Reimbursement of the cost of transportation, meals, beverages, and lodging in connection with attending a meeting, inspecting a facility, or performing other official duties.

(b) A public servant who is an elected official or a political candidate may accept payment or reimbursement from a political candidate or political organization for transportation, meals, and accommodations when such costs are incurred by the public servant in the course of engaging in political activity on behalf of the political candidate or political organization. “Political candidate” means any individual running for elected public office. “Political organization” means any entity that is affiliated with or is a subsidiary of a political party, including, without limitation, a partisan political club or committee, or a campaign or fundraising committee for a political party or for a political candidate. An organization that is not required by law to disclose its donors is not a political organization for purposes of this subsection.

(c) The cost of meals and lodging provided to a public servant pursuant to this Section should be reasonable under the circumstances.

§ 218. Other Exceptions

The following are not considered gifts from prohibited sources unless prohibited under other laws or regulations:

(a) Anything for which the government has paid or that has been secured by government contract.

(b) Rewards or prizes given to competitors in contests or events (including random drawings) offered to the general public or a segment of the general public defined on a basis other than status as a public servant.

(c) Awards, plaques, and other ceremonial items of the type customarily bestowed in connection with similar ceremonies and otherwise reasonable under the circumstances.

(d) Honorary degrees bestowed upon a public servant by a public or private college or university. This exception, however, does not apply to any benefits accompanying the honorary degree except benefits made available on similar terms and conditions to all degree holders from the college or university.

(e) Promotional items having no substantial resale value—such as pens, mugs, calendars, hats, and t-shirts—that bear an entity’s name, logo, or message in a manner that promotes the entity’s cause.

(f) Goods and services, or discounts for goods and services, offered to the general public or a segment of the general public defined on a basis other than status as a public servant and offered on the same terms and conditions as the goods and services are offered to the general public or a broad category thereof. Notwithstanding the foregoing, discounts made available to all public servants working for the same state or municipality fall within this exclusion. Similarly, discounts made available to all public servants working for the same agency or department of the same state or municipality fall within this exclusion if approved by the head of the agency or department after public disclosure.

(g) Gifts received by a spouse of the public servant solely as a result of his or her own employment, volunteer activities, or personal relationships, provided the gift is not re-gifted by the spouse to the public servant and provided that the public servant complies with any requirements adopted by his or her jurisdiction or agency to report any such gifts from a prohibited source above a threshold level set by the jurisdiction or agency.

(h) Gifts of food or beverages that are donated to charity, or are promptly distributed or made available for shared consumption on a nondiscriminatory basis to other public servants in the same office as the public servant receiving the gift and that are consumed within that same office shortly after receipt of the gift, provided that no one public servant consumes a portion of the gift in excess of nominal value and provided such consumption within the office is not prohibited by other laws or regulations.

(i) Modest hospitality such as dinner and drinks provided on a social occasion to the public servant in a personal residence other than the public servant’s own home.

(j) Benefits from legal-defense funds and discounted legal services if in accordance with § 221 of these Principles.

§ 219. Agency Specific Variations

Any agency or department may adopt or implement its own rules, regulations, or procedures that are more restrictive than these Principles.

§ 220. Gifts, Financial Transactions, and Financial Relationships between Public Servants

(a) A gift from one public servant to another or a financial transaction or financial relationship between public servants should be treated as similar to a gift or financial transaction or financial relationship involving a prohibited source if a public servant who receives the gift or is a party to the financial transaction or financial relationship supervises or has significant influence over the terms and conditions of employment of the other public servant.

(b) Unless the public servant giving the gift or entering into a financial transaction or financial relationship is a family member of the other public servant, as defined in § 215, the exception in § 215 allowing gifts from and financial transactions and financial relationships with prohibited sources having a personal relationship with the public servant does not apply to gifts subject to subsection (a) of this Section.

(c) The exceptions for payments for travel, meals, and lodging in § 217 do not apply to gifts subject to subsection (a) of this Section.

(d) Notwithstanding subsection (a), the following gifts between public servants are permitted: gifts of value commensurate with the value of gifts given by other guests who are not public servants in connection with the birth of a child, weddings, and other ceremonial events, and departure or retirement gifts given to public servants by other employees collectively shortly before or after they end their employment with the agency or department.

§ 221. Gifts to Legal-Defense Funds for Public Servants; Gifts of Legal Services to Public Servants

(a) A gift from a prohibited source to a legal-defense fund established for the purpose of paying personal legal expenses incurred by a public servant is considered a gift to the public servant.

(b) A public servant should conduct reasonable due diligence with respect to a legal-defense fund before receiving any benefit from the fund. This includes reasonable efforts to ascertain the identities of persons and entities involved in establishment, administration, and solicitation on behalf of the fund, as well as reasonable efforts to identify its donors. A public servant who discovers that a prohibited source has contributed to a legal-defense fund used

by the public servant must return the contribution to the prohibited source unless the fund returns the contribution to the prohibited source.

(c) A public servant may not receive any benefit from a legal-defense fund that does not publicly disclose the names of its donors, the names of persons or entities establishing the fund, and the names of individuals authorized to solicit contributions on behalf of the fund.

(d) A jurisdiction may choose to permit a public servant to accept discounted legal services from a lawyer or law firm for a legal representation that arises out of the public servant's official position provided that such lawyer or law firm is not a prohibited source. Alternatively, a jurisdiction may choose to bar such discounted legal services, even when not from a prohibited source, if the discounted rate is provided because of the public servant's official position.

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

(a) A public servant should avoid both the possibility of conflict of interest and the appearance of such conflict that would arise if the public servant seeks or accepts an offer of employment from a private individual or organization when the public servant is personally and substantially involved in addressing a particular matter involving the prospective employer.

(b) A former public servant should avoid both the possibility of conflict of interest and the appearance of such conflict that would arise if, after leaving government employment, the former public servant works for a private employer on a particular matter in which he or she was personally and substantially involved while in public service.

(c) A former public servant should avoid both the possibility of conflict of interest and the appearance of such conflict that would arise if the former public servant appears before or communicates with his or her former government agency or department within a defined period of time after leaving public service.

§ 511. Seeking Post-Government Employment

(a) Except as provided in subsections (b), (c), and (d), a public servant may not seek, negotiate for, or accept any offer of employment from a private individual, organization, or firm if:

(1) such individual, organization, or firm is directly affected by a particular matter pending before the public servant's government; and

(2) the public servant is personally and substantially involved in the disposition of the matter.

(b) The restriction in subsection (a) may be waived if:

(1) the public servant informs the head of his or her agency or department before seeking, negotiating for, or accepting an offer of employment from an individual, organization, or firm covered by subsection (a); and

(2) the agency or department head and the jurisdiction's ethics agency agree that the public servant may continue to seek, negotiate for, or accept such an offer of employment provided that the public servant immediately recuses from all further involvement in any matter that individual, organization, or firm has with the public servant's government;

(3) provided further, however, the head of the public servant's agency or department, with the approval of the jurisdiction's ethics agency, may permit the public servant to continue to work on matters involving such individual, organization, or firm if the agency or department head and the ethics agency conclude that is in the best interests of the public servant's government.

(c) The restriction in subsection (a) shall not apply to a public servant who seeks, negotiates for, or accepts an offer of employment from another agency or department in the public servant's government.

(d) An elected official may seek, negotiate for, or accept an offer of employment from a private individual, organization, or firm only if, immediately upon contacting or being contacted by the prospective employer with respect to such employment, the elected official:

(1) recuses from participation in the consideration of, including the casting of any votes on, any particular matter affecting the prospective employer, and

(2) notifies the ethics agency that has jurisdiction over the elected official with respect to his or her seeking, negotiating for, or accepting the offer, for any further recommendations it deems appropriate to prevent a conflict of interest. The elected official should give any such recommendation serious consideration.

§ 512. Restriction on Post-Employment Participation in Particular Matters with Which the Former Public Servant Was Engaged as a Public Servant

(a) Except as provided in subsection (b), a former public servant may not appear before or communicate with that public servant's former government agency or department on behalf of another person or entity, or assist any other person or entity appearing before or communicating with such agency or department, in order to influence any action of such agency or department with respect to any particular matter in which the former public servant was personally and substantially involved while in government service.

(b) The prohibition in subsection (a) shall not apply if:

(1) the former public servant's agency or department head determines, and the jurisdiction's ethics agency agrees, that waiving the restriction in subsection (a) in whole or in part is in the best interests of the jurisdiction; or

(2) the former public servant was an elected official and the jurisdiction's ethics agency finds that waiving the restriction in subsection (a) is in the best interests of the jurisdiction; or

(3) the former public servant's action is pursuant to an order of a court with jurisdiction over the matter; or

(4) the former public servant is employed by and acting on behalf of another agency or department of the same government.

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

(a) Except as provided in subsections (b), (c), and (d), a public servant who has left public service shall not appear before or communicate with the agency or department that employed the public servant with the intent to influence any decision or action of such agency or department on behalf of any firm, organization, or other person for a period of one year after leaving such agency or department.

(b) For public servants who held high-level positions, the restriction in subsection (a) applies to any unit within the agency or department that reported to or was subject to the public servant's authority and shall apply for two years. All agency or department heads and

elected officials and the members of the personal staffs of agency or department heads and elected officials shall be considered to hold high-level positions.

(c) The restrictions in subsections (a) and (b) shall not apply to:

(1) any uncompensated appearance in any public hearing conducted by any agency or legislative committee;

(2) any appearance or communication on behalf of any government agency; or

(3) any appearance or communication required by an agency or court of appropriate jurisdiction.

(d) With respect to the public servants covered by subsection (a) only, the restriction in subsection (a) may be waived by the jurisdiction's ethics agency, on the request of the head of the former public servant's agency or department, if the ethics agency finds that such waiver is in the best interests of the jurisdiction.

APPENDIX B
OTHER RELEVANT BLACK-LETTER TEXT

§ 401. Prohibition on the Use of Public Resources in Election Campaigns (T.D. No. 1)
(approved 2015)

(a) Except as provided in subsections (b) and (c), public servants may not use public resources to promote, attack, support, or oppose the campaign of any candidate for elected office, to assist or oppose any political party, or to assist or oppose any other organization in its support for or opposition to candidates for elected office.

(i) “Elected office” includes any federal, state, or local office.

(ii) “Public resources” include but are not limited to

(A) public funds;

(B) space in buildings, offices, or rooms owned, rented, or leased by a public entity;

(C) office equipment and supplies, such as stationery, postage, mailing lists, and office files; furniture; computer hardware, software, and e-mail systems; printers, copiers, fax machinery, telephones, and personal digital assistants; and

(D) publicly maintained websites.

(iii) Campaign-related activities subject to this prohibition include but are not limited to the solicitation, receipt, or acceptance of campaign contributions; planning campaign strategy; solicitation of endorsements or other statements of support; solicitation to work on an election campaign; and solicitation of votes.

(b) The use of public resources for campaign-related activity is permitted when such resources are generally available to competing candidates or political organizations, or to the public.

(c) An elected official, or staff to an elected official, may use public resources for campaign-related activity if such use

(i) is incidental and subordinate to the public use or is, as a practical matter, unavoidable, and

(ii) involves minimal public expense, or, if the cost is more than de minimis, the public is reimbursed for the cost of the campaign-related use.

§ 402. Prohibition on the Use of Public Resources for Communications in Election Campaigns (T.D. No. 1) (approved 2015)

(a) Communications financed by public resources may not be used to promote, attack, support, or oppose the campaign of any candidate for elected office, or to assist or oppose any political party or other organization that supports or opposes candidates for elected office.

(b) Public resources may not be used to finance advertisements or the preparation or dissemination of mass communications that use the name, voice, or likeness of a public official who is running for office during the period preceding the election—including primaries, general elections, runoffs, and special elections—in which the official is a candidate.

(i) For purposes of this subsection, “mass communications” shall mean radio, television, mass mailings of printed communications (such as letters, newsletters, pamphlets, or brochures), use of telephone banks or robocalls, bulk e-mails, text messages, websites, social media accounts and other forms of telecommunication.

(ii) The news or editorial programs of a public radio or television station may use the name, voice or likeness of a public official running for office in the pre-election period, provided that such action is taken independently of the official.

(c) Public resources, as defined in § 401(a)(ii), may not be used to finance mass communications by an elected official to the general public outside the official’s constituency.

§ 403. Regulation of Publicly Funded Travel Related to Election Campaigns (T.D. No. 1) (approved 2015)

(a) Subject to subsection (b):

(i) Public funds may not be used to pay for travel in connection with election-related or partisan activities.

(ii) Vehicles or other transportation equipment, such as motor vehicles or aircraft, that are owned, rented, or leased by a public entity may not be used for travel in connection with activities that promote, attack, support, or oppose the campaign of any candidate for elected office, or to assist or oppose any political party, or to assist or oppose any other organization in its support for or opposition to candidates for elected office.

(b) When for reasons of security, protocol, ceremonial functions, or overall demands of time, a government official as a practical matter must use a publicly owned vehicle or transportation equipment for travel, the official may use such vehicle or transportation equipment in connection with election-related or partisan activity, provided that the official reimburses the public entity that owns, rents, or leases the vehicle or equipment for the share of the cost of the travel that is attributable to the election-related or partisan activity. Similarly, an official may use public funds to pay for travel that is partly election-related or partisan, provided that the primary purpose and predominant activity of the travel is not election-related or partisan, and the official reimburses the public entity for the share of the cost of the travel that is attributable to the election-related or partisan activity.

(c) For purposes of this Section, an activity will be considered election-related or partisan if it involves:

(i) soliciting votes, contributions, or support for or opposition to any candidate for elected office, or making public statements promoting, supporting, attacking, or opposing a candidate for elective office;

(ii) soliciting votes, contributions, or support for or opposition to a political party or to a political organization that supports or opposes candidates for elective office;

(iii) attending a national, state, or local political-party convention, the meeting of any political-party committee, or attending an event sponsored by a political party or other political organization;

(iv) attending a campaign or partisan rally or a campaign or partisan fundraising event; or

(v) speaking, during a defined pre-election period, at a public event in a jurisdiction at which candidates for office in that jurisdiction are featured as

speakers or attendees; however, speaking at an event that clearly involves an official response to a national, state, or local emergency will not be considered election-related.

§ 404. Restrictions on Public-Employee Participation in Election Campaigns and Partisan Activities (T.D. No. 1) (approved 2015)

- (a) Except as provided in subsections (b), (c), and (d), a public employee may not**
 - (i) use the authority of his or her office to influence the outcome of an election;**
 - (ii) engage in election-related or partisan activities while**
 - (A) on duty or during normal working hours and receiving government compensation; or**
 - (B) in any room, building, or other location occupied in the discharge of the official duties of a public employee; or**
 - (C) wearing a uniform or official insignia identifying the person as a public employee; or**
 - (iii) require or improperly influence any other public employee to engage in election-related or partisan political activity, whether while on duty or on the other public employee's own time.**
- (b) An elected official may engage in election-related or partisan activities during normal working hours, provided that**
 - (i) the official does not use the authority of his or her office to influence the outcome of an election or to assist the electioneering activities of a political party;**
 - (ii) the official does not require or improperly influence any other public employee to engage in election-related or partisan activity, whether while on duty or on the other public employee's own time;**
 - (iii) the official does not wear any uniform or official insignia of office while engaged in public election-related or partisan activities, such as speaking at a campaign rally or fundraising event;**

(iv) the official does not engage in public election-related or partisan activities in any room, building, or other location occupied in the discharge of the official's official duties;

(v) any such election-related or partisan activity does not impose any additional cost on the government, or, if such activity does so, the official reimburses the government for the additional cost in a timely fashion; and

(vi) any such election-related or partisan activities do not interfere with the ability of the official to discharge his or her official duties and do not compromise the efficiency and integrity of the official's office or agency.

(c) A senior appointed official such as a cabinet officer, agency head, or other significant policymaking official whose appointment or nomination to office and removal from office is normally determined by an elected official or whose official duties and responsibilities continue outside normal working hours and away from the official's normal workplace may engage in election-related or partisan activities during normal working hours, provided that the conditions stated in clauses (i) through (vi) of subsection (b) of this Section are satisfied.

(d) An employee who works on the immediate staff of an elected official may, while on duty and as part of his or her official responsibilities, engage in minor or incidental election-related or partisan work concerning the election of that employee's employer.

