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is empowered to modify or waive the financial disclosure requirement to the extent necessary to relieve such hardship. Such waiver authorization does not extend to references to member of household in conflict of interest provisions relating to such matters as government contracts, as for instance in Section 13, which are designed to prevent the abuse of official position.

(f) "State Employee" means a person who obtains or is entitled to compensation for any services to any department or agency of state government other than a state official. The term includes full-time and part-time service and service on a long-term or short-term basis, whether or not included in civil service or a merit system, whether undertaken pursuant to a written agreement or otherwise, and whether the relationship is considered an employment relationship or an independent contractor relationship for any purposes other than this Act, unless the Commission exempts such independent contractor relationship by regulation.

Commentary

Section 3 (f). State employee is defined to include all persons who, by reason of their work for the government, gain contacts and inside knowledge which, because of their position, may be abused or used in a manner to benefit themselves or others. The definition includes not only persons who stand in a formal employment relationship, but also persons who may be regarded as independent contractors. For instance, a lawyer, accountant or consultant should not be able to do work for the state, whether as an employee or an independent contractor, and then represent or assist private clients against the state in the same, or in a related matter. In instances where there is no risk of an abuse of the independent contractor relationship, as in independent contractual relationships with plumbers, electricians, and other such service- and repair-related matters, the Commission may by regulation exempt such contractors, unless there is good reason that they continue to be covered by this definition.

(g) "State Official" means an elected office holder in the legislative and executive branches of state government, or a member of any state board, commission, agency, bureau, department or any other part of state government who is appointed by any elected state official or by the legislature, except a member of the judiciary. The term includes a member of a commission, except that a member of any commission which is solely advisory in nature and which has no authority to make binding decisions, to enter into contracts or to make expenditures other than expenditures necessarily incurred for research in connection with its advisory functions shall not be required to meet the requirements of financial disclosure of Sections 9 and 10.

Commentary

Section 3(g). The definition of State Official includes all elective office holders in the legislative and executive branches and all appointed office holders who owe their appointment to an elected official. Thus, it includes all officials who are charged with authority to make choices and decisions, and whose conflicts of interest and official corruption are likely to be most injurious to public confidence in government. The betrayal of the public trust by such an official, whether appointed or elected, who is expected to serve the public interest and who, generally, has taken an oath pledging to do so, undermines the public confidence in the official's agency and in the government as a whole, unless it is dealt with promptly and effectively. The definition thus covers officials whose fidelity is essential to well-ordered government.

There are some states which include the judiciary in conflict of interest and financial disclosure provisions. In many others this would pose substantial constitutional problems. It is for this reason that judicial offices are not included in this Model. The Model thus recognizes that the laws relating to ethical standards for judicial offices may need to be varied by each state. To include the judiciary within this law one need merely delete "except a member of the judiciary" from the first sentence of the definition.

Members of commissions which are purely advisory in nature and have no authority to make binding decisions, to enter into contracts or to make expenditures other than those necessarily incurred for research in connection with its advisory function are covered by the conflict of interest provisions of the law, but they are exempted from financial disclosure requirements. Members of such commissions are usually not compensated and frequently are very difficult to recruit. Their exemption from the financial disclosure requirements is intended to avoid further discouragement from such service. Moreover, because of the limitations regarding spending and decision-making authority, the opportunities to use these positions for personal financial gain or benefit are greatly diminished.

Section 4. State Ethics Commission; Establishment, Membership, Executive Director; Offices.

(a) There is hereby established the State Ethics Commission to administer and implement this Act. The Commission shall consist of seven members appointed by the governor with the concurrence of the Senate. Not more than four members shall be identified with the same political party. No member shall hold any elected or appointed office under the government of the United States, the state or any of its political subdivisions or be a candidate for any such office. A member may contribute to a political campaign, but no member shall hold any political party office, or participate in any political campaign or in a campaign relating to a referendum or other ballot issue, and no member shall be a lobbyist or an employee of the state or any of its political subdivisions. Members of the Commission may be removed by the governor, with the concurrence of the Senate, for substantial neglect of duty, gross misconduct in office or violation of this law, after written notice and opportunity for reply.

Commentary

Section 4 (a). The provision establishing the Ethics Commission requires appointment by the Governor with concurrence by the Senate, which parallels the federal constitutional requirement as laid down in *Buckley* v. *Valeo*, 424 U.S. 1, 46 L.Ed. 2d 659, 96 S. Ct. 612 (1976) which sets the *federal* separation of powers standard for commission appointments where the commission has regulatory and enforcement powers. The federal requirement is that all such appointments be made by the chief executive rather than by other executive or legislative officers. In most states, by express constitutional requirement or by judicial interpretation under the doctrine of separation of powers, the result reached in *Buckley* v. *Valeo* would be followed. In some states it is permissible, however, to have various executive and legislative officers appoint members of regulatory commissions. If this is done, it is advisable not to authorize the attorney general to appoint members as he may do in some states, because there might be a conflict in his official obligations due to his role in Commission litigation.

The Commission is designed to be bipartisan. Because of its sensitive position, its members must avoid even the appearance of a conflict of interest, and they are barred from participation in political campaigns, running for or holding any federal, state or local office or employment, or engaging in lobbying. They may, however, contribute to a political campaign.

While many states do not have any provisions for the removal of members of ethics commissions, it is advisable to allow removal for cause. The Model follows this course, but requires the concurrence of the Senate in order to prevent abuse of this power by the Governor. The Model thus seeks to balance Commission independence against prevention of abuse. This Commission ought to be as independent as possible so long as its members perform their duties faithfully and in compliance with the law.

It has been suggested that there ought to be two separate state ethics commissions—one for the executive branch and one for the legislature—administering the same law. Several states, among them Nevada, Ohio and South Carolina, have this arrangement because of constitutional separation of power provisions which do not allow legislators to be overseen or regulated by a gubernatorially appointed body; they can only be governed by their own members. States that encounter this problem may have to adapt the Model to meet their special constitutional requirements. For other states a single commission is considered preferable.

(b) A member of the Commission shall be appointed for a term of office of seven years and until his successor has been appointed and has qualified, except that the members first appointed shall be appointed for terms of office of one, two, three, four, five, six and seven years, respectively, and until their successors have been appointed and have qualified. No member shall serve for more than one full seven-year term. When a vacancy occurs in the

membership of the Commission, it shall be filled by appointment for the unexpired portion of the term in the same manner as original appointments.

Commentary

Section 4 (b). The provision for limited and rotating terms is intended to achieve continuity on the Commission while avoiding long-term domination of the Commission and its decisions by any single member.

(c) The Commission shall elect a chairman from among its membership. Four members of the Commission shall constitute a quorum and, if a quorum is present, a vacancy on the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission. A majority of the total membership shall be necessary to act at all times.

Commentary

Section 4 (c). A majority of the total membership of the Commission is necessary for Commission action. This discourages the practice of leaving one or more vacancies in order to gain more favorable decisions from a "rump" commission. The requirement for an absolute majority for binding action—rather than merely a majority of a quorum—is not unusual. An absolute majority is necessary for many government actions including, in most states, those of state legislatures.

(d) Each member of the Commission shall be compensated at the rate of $________ for each day devoted to the performance of his official duties. Each member of the Commission shall be reimbursed for reasonable and necessary expenses incurred in the performance of official duties.

Commentary

Section 4 (d). The level of per diem compensation ought to be high enough so as not to discourage professionals and others of high standing in the community from service, where such service would otherwise constitute an undue economic sacrifice. On the other hand, the rate of compensation should not be so high as to make service on the commission a plum to be sought for its economic benefits.

(e) The Commission shall appoint and set the compensation of an executive director to assist the Commission in carrying out its functions, in accordance with Commission policies and regulations and with applicable law. The executive director shall appoint and discharge counsel and employees, consistent with applicable civil service laws, and shall fix the compensation of employees and prescribe their duties. The counsel to the Commission shall advise the Commission on all legal matters and on the instructions of the Commission may commence civil or criminal actions as may be appropriate.

Commentary

Section 4 (e). The executive director is directly responsible to the Commission which does the hiring and sets the salary. In turn, counsel and employees are responsible to the executive director, who is responsible to the Commission for their work. However, the counsel is directly responsible to the Commission in the sense that he or she may commence legal proceedings only on its instruction. In all other matters counsel is responsible to the executive director, thus avoiding the problem of competition for staff leadership position and power.

(f) The Commission may delegate authority to the chairman or executive director to act in the name of the Commission between meetings of the Commission, except that the Commission shall not delegate the power to hold hearings and determine violations.

Commentary

Section 4 (f). It is a common pattern that Commission staff may be delegated to act for the Commission on routine matters between commission meetings. Some states also allow commission staff or others to act as hearing officers and present their findings to the Commission for its decision. Such a delegation may be necessary when the Commission would otherwise be overburdened by the size of its docket. States wishing to adopt such a system should change the section to read:

> "(f) The Commission may delegate authority to the chairman or executive director to act in the name of the Commission between meetings of the Commission. The Commission may delegate the power to hold hearings but not to determine violations."

The delegation of the power to hold hearings to hearing officers generally meets the requirements of due process if the Commission itself makes the appropriate determination or decision on the basis of a fully adequate record so that it may review the hearing officers' recommendations.

(g) The principal office of the Commission shall be in ______________ but it may establish offices, meet, and exercise its power at any other place in the state. Meetings of the Commission other than hearings shall be public or private as provided for in Section 6(b), except that the Commission may exclude the public from attendance at discussions of Commission personnel, planned or ongoing litigation and planned or ongoing investigations.

Commentary

Section 4 (g). The subsection provides for accessible commission offices and for open meetings, making exception in certain limited situations. As provided for in Section 6 (b), hearings may be open or private, depending on the wishes of the person charged (see commentary, subsection 6(b)). Meetings may also be closed when the Commission discusses its own personnel, and certain litigation and investigations. The provision is intended to balance the need for the protection of confidential discussions to enable the Commission to perform its functions effectively against the public's right to open movement.

Section 5. State Ethics Commission; Powers and Duties.

(a) The Commission may adopt, amend and rescind rules and regulations to carry out the provisions of this Act, and to govern the procedures of the Commission, in accordance with the administrative procedure act of the state. Such rules and regulations shall be consistent with this law and other applicable law.

(b) The Commission may subpoena witnesses, compel their attendance and testimony, administer oaths and affirmations, take evidence and require by subpoena the production of books, papers, records or other evidence needed for the performance of the Commission's duties or exercise of its powers, including its duties and powers of investigation.

(c) The Commission shall, in addition to its other duties:

- (i) Prescribe forms for reports, statements, notices, and other documents required by law;
- (ii) Prepare and publish manuals and guides explaining the duties of individuals covered by this law; and giving instructions and public information materials to facilitate compliance with, and enforcement of, this law; and
- (iii) Provide assistance to agencies, officials and employees in administering the provisions of this law.

(d) The Commission may:

- (i) Prepare reports and studies to advance the purposes of the law;
- (ii) Contract for any services which cannot satisfactorily be performed by its employees;
- (iii) Request the Attorney General to provide legal advice and representation without charge to the Commission, and the Attorney General shall comply with the request. The Commission may also employ additional legal counsel, and

(iv) Request appropriate agencies of state government to provide such professional assistance as it may require in the discharge of its duties.

Commentary

Section 5. This section authorizes the Commission to carry out its routine ousekeeping functions. It also grants the Commission full authority to make rules onsistent with the law, and it provides the Commission with the necessary powers to arry on investigations and to hold hearings and determine cases. The intent is to give he commission sufficient authority to run effective, efficient and timely investigations vith the full cooperation of other state agencies, and to carry out its other enforcement esponsibilities. It may use its powers of subpoena both for investigational purposes nd in mind of the production of evidence at hearings. It may undertake studies and nter into contracts. In addition, the Commission also has the duty to provide ssistance and information to persons and agencies covered by the law, and it may lso prepare instructional and other public information materials it may deem dvisable to advance compliance with the law.

Section 6. State Ethics Commission; Complaints; Hearings; Dispositions; Judicial Review.

(a) Upon the sworn complaint of any person or on its own initiative, the Commission shall investigate alleged violations of this law.

Not later than fifteen days after the Commission receives a sworn complaint, or after it decides to investigate on its own initiative, it shall acknowledge the receipt of the complaint to the complainant, where appropriate, and it shall give notice of the investigation to the person complained against. Not later than thirty days after receipt of a complaint under this section, or after the Commission decides to act on its own initiative, the Commission shall notify in writing the person who made the complaint and the person complained against of what action, if any, the Commission has taken or plans to take on the complaint, together with the reasons for such action or non-action. If the Commission does not decide within thirty days of receipt of the complaint what action to take, it shall notify the person who made the complaint of the reasons for the delay and shall subsequently give him the appropriate notification.

Commentary

Section 6 (a). Section 6 requires the Commission to investigate on the sworn complaint of any individual and sets up procedures under which the Commission is required to keep the complainant and the person complained against apprised of Commission actions and decisions with regard to the complaint until such time as final decisions are made. This provision is designed not only to ensure prompt action by the

Commission, but also to make sure that the cases will not be buried or delayed for political reasons, or in order to avoid hard political choices. The time limits and procedures are particularly important in light of the three-year statute of limitations on criminal prosecutions (Section 21(c)) and civil actions (Section 24 (b)), and in light of provisions which allow for citizen action to sue for relief should the Commission fail to take action. The section also allows the Commission to initiate complaints on its own.

(b) When the Commission concludes that there is probable cause for believing that the law has been violated, it may hold a hearing to determine if such violation has occurred. The person complained against may choose whether the hearing shall be open or closed. At the hearing, the person complained against shall have all of the protections of due process consistent with the state administrative procedure act, including but not limited to the right to be represented by counsel, the right to call and examine witnesses, the right to the production of evidence by subpoena, the right to introduce exhibits and the right to cross-examine opposing witnesses. When the Commission determines that the preponderance of the evidence shows a violation has occurred, it shall issue an order to the violator to comply with any one or more of the following requirements:

(i) To cease and desist violation of this law;
(ii) To file any reports or other documents or information required by this law; or
(iii) To pay a penalty not to exceed $100 a day until the proper financial disclosure statements are filed.

Commentary

Section 6 (b). The Commission may not proceed to the hearing stage unless it concludes that there is "probable cause for believing that the law has been violated." Thus, it may not proceed on mere suspicion. Once it has found such probable cause it may hold a hearing to determine whether such a violation has indeed occurred.

The provisions for hearings allow the person complained against to choose whether the hearing shall be open to the public or not. Many states require that such hearings be open while others require that they be closed. The decision to allow a choice reflects a desire to keep a balance between the rights of persons who are drawn into situations without wrongdoing—such as individuals who may not be directly involved in the situation in question—and the rights of the public. Since the final determination made by the Commission will be a matter of public record, the public's right to know will ultimately be served in every case.

There are good and valid reasons why a perso. might choose to have a hearing closed to the public. There are cases in which the inquiry might involve delicate or confidential information about government plans, where disclosure might be detrimental to the best interests of the government. Other such cases might involve lisclosure of the assets of a minor or disclosure of a serious mental or physical illness of omeone other than the involved official and which might interfere with that person's ight to lead as normal a life as possible. If a determination is made to go to court, such nformation would become public, but in many situations cases will not progress that ar and could be handled without damage to privacy or the public right to know by llowing the option of closed hearings.

For others, an open hearing may offer prompt public vindication and may be the nore desirable alternative. While in some situations the protection of privacy is a lesirable goal, it seems equally important to guarantee the personal right of an ndividual to a public hearing, particularly in situations in which a great deal of public peculation and inneundo already exists, when only full and prompt disclosure of facts nay lead to public vindication.

This section also provides for the usual guarantees of due process at hearings, ncluding the right to counsel, to call and examine witnesses, to subpoena evidence, nd the right of cross-examination.

The Commission has the authority to impose a number of sanctions and restrictions dministratively, without going to court, if it finds by a preponderance of the evidence hat violation has occurred. It may issue cease and desist orders against a further iolation of law, and it may order the violator to file reports or other documents as equired by law. It may also order the violator to pay a penalty of not more than $100 a day until proper financial disclosure statements are filed. The issuance of any dministrative order does not, however, preclude the Commission from referring a ase to the Attorney General for criminal prosecution (cf. Section 6(c)), or from suing or injunctive relief or for civil penalties (cf. Section 22 (a)).

(c) The Commission shall refer to the Attorney General violations of the aw which in its opinion merit prosecution. The Attorney General shall have esponsibility for all prosecutions under the law and may request from the Commission all evidence collected in its investigation.

Commentary

Section 6 (c). Where the Commission finds by a preponderance of the evidence hat a violation has occurred which, in its opinion, merits prosecution, the Commission nay refer the case to the Attorney General for criminal prosecution. Under section 21 t must be shown for conviction that the violation was knowing or willful. Thus, the Commission is likely to find that a case merits prosecution when there is evidence of knowing or willful violation. Referral for prosecution does not preclude the Commission from issuing the order authorized in Section 6 (b) or from filing a civil suit pursuant o Section 22 (a).

In states where the Attorney General is not the chief prosecutor for the state, this provision should be adapted to mandate referral to the appropriate prosecutorial uthority.

(d) Any person directly involved or affected by a final action of the Commission within the meaning of the state administrative procedure act may seek judicial review of the action of the Commission other than of a determination to refer a violation to the Attorney General for prosecution.

Commentary

Section 6 (d). Subsection (d) gives any person "directly involved or affected by a final action of the Commission" the right to seek judicial relief of a final action of the Commission other than the determination to refer a violation to the Attorney General.

Thus, a right to seek judicial review is available only to final actions of the Commission, carrying out the usual requirement of administrative law that there must be an exhaustion of administrative remedies before a judicial review may be had.

It should be noted, too, that not only the person charged with a violation may seek judicial review, but other persons involved or affected by such final action may ask for review, too. For instance, if a person is ordered to file certain information and the filing of such information would have adverse consequences to a third person, such person adversely affected would also have a right to judicial review. This may become a matter of some significance in light of the broad financial disclosures required under the law.

(e) If judicial review is sought of any action of the Commission relating to a pending election, the matter shall be advanced on the docket of the court. The court may take any steps authorized by law to accelerate its procedures so as to permit a timely decision.

Commentary

Section 6 (e). Subsection (e) provides for docket preferences, and allows the court to speed the resolution of matters relating to a pending election. A prompt resolution of such matters is desirable so that the matter will not unfairly become an election issue or otherwise taint the election.

Section 7. State Ethics Commission; Advisory Opinions.

The Commission may on its own motion issue opinions and interpretations of the law. Any person may request the Commission to issue an opinion with respect to his duties under this law in a given factual situation. The Commission shall, within thirty days, either issue the opinion or advise the person who made the request whether an opinion will be issued. No person who acts in good faith relying on an opinion issued to him by the Commission shall be subject to criminal or civil penalties for so acting, if the statement of facts and other data submitted as part of his request for an opinion and on which the opinion is based are complete and true. The Commission's opinions with such limited modifications as may be necessary to protect the privacy of individuals, other than public officials or candidates for public office, shall be public records and shall from time to time be published.

Commentary

Section 7. The power of the Commission to issue advisory opinions is intended to provide protection to persons who seek advance determination as to whether particular activities will violate the law. If such a person submits a true and complete statement of facts to the Commission, and if the person follows the Commission's opinion in good faith, then such a person will be protected against civil and criminal penalties which would arise from a different resolution of the issues.

By giving opinions on certain issues prospectively, the Commission may also ease its caseload and the number of cases which must go through time-consuming hearings. With this power the Commission can, with authority, clarify the application of the law in a variety of circumstances. The certainty of the application of the law is also sought to be advanced by the requirement that advisory opinions be published from time to time. When made public or published, names of individuals other than public officials and candidates for public office may be deleted or withheld to protect the privacy of persons who are not involved as officials or candidates.

In *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E. 2d 409, *app. dismissed* 412 U.S. 925, 93 S. Ct. 2750, 37 L.Ed 2d 152 (1973), a provision of the Illinois Ethics Act was held unconstitutional because it authorized the Secretary of State to hire legal counsel and to render advisory legal opionions interpreting a legislative enactment, because that function properly belonged to the attorney general, the chief law officer of the state. Thus, states which follow the Illinois approach should delegate the advisory opinion function under this section to the attorney general. In *Dunphy v. Sheehan*, 549 P.2d 332 (Nev. 1976) the invalidation of the financial disclosure provision of the Nevada Ethics in Government Law was based in part on the ground that advisory opinions from the State Ethics Commission provided no insulation from criminal prosecution.

Section 8. State Ethics Commission: Modification of Reporting Requirements.

Upon application made in the form prescribed by the Commission, it may suspend or modify any of the requirements of Sections 9 and 10 of this law in a particular case, if it finds (a) that strict application of this Act works a manifestly unreasonable hardship, and (b) that such suspension or modification will not frustrate the purposes of the law. Any such suspension or modification shall limit the application of a requirement only to the extent necessary to relieve the hardship.

Commentary

Section 8. This provision gives the Commission flexible powers to suspend or modify financial disclosure requirements where warranted. This may obviate the criticism that financial disclosure requirements will discourage substantial and dedicated people from seeking public office or employment when required disclosures produce manifest hardship. Under the provision, it would be possible for the Commission to tailor difficult financial disclosure provisions to the particular requirements of the position held or sought, while providing sufficient information so as not to frustrate the purposes of the law relating to public disclosure.

Section 9. Financial Disclosure; Filing Requirements.

(a) On or before January 31 of each calendar year, each state official shall file with the Commission a financial disclosure statement. The statement shall cover the previous calendar year. The state official shall file the statement at the office of the Commission, or shall mail it by certified mail to the Commission prior to the time specified.

Commentary

Section 9 (a). Section 9 requires that all "state officials" as defined in Section 3 (y) file by January 31 of each year a financial disclosure statement covering the previous calendar year. It is the responsibility of each official to make sure that the Commission has received the statement by January 31 or that it has been mailed by certified mail by January 31. Certified mail is required to ensure timely mailing and to prevent violation of the time limit by using a back-dated postal meter. It is necessary that all state officials file financial disclosure forms because only in this manner can the legislative purposes of the law be carried out (see Section 2).

While the financial disclosure provisions as stated are limited to "state officials" and do not include "state emkoyees," this does not indicate any disapproval of such inclusion. Financial disclosure provisions might well include employees in policy-making positions, particularly those who can authorize and make expenditures. Differences between states' employment provisions make it inadvisable to write state employees into a model provision. States are urged to consider including some state employees in disclosure requirements. It is advisable, however, to limit inclusion to employees who are actually in a position to benefit their own interests. Over-inclusiveness may become burdensome to the Commission in that the mass of filing may obscure violations rather than reveal them.

(b) A person who becomes a state official less than ten days before the filing date or who becomes a state official after the filing date shall file a financial disclosure statement for the previous twelve months no later than ten days after the date on which he assumes the duties of his office, unless he has filed a financial disclosure statement with the Commission during the preceding twelve months.

Commentary

Section 9 (b). Since many appointments do not take effect until after the appointing authority takes office, or until another official's term of office is completed in mid year, this section provides for a filing procedure for them. It also provides that officials who have filed during the previous 12 months need not file again, so as to avoid the burden of over-repetitive filings. It should be noted that this provides for filing the financial disclosure statement after taking office. This would not, however, prevent a confirming authority (usually the Senate) from requiring earlier filing as part of the confirmation proceedings and perhaps even as a pre-condition for confirmation consideration. The fact that many state-appointed offices may not require confirmation militates against the practicality of a general requirement of pre-appointment filing

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(c) A candidate for state office shall file a financial disclosure statement with the Commission for the previous twelve months no later than ten days after he becomes a candidate, unless he has filed a financial disclosure statement with the Commission during the previous twelve months. A candidate shall continue to file annual financial disclosure statements with the Commission until he ceases to be a candidate by reason of election, withdrawal or defeat. As used in this section, a candidate is a person who officially files as a candidate for office, or who publicly announces that he is running for office, or who authorizes the collection or disbursement of money for the promotion of his candidacy or election. The State Election Commission [or Secretary of State] shall promptly inform the State Ethics Commission when a person files as a candidate for office.

Commentary

Section 9 (c). This section requires candidates to file if they have not already done so in a given year and to continue filing so long as they are candidates. This section is intended to address the problem of public knowledge of the reportable finances and actual and potential conflicts of interest of the incumbent state official, and the lack of comparable knowledge of the reportable finances and potential conflicts of other candidates. The public has a right to know as much about the candidates as it knows about incumbents in order to make an informed choice

The definition of *candidate* in this section is designed to correlate this section with Section 3 (c) of the *Model State Campaign Finance Law* (National Municipal League, 1979). The definition of the term "candidate" in both laws is similar but not identical. A person must have taken some positive action to become a candidate in order to be required to file financial disclosure statements. For purposes of the Campaign Finance Law, the fact that money is being collected with or without his permission or authorization for the promotion of his nomination or candidacy suffices to make him a candidate, though the positive assertion of his candidacy will also reach that result.

(d) The Commission shall retain financial disclosure statements in its files for not less than ten years from the date of filing.

Commentary

Section 9 (d). This subsection puts a limit on the required retention of records, while providing that they be kept for ten years—long enough to facilitate efficient investigation should that be necessary.

Section 10. Financial Disclosure Statement; Contents.

The financial disclosure statement shall disclose the economic interest of the state official or candidate, and of all members of his household. The value of interests shall be indicated by category only. The categories are Category I, less than \$5,000; Category II, \$5,000-\$24,999; Category III, \$25,000-\$99,999; and Category IV, \$100,000 or more.

Commentary

Section 10. A key provision of the law is the requirement that public officials and candidates regularly disclose their holdings and earnings. The Model provides for disclosure by officials or candidates by categories rather than by actual specific amounts. Disclosure by categories represents an acceptable compromise between specific disclosure by amount and disclosure by source or type of property only. Disclosure by categories as in the Model produces significantly more information by which the public may judge the behavior of its public officials, as well as information for the Commission should investigation be called for. Among other things, it reflects any significant augmentation of reportable holdings and income. The lesser alternative is to list by sources and nature of holdings. This model would work without categorization by amount, but not as effectively.

However, if reporting by source is relied on, once a source reaches a reportable level, the income can become much greater or the value of a holding can be augmented substantially without triggering public or Commission awareness, except in the case of the acquisition of a controlling interest in a business, in which case its real estate holdings would have to be disclosed under Section 10 (d). Disclosure by categories, as in the Model, will facilitate the use of the information to call attention to major or potential conflicts of interest, or to indicate possible use of confidential information or use of public position for private financial gain, thus aiding the preventive purpose of the Act.

States which do not seek financial disclosure by category may use the Model without such categories by eliminating all references to them in Section 10, Section 10 (d), Section 10 (e), Section 10 (f), Section 10 (g) and Section 10 (h).

In addition, broader or narrower ranges may be used. The Model may be adapted to such changes so long as the threshold amounts referred to in the body of the law are keyed to the arrangement of the categories. The amounts shown in the Model were designed to be far enough apart to prevent accurate pinpointing of net worth of officials and candidates, but to provide an opportunity for the observation of substantial changes in holdings which may give rise to inquiry.

The statement shall include:

(a) The name, address, and public position held or sought by the state official or candidate, the names of all members of his household, and all names under which any of them do business.

Commentary

Section 10 (a). There is a substantial issue as to whether financial disclosure requirements should be limited to public officials, or whether members of the official's household should also be included. The Model resolves this issue in favor of the broader disclosure requirement, in view of the ease of concealment of questionable income or holdings by such methods as giving it or having it paid to the spouse, particularly in community property states, putting it in a revocable trust, or using some other device through which actual control is retained.

This provision covers only persons included in the definition of "member of household" (Section 3(e)). Thus, persons who share the official's legal residence, or relatives over whose financial affairs the public official has legal or actual control whether or not they share the same legal residence are included. In most cases, adult children or wards will probably not fall within the requirement. In cases where such disclosure would cause unusual problems, the Commission can make necessary modifications in the disclosure requirements under Section 8 without allowing circumvention of the disclosure law. For example, in a situation in which a member of the official's household is one of several beneficiaries of a trust where the official has neither control nor even knowledge of its holdings, and in which disclosure would necessarily make known the holdings of persons not covered by the act, the Commission could waive disclosure.

For discussion of the implications of the "member of household" definition, see Commentary on Section 3 (e).

Financial disclosure provisions have been upheld against a variety of constitutional challenges, including the alleged invalid delegation of legislative power; vagueness and overbreadth, thus violative of due process; denial of the equal protection of the law; unconstitutional conditions on right to public employment; invasion of privacy; invasion of employees' right to freedom of association and other first amendment rights; infringement of employees' rights to petition government for redress of grievances, e.g., *Alabama State Employees' Assoc. v. Dr. Wright, et. al.*, Circuit Court of Montgomery Co. (Ala.), Civil Action No. 39026, 1974; *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 114 Cal. Rptr. 345, 522 P.2d 1345 (1974); *Baty v. Bales*, Marin County Superior Court, No. 83978 (July 15, 1977); *Metropolitan Water District of Southern California v. FPPC*, 73 Cal. App. 3d 650 (1977); *Goldtrap v. Askew*, 334 So. 2 20 (Fla. 1976); *Plante v. Gonzalez, Thomas v. Gonzalez*, 575 Fed. 2d 1119 (5th Cir. 1978), *cert. den.* — U.S. — 1979; *Stein v. Howlett*, 52 Ill. 2d 570, 289 N.E. 2d 409, *app. dismissed*, 412 U.S. 925, 93 S. Ct. 2750, 37 L.Ed 2d 152 (1973); *Illinois State Employees' Association (I.S.E.A.) v. Walker*, 57 Ill. 2d 512, 315 N.W. 2d 9, *cert. denied* (with memorandum, Douglas, J.) sub. nom. *Troopers Lodge No. 41 v. Walker*, 419 U.S. 1058, 95 S. Ct. 642, 42 L.Ed. 2d 656 (1974); *Klaus v. Minnesota State Ethics Commission*, 309 Minn. 430, 244 N.W.2d 672 (1976); *Kenny v. Byrne*, 144 N.J. Super. 243, 365 A.2d 211 (App. Div. 1976); *Evans v. Carey*, 53 A.D. 2d 109, 385 N.Y.S.2d 965 (1976), *aff'd*, 40 N.Y.2d 393, 359 N.E. 2d 983 (1976); *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (1974), *app. dismissed* 417 U.S. 902, 94 S. Ct. 2596, 41 L.Ed. 2d 208 (1974), *In Re Kading*, Wis. 2d 508, 235 N.W. 2d 409 (1975) (disclosure requirements under Judicial Code of Ethics). Decisions apparently to the contrary involved special and non-recurring situations, e.g., *Comer v. City of Mobile*, 337 So. 2d 742 (Ala. 1976) (law amending earlier state ethics legislation invalidated in part on such grounds as violation of prohibition of a special legislation in its effect on certain local governments; major provisions on disclosure upheld); *Alabama League of Municipalities v. Dr. Wright* (unconstitutional delegation of legislation in that state ethics commission was granted overly broad, and not legislatively defined, role asking power on ethical conduct and financial disclosure; also, violation of subject/title rule); *Dunphy v. Sheehan*, 549 P.2d 332 (Nev. 1976) (required disclosures limited to economic interests that would "materially affect" the official in the performance of his duties; held unconstitutionally vague, in that they failed to inform officials as to what conduct was proscribed); *Rapp v. Carey*, 44 N.Y. 2d 157 (1978) (Governor's executive order for financial disclosure inconsistent with earlier state law).

The inclusion of the economic interest of the spouse, children or other dependents was challenged and upheld in a number of cases, e.g., *County of Nevada v. MacMillen, supra*; *Baty v. Bales, supra*; *Illinois State Employees' Association (I.S.E.A.) v. Walker, supra*; *Haurilsky v. Byrne*, N.J. (1978); *In Re Kading, supra*;

(b) The occupations and principal places of business of the state official or candidate, and of all members of his household, indicating in each instance which person is associated with any particular business.

(c) The name of each business with which the state official or candidate or any member of his household was associated at any time during the filing year, indicating to which person it applies, and a brief description of the business or activity of each business entity, and the nature of the association of the state official or candidate or member of his household with each such business.

Commentary

Section 10 (b) and (c). These requirements primarily serve the purpose of identification, helping to connect individuals covered by the financial statement and their business interests.

(d) A listing of all interests of the state official or candidate and of all members of his household, in real property, excluding his principal residence, held by him at any time during the previous year and which had a fair market value exceeding $5,000. If he acquired or divested any such interest during the year, he shall disclose the transaction and the date it occurred. This listing shall include the street address or legal description of the property, and its value by category. An interest in real property for purposes of this section shall include property owned by any business in which the official or any member of his household owns a controlling interest.

Commentary

Section 10 (d). Inclusion in financial disclosure statement of direct and indirect interests in real property is particularly important because such interests provide many opportunities for conflict of interest violations. For instance, an official can use confidential information to buy real estate while the price is low, expecting its value to rise sharply when public announcement of state building plans is made. This has given rise to problems in areas surrounding highway development, specifically in the acquisition of land at premium prices for planned entrance and exit ramps. Another example involves the participation in decisions on the location of government buildings or other projects on or adjacent to land owned by the decision maker. A further example is the corrupt development of design specifications for a project to fit only the real estate the official owns, such as in the development of water resources and other similar uses for undeveloped land.

(e) A listing of all securities the state official or candidate or members of his household held at any time during the previous year and which at any time during the year had a fair market value of $5,000 or more, and their value by category for each such security. If he or any member of his household acquired or divested any such securities during such year, the transaction and date shall be shown.

Commentary

Section 10 (e). Persons required to file financial disclosure statements must list all securities having a fair market value of $5,000 or more which they or members of their household held at any time during the previous calendar year. In addition, acquisitions and divestments of such securities must also be shown, together with an indication of when they were acquired or disposed of. The $5,000 value of securities was chosen as a threshold because it would be considered by most a fairly substantial holding and because, particularly in closely held corporations, a person holding a $5,000 security interest may well be in the position to affect company decisions. Holdings of a lesser value than $5,000 are not considered to give their owner an interest which is likely to affect the business decisions. It is difficult to determine a value which is likely to give the owner of shares a sufficient interest to affect business decisions in all situations. Clearly, in a major, publicly held company a $5,000 share interest is not likely to be of

sufficient dimension to affect company policy so as to involve the holder or the company in significant conflicts of interest.

The requirement that dates of acquisition and dates of divestiture be indicated serves the additional purpose of flagging what may be significant transactions having conflict of interest implications. The acquisition of shares in a company at a time when the official has regulatory responsibilities relating to the field of operations of the particular business would of course be a matter which would give rise to inquiry. An additional purpose of the requirements of detail in furnishing information relating to security holdings is a preventive one, in that a public official who knows that his acquisition and divestiture of securities is subject to scrutiny is less likely to acquire shares and other securities in companies and at times when these may point to conflict of interest situations.

(f) A listing of all bonds issued by the state or by any municipality, county or other political subdivision of the state regardless of value, held by the state official or candidate, or any member of his household at any time during the filing year, and their value by category. If he or any member of his household acquired or divested any such securities during such year, the transaction and date shall be shown.

Commentary

Section 10 (f). The section requires that all persons who must file financial disclosure statements must list holdings of all bonds issued by any state or local government regardless of value. As in the case of other securities, their value, time of acquisition and time of divestiture must also be shown. The requirement that state and municipal bonds be listed regardless of the value of the holding indicates the importance of the concern for potential conflicts of interest which officials may encounter who have an interest in state and municipal bonds. The value of state and municipal bonds is peculiarly affected by decisions made on the state level. This is the case especially in the instance of revenue bonds issued to support particular capital projects of the state or municipality.

(g) The name and address of each creditor to whom the state official or candidate or a member of his household owed a debt in excess of $1,000 at any time during the filing year, other than for a credit card or retail installment contract, and the rate of interest, listing each obligation to each creditor and the amount of each debt by category. If he or any member of his household incurred or discharged any such debt during such year, the transaction and date shall be shown.

Commentary

Section 10 (g). Persons required to file financial disclosure statements must list any debt in excess of $1,000 owed at any time during the filing year. This does not include credit card or retail installments which may be regarded as faily routine. Other debts, rate of interest and listing of each obligation to individual creditors and the amount of the debt must be listed, and the incurring or discharge of the debt during the year and the date of such transaction must also be shown. Note that all personal debts of the person who files, and of his household, must be included if they exceed the $1,000 threshold. The purpose of the provision is to forestall or at the very least to raise questions regarding debts which have been granted on a preferential basis, or where the interest rate shows that the borrower has been given an unusual preference or advantage, or that he has been given unusually favorable terms in situations which may well raise questions of conflicts of interest. The nature of the obligation may also provide useful information. In political life it is not at all unusual to make gifts by way of extending credit in instances where there is no intention that the loan be repaid, even though it will ostensibly have all of the characteristics and all of the formalities and legal instruments that normally show that a loan rather than gift was intended.

The $1,000 threshold is intended to cover loans of some significance. The figure may need adjustment from time to time to insure that the requirement includes only significant obligations.

(h) The name and address of any person or business that made payments or provided gross income exceeding $1,000, other than income received from securities reported in subsection 10(e), including the amount by category, to the state official or candidate or any member of his household, indicating the nature of the business or services for which such payment or income was received. A report shall be made under this subsection when the payment is to a business which pays, or which is under an obligation to pay, a prorated share to the state official or candidate exceeding $1,000. If such payments or income are for the rendition of medical or mental health services, the income shall be listed but the identity of individual patients need not be disclosed.

Commentary

Section 10 (h). The provision requires persons who file financial disclosure statements to include information on all payments made exceeding $1,000 during the reporting year to the person filing or to any member of his household, indicating the nature of the business or services for which the payment was made. The section expressly excludes payments of dividends earned on securities which are already covered in another provision. The disclosure requirement is of all payments regardless of whether these payments were made by an individual or by a business or corporate entity. The source of the payment must be disclosed unless such payment is for medical or mental health services. Included in the report are to be payments to a business which in turn is under an obligation to pay the state official a prorated share exceeding $1,000. The purpose of the provision is the disclosure of sources of income to the state official or candidate other than the public sources which pay his compensation as a state official. The requirement that the nature of the business or

services for which payment was made must be disclosed is intended to prevent the gratuitous and potentially corrupt payment of moneys under the guise of payment for goods or services rendered. Under the provisions government officials who are involved in law practice for instance would have to indicate payments received from particular clients, but they would not have to disclose the exact nature of services rendered. It has been held that it is not a violation of the code of professional ethics to reveal the name of clients so long as the exact nature of the professional services is not disclosed. Legal requirements of a similar nature in other laws have not had any untoward effects on the practice of the professions and have not caused lawyers with outside interests to leave public employment.

A requirement that attorneys disclose the names of clients who paid a fee of $1,000 or more in the report year was upheld in *Hays* v. *Wood*, 79 Cal. App. 3d 354, modified 79 Cal. App. 3d 447, with the court indicating that the requirement of disclosing the client's name did not invade any recognized rights of privacy or legally recognized privilege. The California Political Reform Act of 1974 required attorneys and others, such as brokers, to disclose the names of clients who had paid $1,000 or more during the year. This the court found discriminatory, and held that lawyers and brokers would be bound only by the $10,000 disclosure rule applicable to other professionals under the law.

(i) The name and address of business or governmental clients or customers of any business in which the state official or candidate or a member of his household is an officer, director or partner or has an ownership interest of more than ________ percent, if the client or customer has paid an aggregate of $25,000 or more to the business during the filing year, but the full amounts of such fees need not be disclosed.

Commentary

Section 10 (i). The section covers the rather unusual situation of a state official, candidate or member of his household who is an officer or has a major ownership interest in a business to which a customer or client has paid an aggregate of $25,000 or more during the filing year. The disclosure required by this section affects only state officials with major business interests in situations where a major client or customer may affect the overall financial condition of the firm. The underlying assumption is that where a government official also has a major interest in a business he is likely to value important customers and clients, and that this may in turn influence his judgment in carrying out his official duties. There is a particular risk of this in instances where a number of important clients or customers may have similar interests in certain government decisions. So, for instance, a law firm which represents a number of banks or insurance companies or which represents a number of mining operations may well have a particular point of view with respect to the law which applies to these regulated interests. The disclosure of the relationship of the public official to certain regulated industries puts the matter on the public record and may thus be useful in preventing undue influence.

An effort has been made to make this provision no more burdensome than ecessary. The only disclosure that is required is the name of the client or customer ho has paid an aggregate of $25,000 or more during the filing year. The exact mount paid need not be disclosed, and there is no requirement that the amount paid e disclosed by category. It should be noted that professional or trade directories equently list the important clients of law firms or the most important trade onnections of the firm. Except in the case of very large firms or businesses, it is nlikely that an officer, director, partner, or part owner will be unaware of the xistence of such important clients or customers. It may well be that the $25,000 reshold is too low to be of significance in the case of large companies. In that event, is may be an appropriate situation for a petition to the Commission for a odification of the requirement under Section 8 of the law.

(j) A list of all gifts received which exceed _________ dollars in value from persons other than relatives or a person to whom the state official or candidate is engaged or intends to marry. As used in this section, the term "gifts" does not include campaign contributions, but shall have the same meaning as in Section 18.

Commentary

Section 10 (j). The section requires financial disclosure of valuable gifts, exempt-ng only defined categories of gifts among family members or among persons who xpect to marry. The section makes the assumption that large gifts received by a public fficial or candidate from persons other than family members may at least be subject to ome explanation. The section expressly exempts campaign contributions which have een properly defined in Section 3(e) of the *Model State Campaign Finance Law*. The atter of the acceptance of gifts by state officials or employees is dealt with in onsiderable detail in Section 18 of this law. Thus, the present section may be viewed s a regulatory mechanism to see that Section 18 is properly complied with.

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ection 11. Conflicts of Interest; Prohibitions.

(a) No state official or state employee shall use his public office for private dvancement or gain.

Commentary

Section 11 (a). Section 11 contains a number of specific prohibitions that deal with ecurring problems involving conflicts of interest. Section 11 (a) is a general prohibition n the use of public office for private advancement or gain. The subsection is ntentionally broad because it is intended to cover the variety of situations which may ot be expressly covered by more specific prohibitions. One such example of the use f public office for private gain is the situation of a state official who uses his official osition to place state funds in a bank in order to obtain favorable action from the ank on a personal loan application.

(b) A state official or state employee shall not represent or otherwise assist any person or business before any state agency or before any agency of any political subdivision of the state for contingent compensation in any transaction involving the state or any political subdivision.

Commentary

Section 11 (b). The section prohibits state officials or employees from representing or assisting any person or business before any agency of the state or any of its political subdivisions for a contingent compensation. The agreement to pay compensation contingent on the success of the assistance of representation adds a special inducement to the use of undue influence to get a desired result. Note that this section does not address the question of state officials or employees who represent others before agencies for compensation other than contingent compensation, such as on a regular fee basis. Such representation is permitted except as restricted by other provisions of this Act, and especially subsections (c), (d) and (e) of this section.

(c) A state official or state employee shall not represent or otherwise assist any person or business for a fee or other compensation to secure passage of a bill or to obtain a contract, or payment of a claim, or in any other transaction or proposal if he has participated, will participate, or is likely to participate as an official or employee in the disposition of the matter.

(d) A state official or state employee shall not represent or otherwise assist any person or business before a state agency on any bill, contract, claim or other transaction or proposal involving official action by the agency if he has official authority over that state agency or is an official or employee of that agency.

(e) This section shall not apply to elected members of the state legislature who shall be governed by Section 12 of this Act.

Commentary

Section 11 (c) and (d). These subsections prohibit state officials or employees from representing others for a fee or other consideration in matters in which they have been involved in their work for the state. Subsection (c) deals with the situation of a state official or state employee who represents another in a situation where such official or state employee participates in or is likely to participate in the disposition of the matter. Such matters as passage of a bill, obtaining a contract, or the payment of a claim are covered transactions. Subsection (d) deals more generally with a state official or state employee who represents or assists another before a state agency on any bill, contract, claim or other transaction if such state official or employee has official authority over that state agency or is an official or employee of that agency. The situations covered involve some classic and recurring conflict of interest problems, and are parallel in some respects to the prohibitions of conflicts of interest contained in the American Bar Association Code of Professional Responsibility. They also parallel the restrictions which business corporations put on the actions of their officers and employees.

Section 12. Conflicts of Interest; Legislature.

(a) A member of the state legislature and a person appointed by the legislature or by any legislator shall not represent or assist any person or business before any state agency or before any agency of any political subdivision of the state for compensation or other benefit or promise thereof.

Commentary

Section 12 (a). This section deals with a variety of conflict of interest situations which may involve legislators or legislative staff. Subsection (a) bars state legislators and persons appointed by them from representing others before any agency of the state or its subdivisions, for compensation or other benefit or promise of benefit. It should be noted that the section prohibits representation "for compensation." It does not, however, interfere with a legislator's responsibility to represent his constituent's interests before a state agency. It should also be noted that the section is not intended to apply to representation of clients by state legislators or legislative employees before the courts of the state. The state courts are not generally considered to be agencies of the state, and, consequently, this section does not bar such representation. In the states which do not follow the usual rule and do consider courts state agencies, an express exception for courts should be added.

(b) A member of the state legislature shall comply with the Code of Legislative Ethics adopted by the legislature, and shall comply with the reporting requirements of Section 17 of this Act.

Commentary

Section 12 (b). This subsection reflects the universal constitutional provision that the legislature is the only body which may regulate a member's behavior on the floor, and the questions of his seating and seniority. Thus the section refers the legislators to their legislature's own code of legislative ethics in lieu of compliance with the requirements of this Act. Note, however, that legislators are not exempt from the reporting requirements of Section 17 of this Act. The section exhorts the houses of the legislature to set rules of conduct for their members and to enforce them. The provisions of this law clearly cannot reach instances of actions on the part of legislators in the legislative chambers that reflect conflicts of interest or that reflect commitment to special interests.

(c) Any violation of this Act by a member of the state legislature shall be subject to the sanctions of this Act to the fullest extent permissible under the provisions of the state constitution. Any violation not subject to the sanctions of this Act by reason of the state constitution shall be subject to such sanctions as the legislature itself may impose under its Code of Legislative Ethics.

Commentary

Section 12 (c). This section states the general principle that violations of the Act by members of the state legislature are to be subject to the sanctions of the Act insofar as such sanctions may be applied consistent with the provisions of the state constitution. In a number of states the constitutional protection granted legislators for actions on the floor of the respective houses of the legislature extends beyond matters of voting and free speech and may be inconsistent with the enforcement of certain conflict of interest provisions under this law. To the extent that some of the conflict of interest provisions under this law may not be applicable to state legislators under the constitution, the Act relegates those violations to sanctions imposed by the legislature itself. Thus, for example, if the Commission may not penalize a legislator for failing to disclose a conflict of interest prior to voting as required by Section 17, the legislature is obligated to proceed against its members when the commission cannot by reason of constitutional limitations.

Section 13. Government Contracts; Prohibitions.

(a) A state official or state employee or a member of his household shall not be a party to or have an interest in the profits or benefits of a state contract or the investment of state funds unless the contract or the investment meets the following exceptions:

(i) The contract is let by competitive bidding or involves not more than $150 (One Hundred and Fifty Dollars);

(ii) The contract is for necessary supplies or services for the governmental agency involved, which are unobtainable elsewhere for the same or lower cost, or which are furnished to the government agency as part of a continuing course of dealing, established before the state official or state employee became associated with the governmental agency, and the entire transaction is conducted at arm's length, with the agency's full knowledge of the interest of the state official or state employee or a member of his household, and the state official or state employee takes no part in the determinations of specifications, deliberations or decision of the governmental agency with respect to the public contract.

(b) In the absence of bribery or a purpose to defraud, a state official or state employee, or a member of his household, shall not be considered as having an interest in a public contract or the investment of public funds when such a person has a limited interest as a shareholder or creditor of the business which is the contractor on the public contract involved or which is the issuer of the security in which public funds are invested. A limited interest for purposes of this section is an interest not exceeding 5 percent of the outstanding shares of a corporation or an interest as a creditor not exceeding 5 percent of the total indebtedness of a corporation or other organization, unless it is a corporation whose shares are traded on a public exchange, in which case the Commission may set lower limits. A person claiming such a limited interest shall file with the State Ethics Commission and the governmental agency an affidavit describing his status in and connection with the corporation or other business, before such public contract is entered into.

Commentary

Section 13. Section 13 places management restrictions on business dealings between state officials or employees and the state. It prohibits outright self dealing but it relieves the state of the burden of limiting its business transactions to companies in which no state official or employee has even a minute or indirect interest. In instances where a state official or employee has such a minor interest in a business that deals with the state the section provides that the state official or employee may take no part in the deliberations and decisions relating to such dealings, and that the persons and businesses involved in such situations be aware of the relationship and take appropriate steps to disclose the same to the commission. The purpose of the section is not only to prohibit outright self-dealing but also to prevent even the appearance of conflict to the fullest extent possible.

The purpose of preventing self-dealing might best be served by an outright and complete ban, but such a ban is not likely to serve the public interest because it is unfeasible and unmanageable.

The prohibition against self-dealing allows for certain exceptions. The exception in subsection (a) is for contracts let by competitive bidding, or where the amount involved is $150 or less where the contract is let for necessary materials at the best available price, as part of a continuing course of dealing established prior to the time the state official or employee became associated with a governmental agency. Further conditions require the arrangement to be at arm's length and that the state official or employee disclose his interest to the agency. Both the small amount involved and the conditions imposed assure that no significant instances of self-dealing will be permitted under this subsection.

Subsection (b) allows public contract or the investment of public funds with businesses in which a state official or state employee has a demonstrably limited interest. Such a limited interest may be a shareholder's interest or a creditor's interest where the shareholder's interest does not exceed 5 percent of the outstanding shares of the business and where the interest of the creditor does not exceed 5 percent of the total indebtedness of the business. In the instance of publicly held companies whose shares are traded on a public exchange, a 5 percent share interest or a 5 percent

interest in the corporate indebtedness would be considered a substantial or major interest, and in that situation the State Ethics Commission may set lower limits. Again, the section relies on the principle of public disclosure in that a state official or employee is required to file with the State Ethics Commission and the governmental agency involved an affidavit which describes the nature of his interest.

Section 14. Conflicts of Interest; Employment.

(a) No state official and no state employee shall seek employment with, or allow himself to be employed by, any business which is or may be regulated by a department or agency which he serves. The term employment within the meaning of this section includes professional services and other services rendered by the state official or state employee whether rendered as an employee or as an independent contractor.

(b) No business shall employ a state official or state employee if the employment violates subsection (a) of this section.

Commentary

Section 14. This section prohibits a state official or employee from seeking or accepting employment from a business regulated by his agency. For purposes of this prohibition the term employment is broadly defined to include professional services and other services that may be rendered either as an employee or as an independent contractor. Subsection (b) poses a correlative prohibition on businesses. They are prohibited from employing state officials or state employees if such state officials or employees are prohibited from accepting such employment under this section, thus the business and the employee would become equally guilty of violating the law.

Section 15. Conflicts of Interest; Avoidance.

No state official or state employee shall acquire any financial interest, including, but not limited to, interest in a business, real property, or in a contractual relationship, when he believes or has reason to believe that it will be directly and immediately affected by his official action or the action of the government department or agency which he serves.

Commentary

Section 15. The section prohibits the acquisition by any state official or employee of any financial interest which he believes or has reason to believe will put him in a conflict of interest situation. It is clearly contemplated by the section that any employee who finds that he has acquired such a financial interest divest himself of the same as promptly as possible.

Section 16. Conflicts of Interest; Reporting.

(a) A state official or state employee, other than a legislator, who is required to take any action or make any decision in the discharge of his official duties that may cause financial benefit or detriment to him, to a member of his household or a business with which he is associated, which is distinguishable from the effects of such action on the public generally or a broad segment of the public, shall:

(i) Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict; and

(ii) Deliver a copy of the statement to the Commission and to his immediate superior, if any, who shall assign the matter to another, or, if he has no immediate superior, he shall take such steps as the Commission shall prescribe or advise to remove himself from influence over actions and decisions on the matter. This restriction shall not prevent such person from making or participating in the making of a governmental decision to the extent that the individual's participation is legally required for the action or decision to be made, but in such event the person shall report the occurrence to the Commission.

(b) The obligation to report a potential conflict of interest under this section arises as soon as the state official or state employee is aware of such conflict or as soon as he should reasonably be aware of such conflict, whichever is sooner.

Commentary

Section 16. When a state official or employee finds himself faced by a conflict of interest as defined in the section he must prepare a written statement describing the situation and he must deliver a copy of the statement to the State Ethics Commission and to his immediate superior in the agency. The state official or employee must then also disengage himself from participation in the matter so far as legally permissible. His superior is under an obligation to assign the matter to another person for determination or decision, and if the official or employee has no direct superior, he must follow the advice of the Ethics Commission in removing himself from a decision making role. In some instances the law may require that certain decisions be made by designated officials. In such an event, where the determination cannot be delegated to another, the needs of government shall be met in that the particular official or employee shall make the legally required decision, but he must report the matter to the ethics commission. The section provides that a state official or employee cannot close his eyes to the existence of a conflict of interest situation. The obligation to report and to disqualify himself arises as soon as he is aware of the conflict, or as soon as he should reasonably be aware of such conflict.

The section protects not only public agency decisions from the effect of conflicts of interest but also the state official or employee involved. A state official who promptly

reports the matter to the State Ethics Commission as required by law and who thereafter follows the direction of the Commission would be protected from any subsequently asserted liability.

Section 17. Conflicts of Interest; Member of State Legislature; Reporting.

(a) A member of the Legislature who is required to take an action in the discharge of his official duties that may cause financial benefit or detriment to him, a member of his household or a business with which he is associated, which is distinguishable from the effects of such action on the public generally or a broad segment of the public shall:

(i) Prepare a written statement describing the matter requiring action and the nature of the potential conflict, and

(ii) Deliver a copy of the statement to the clerk of the house of the legislature for inclusion in the official legislative record and to the Speaker of the House or [Assembly] or the President Pro Tempore of the Senate as appropriate [and to the Commission.]. He may request permission to abstain from voting on the issue and such legislative officers may grant the request. Nothing in this section shall be construed to prohibit any legislator from voting on any matter that comes before his house of the legislature.

(b) The obligation to report a potential conflict of interest under this section arises as soon as the member of the legislature is aware of such conflict or as soon as he should reasonably be aware of such conflict, whichever is sooner.

Commentary

Section 17. Section 17 imposes disclosure requirements on legislators who find themselves in a situation of conflict of interest. Section 16, which deals with conflicts of interest of state officials and state employees other than legislators, requires them to disqualify themselves from official action in conflict situations, except insofar as they may be required to act by reason of the legal responsibilities of their position. Unlike other state officials, legislators are not required to disqualify themselves, but they are required under section 17 to disclose their conflict and to put it on the legislative record. Disqualification of state legislators is not required because to require them to disqualify themselves would deprive their constituents of representation. To require a legislator to disqualify himself, and in effect to prohibit him from voting when he finds himself in a conflict of interest, or to penalize him for voting in such a situation, would probably be an unconstitutional interference with the legislative process. The right of the legislature to be the sole judge of the conduct of its members on the floor is virtually absolute. However, a legislator who finds himself in a conflict of interest is encouraged to request permission to abstain from voting on the particular issue and the presiding officer of the particular house may grant the request. It is clear that the effectiveness of Section 17 in dealing with legislative conflicts of interest will depend largely on the seriousness of the legislature in its enforcement. In this area it is likely that efforts by the State Ethics Commission to seek enforcement of the law will meet with constitutional objections based on the principle of the separation of powers.

Section 18. State Officials or Employees: Making and Acceptance of Gifts.

(a) No state official or state employee shall solicit, accept or agree to accept any gift, including economic opportunity, loan (other than from a regular lending institution on terms generally available for such loans), gratuity, special discount, favor, hospitality or service having an aggregate value of one hundred dollars ($100) or more in any calendar year from any person, except from members of his family or from a person whom he plans to marry. This section shall not, however, operate to prevent the acceptance by a state official or state employee of reimbursement for expenses which are expressly provided for or permitted by law.

(b) No person or business shall offer or make any gift which a state official or employee is prohibited from accepting pursuant to subsection (a) of this section.

Commentary

Section 18. Section 18 prohibits any state official or employee from accepting any gift in excess of $100 from persons other than his family or a person whom such official or employee plans to marry. Earlier formulation of state ethics laws prohibited officials from accepting gifts from persons one might "reasonably" expect to have an interest in some matter over which such official's agency had authority. In this earlier formulation there was the recurring risk that the law would be declared unconstitutional, as void for vagueness. The firm dollar limit eliminates the problem of what is a reasonable gift, and it also eliminates the problem of determining when a gift is made because it is reasonably expected to have some impact on the official's actions. The section assumes that gifts other than from relatives or future spouses in excess of the limit are questionable in purpose and resolves the issue by prohibiting such gifts altogether. The dollar limit on gift giving may have to be adjusted from time to time to reflect inflationary changes. Subsection (b) of Section 18 makes the giver or offerer of an illegal gift equally liable with the official who accepts it.

Section 19. State Officials or Employees; Disclosure of Information.

No state official or state employee shall disclose or use confidential information or information not available to members of the general public for

his personal gain or benefit or for the personal gain or benefit of any other person or business if he has obtained such information through his official position. The restriction on the use of information shall continue for two years after he ends his term of office or leaves government service or employment, and shall supersede any other less restrictive requirements of confidentiality that may be applicable.

Commentary

Section 19. Section 19 prohibits the use of confidential information for financial gain. The use of confidential information has long been a common and serious abuse of public trust and one which, because of its nature, was particularly difficult to prove. Financial disclosure requirements make certain gross abuses easier to trace. However, when confidential information is not used by the official himself but is given to friends or business associates, tracing it may still be difficult. The abuse of confidential information gained through official position both during and after public service has been the frequent subject of public investigations, particularly as "government in the sunshine" laws diminish the amount of truly confidential information and makes it easier to trace its leakage. Note that Section 19 restricts the use of information gained in consequence of official position for two years after the term of office is concluded or government service or employment is ended. This two-year limitation supersedes other less restrictive requirements which are commonly scattered throughout the law with a variety of requirements applicable to different agencies.

Section 20. State Officials or Employees: Limitation on Representation.

(a) No former state official or former state employee shall for a period of two years following the end of his term of office or the termination of his state service or employment assist another person or business whether or not for compensation, in any transaction, or in any appearance in connection with any transaction involving the state or any of its agencies or subdivisions in which such former state official or former state employee participated during his term of office or employment.

(b) No business in which a former state official or former state employee is a partner or member, or, in the case of a professional corporation, a shareholder, and no employee of such business, shall, for a period of two years following the termination of his term of office or employment, assist another person in any appearance or transaction involving the state or any of its agencies or subdivisions in which the former state official or former state employee participated during his term of office or state employment. For purposes of this section, the termination of employment of the former state official or former state employee with the agency which he served when he so participated shall be deemed to be the termination of his state employment.

(c) Nothing contained in this Act shall prohibit a former state official or former state employee from being retained or employed by the department or state public agency which he served.

Commentary

Section 20. Section 20 deals with the recurring problem of state officials and employees who leave public employment to work in the private sector, who are then able to use confidential information and the previous close contacts gained in public employment for the advantage of their private employer's customers or clients. The problem of the "revolving door" in public service is a recurring and serious one. While abuses in the use of special contacts and special information gained during public employment must be curbed, it is constitutionally unacceptable to place undue job restrictions on public officials and public employees after they leave public service. Moreover, it would be a disservice to the public interest to limit employment opportunities of former government officials and employees unduly because it would discourage highly qualified and expert persons from entering government service for fear of unduly limiting their future employment opportunities.

Section 20 seeks to resolve these competing considerations by drawing a balance which results in reasonable limits. Under subsection (a) a former state official or employee is barred for a period of two years following the end of his official service from assisting or appearing on behalf of any other person or business in connection with any transaction in which such official participated during his term of office or employment. Subsection (b) applies a similar limitation to any business or person associated with such business in which such a former state official or state employee is a partner or member, or in a professional corporation, a shareholder. It should be noted that only those matters with which the former state official or employee had any direct connection are out of bounds. It may be of particular significance to law firms and similar professional undertakings that all appearances, including those before the agency of the former official or employee, on matters that were not his responsibility are permitted. The narrow range of prohibitions is intended to limit the adverse impact which such limitations would have on highly qualified professionals who might otherwise avoid entering government service. At the same time the section also protects businesses from a form of undue pressure or blackmail by state officials or employees who may condition favorable government action on advantageous private job offers.

Section 21. Criminal Prosecution; Penalties.

(a) A person who knowingly or willfully violates any provision of this Act other than a requirement of financial disclosure pursuant to Sections 9 and 10 of this Act is guilty of a misdemeanor, punishable for each such violation by imprisonment of not more than one year and by a fine not to exceed $10,000.

Commentary

Section 21(a). Section 21 separately provides for convictions which involve violation of the conflict of interest provision of the law and violation of the financial disclosure requirements. Knowing and willful violation of the conflict of interest provisions is a misdemeanor and the penalty is a fine of not more than $10,000, imprisonment for not more than one year, or both. Many jurisdictions treat the violation of conflict of interest provisions as a felony. However, it has been a common experience that white collar crimes, which generally do not involve any violence or threat of violence, are treated lightly by juries and that juries are less likely to convict when the violation is treated as felony subject to many years of imprisonment. Thus, designating knowing and willful violation as misdemeanors is more likely to result in convictions. It should be noted, moreover, that in many instances it is likely that more than one offense of conflict of interest will be charged. Thus, in egregious cases, consecutive one-year terms for different counts or violations are not unlikely.

(b) A person who knowingly or willfully violates any financial disclosure requirements of Section 9 or 10 of this Act is guilty of a misdemeanor, punishable by a fine of not more than $10,000 or three times the amount or value of the interest or interests the person failed to report, whichever is greater.

Commentary

Section 21(b). The violation of financial disclosure requirements under the law is treated as a misdemeanor. Unlike violations of conflict of interest provisions this misdemeanor is not punishable by a jail term but only by a fine. In effect, the violation of a financial disclosure requirement is regarded as a primarily economic offense; consequently, the penalty provided is primarily economic in nature. For the conviction of failure to make required financial disclosures the penalty is three times the amount or value of items not reported. Thus, when there has been a gross failure to meet financial disclosure requirements, penalties may be greatly in excess of $10,000.

(c) The Attorney General shall commence prosecution for violation of this Act no later than three years after the date of violation.

Commentary

Section 21(c). A three-year statute of limitations for violations of the *Model State Conflict of Interest and Financial Disclosure Law* is intended to provide sufficient time for the discovery and careful investigation and case preparation of violations which in many instances may involve complex financial dealings. While some states allow for longer statutes of limitations in laws of this nature, the three year statute of limitations is intended to require diligent prosecution efforts when violations have been discovered. A three-year statute of limitations is also subject to less abuse for political purposes and for purposes of influencing the outcome of elections.

(d) A person convicted of a misdemeanor under this Act shall not be a candidate for any elective office or be eligible for any appointive office or act as a paid lobbyist for a period of four years following the date of the conviction, unless the court at the time of sentencing reduces the period or determines that this provision shall not be applicable. A plea of *nolo contendere* shall be deemed a conviction for purposes of this Act.

Commentary

Section 21 (d). As an additional sanction, Subsection (d) provides that a convicted official or employee may not become a candidate for public office, or become eligible for appointive office, or be a paid lobbyist for four years unless the court relieves him from the effects of this provision at the time of sentencing. Removal from office as a sanction for conviction of violation of law is a justifiable penalty, and it is recommended that Section 21 (d) also provide for removal from office in states where such a provision is constitutionally permissible. It is not constitutionally permissible in all states for all public officials, because the constitution may limit removal from office to certain offenses or may require certain constitutionally prescribed procedures.

Section 22. Civil Action; Injunctive Relief; Civil Penalties.

(a) The Commission may sue in the _______ Court for injunctive relief to enjoin a violation or to compel compliance with the provisions of the Act, and for the collection of civil penalties.

Commentary

Section 22. Section 22 authorizes the Commission to bring civil actions for two purposes. First, to secure injunctions against violation of the Act, or to compel compliance with its provisions and, second, to sue for the collection of civil penalties under the Act.

The injunctive process is a useful and necessary procedure to deal with situations that involve conflicts of interest before they have done irreversible damage. Such damage may involve not only public confidence in government, but also the expenditure of substantial public funds in reliance on administrative decisions or other government action based on a process that was tainted by the private interest of the decision maker. The injunctive process has the advantage of a prospective, preventive procedure that can deal with imminent risks in a timely fashion, unlike criminal prosecution for violation of the Act which generally deals with violation after the harm is done, and which takes a lengthy course of preparation, and evidence to convict beyond a reasonable doubt. The effectiveness of the injunctive procedure is enhanced by the availability of the power of the court to hold the violator in contempt if he fails to obey the court's injunctive order. Such contempt powers are exercised by the court subject to the applicable provisions of state law.

It is likely that the power to enjoin violations of the law will usually be exercised after the violator has failed to obey the State Ethics Commission's own administrative order to cease his violation.

The Commission's right to sue for civil penalties is discussed in connection with Subsection 22 (d).

(b) Upon a preliminary showing in an action brought by the Commission that a violation of the law has occurred that involves a conflict of interest or a disqualification for official action, the court may restrain the execution of any official action in relation to which such violation occurred, pending final adjudication. If it is ultimately determined that a violation has occurred and that in the absence of such conflict of interest the official action might not have been taken or approved, the court may set the official action aside as void. The term official action as used in this subsection includes, but is not limited to, executive and administrative action, such as orders, permits, resolutions and contracts, but does not include the enactment of state legislation. In considering the granting of preliminary or permanent relief under this subsection, the court shall accord due weight to any injury to members of the public who rely on the official action in good faith.

Commentary

Section 22 (b). In addition to the power of the State Ethics Commission to seek an injunction against a violation of the ethics law under Subsection 22(a), this subsection allows the court, in an injunctive proceeding brought by the Commission, to restrain the official action alleged to be tainted. The Commission may obtain a temporary restraining order against such government action after a preliminary showing that a violation of the law has occurred. Such a preliminary restraining order will hold all further government action in relation to which the violation has occurred until the issue of the existence of the alleged violation has been determined. When it is determined that there has been a violation, the court may void the tainted government decision or action. The court, however, is not required to grant such temporary or permanent relief, but must give due weight to the detrimental effect such an order may have on members of the public who rely on the official action, in good faith. A number of instances of such good faith reliance may be suggested—such as employees whose jobs may be lost when their company's contract is voided, or the residents of a particular area who may lose the benefit of some public works project, be it a housing project, a public transportation project, or a flood control project, as a result of the voidance of the particular government action.

(c) Any person who violates any of the reporting requirements of this Act is liable to the state for a civil penalty in an amount not exceeding the value of the interest not properly reported.

Commentary

Section 22(c). This subsection allows a civil action for the collection of a civil penalty for the violation of the reporting requirements of the Act, in an amount not exceeding the value of the interest not properly reported in the financial disclosure statement. Note that this civil penalty is limited to violations of reporting requirements, and that, unlike the criminal fine for the same violation, the penalty may be collected regardless of whether the violation was knowing and willful. The civil penalty, as in other civil suits, may be imposed on the basis of the fair preponderance of the evidence of violation. For additional discussion of the imposition of civil penalties see Commentary in Section 24.

(d) Any state official or state employee who realizes an economic benefit as a result of violation of the conflict of interest provisions of Sections 11 to 20, is liable to the state for a civil penalty in an amount not exceeding three times the amount or value of the benefit.

Commentary

Section 22 (d). This subsection allows a civil action for the collection of a penalty for the violation of the conflict of interest provisions of Sections 11 to 20 in an amount not exceeding three times the amount of the benefit derived from the violation (such as the use of official information for private benefit, or the benefit from government contracts improperly obtained). The provision does not require proof beyond a reasonable doubt or proof of knowing and willful violation. The section treats the violation as a civil, economic or administrative offense, for which an economic penalty is imposed that stands in direct relationship to the economic benefit gained from the violation.

(e) If two or more persons are responsible for any violation, each of them is liable to the state for the full amount of the civil penalty, and a separate civil penalty for the full amount may be imposed on, and collected from, each of them individually.

Commentary

Section 22 (e). This subsection provides for separate civil causes of action against each person civilly liable under the provision of the Act. Civil penalties, therefore, are not to be divided among the persons responsible in cases where more than one person bears responsibility, but each person is liable independently for the full amount of the penalty.

Section 23. Citizen Action.

Any resident of the state may file a written request with the Commission that the Commission commence action for injunctive relief to enjoin a violation or to compel compliance with the provisions of the Act, or for the collection of civil penalties. The request shall state the grounds for belief that a cause of action exists. The Commission shall respond no later than forty days after the receipt of the request, indicating whether it intends to file a civil action. If the response is affirmative, and suit is commenced within fifty days thereafter, no other action may be brought unless the action brought by the Commission is dismissed without prejudice as provided for in subsection 24 (c). If the Commission fails to reply or to take any action, the resident may proceed with the action in the same manner and to the same extent as is provided for civil actions by the Commission pursuant to Section 22 of this Act.

Commentary

Section 23. This section follows the trend, which began in the sixties, to give standing to private citizens to engage in litigation to vindicate the public interest. In areas of the law where there is a great concern that powerful groups within and outside the government may prevent others from carrying out the law to the fullest, private citizens may bring lawsuits not to protect narrow personal interests but rather broad public ones. Citizens acting in this manner have sometimes been referred to as "private attorneys general," and the public interest litigation they have engaged in in such areas as civil rights, consumer protection, environmental protection, has added greatly to compliance with the law.

As in other areas of citizen action, the purpose is not to oust the government from jurisdiction, but rather to encourage government assumption of its duties. Moreover, it should be noted that citizen action is limited to civil action and plays no direct part in criminal prosecution. Great care is taken in Section 23 to assume that citizen action will not interfere with, but will rather enhance public enforcement activities. Thus, citizen action can only be brought if the Ethics Commission has failed to respond to a request to take action, or having responded to the request, has failed to proceed promptly. Once the Commission has begun its own civil suit, no citizen action may be brought, unless the Commission's action is dismissed without prejudice. The kind of action the citizen may bring is like the Commission's authorized actions—either for injunctive or for civil penalties. The purpose of the section is to give private citizens the opportunity of closely reviewing government action or inaction, without objectionable interference in the government's primary sphere. In the case of this model state ethics law, it is expected that in most instances the law would work to stimulate the Commission to take enforcement steps on its own.

Section 24. Civil Action; Generally.

(a) In any civil action brought under Section 22 or 23 of this Act:

(i) The court may award court costs and reasonable attorney's fees to the prevailing party;

(ii) The court in determining the amount of civil liability under subsections (c) and (d) of Section 22 may take into account the seriousness of the violation and the degree of culpability of the defendant;

(iii) The court, on motion of any party, may require the defendant or a private plaintiff at any stage of the proceedings to post a bond in a reasonable amount sufficient to assure payment of costs and attorney's fees.

(b) No action shall be filed under Sections 22 and 23 more than three years after the occurrence of the violation complained of.

Commentary

Section 24(a) and (b). The provisions of this section are applicable to all civil actions brought under this law, whether by the Commission under Section 22, or as a citizen action under Section 23. In all such civil actions, the court may award court costs and attorneys fees to the winning party, and it may also require the posting of bond by defendants and by citizen plaintiff, to secure the payment of costs and attorneys fees. This is a device to discourage frivolous lawsuits. In addition, the section sets forth the considerations the court may take into account in setting the amount of the civil penalty.

A three-year statute of limitations on civil actions, which parallels the statute for criminal prosecution is Section 21(c), is provided for.

(c) The court may dismiss an action under Section 22 or 23 without prejudice to any other action for failure of the plaintiff to proceed diligently and in good faith. The action may be so dismissed on motion of the Commission or any other plaintiff who intends to bring an action based on the same violation.

Commentary

Section 24(c). The subsection authorizes the court to dismiss a civil action, whether brought by the Commission or by a private citizen, for failure to proceed diligently and in good faith. The subsection meets several needs. It prevents an action from being dragged out unnecessarily Such protracted delay, which reflects a failure to pursue the matter diligently, gives evidence of lack of good faith. Delays in litigation have the result of damaging the defendant's reputation, and, where a particular business contract or activity has been suspended, it may damage other, tangible, interests as well. Delay intended to defeat the full pursuit of the matter may be dealt with by dismissing the action "without prejudice," which has the result of allowing some other party—most probably a private citizen plaintiff—to start a new lawsuit and carry the matter to a completion, so long as the three-year statute of limitations has not run out at the time the new action is commenced.

(d) Any civil penalties imposed under Section 22 or 23 shall be paid into the general fund of the state.

Commentary

Section 24 (d). Civil penalties, whether collected in a civil action brought by the Commission or by a private citizen, must be paid into the general fund of the state. This also demonstrates the public interest nature of citizen actions, because the plaintiff does not derive any personal benefit from the successful outcome of the suit.

(e) The commencement or conclusion of a criminal prosecution for violations shall not bar a civil action under Section 22 or 23, nor shall a civil action be a bar to criminal prosecution for violation of this Act.

Commentary

Section 24 (e). The subsection expressly provides that civil and criminal proceedings and sanctions are not mutually exclusive. The purpose of a criminal prosecution is to prove a criminal violation beyond a reasonable doubt, and to impose a criminal penalty that will, because of its punitive nature, exert a deterrent effect. The civil sanction is based on a civil proceeding that does not impose the stigma of criminality on the violator. A civil violation may, therefore, be proved by a fair preponderance of the evidence. While the civil sanction may be economically onerous, it is nonetheless not intended to be punitive, but rather compensatory and restitutional in scope, in that it is designed to have the violator pay back to the public the economic cost of his violation. In view of the different modes of proof, the different procedural requirements and the different measures for, and purposes of, the sanctions imposed, the two procedures may stand separately, and no question of double jeopardy arises. The existence of two possible procedures to deal with violation allows the Commission a wide range of choices of civil and criminal sanctions, depending on the nature of the violation and the nature of the available evidence. The constitutionality of civil and criminal sanctions for violation growing out of the same set of circumstances has been upheld by the U.S. Supreme Court.

The distinction between criminal prosecution and civil penalty action was drawn authoritatively in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed 2d 644 (1963). The distinction has been applied in numerous cases where both criminal and civil sanctions were available, e.g., *United States v. Ashland Oil & Transp Co.*, 364 F.Supp 349 (W.D. Ky. 1973); *United States v. General Motors Corp.*, 403 F.Supp. 1151 (D.Conn. 1975).

Section 25. Violations; Employment Discipline.

Any state employee who violates a provision of the law is subject to discipline, including dismissal, by his agency, consistent with any applicable civil service or other personnel laws, regulations and procedures.

Commentary

Section 25. This section adds another sanction to the array that may be imposed for violation of the law. A violation of this Act is clearly a breach of employment discipline in the case of state employees and may be treated accordingly.

Section 26. Severability.

If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 27. Effective Date.

This law shall become effective on ________.

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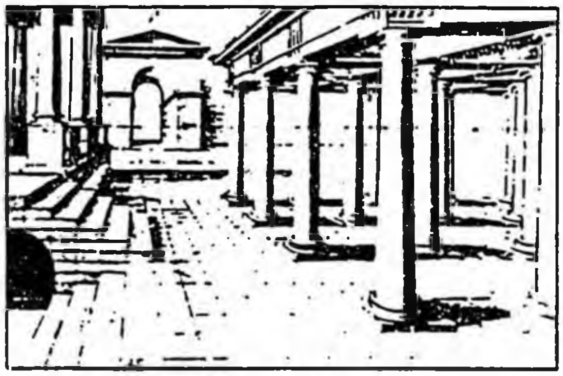
A MODEL ETHICS LAW FOR STATE GOVERNMENT



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APPENDIX

TEXT OF MODEL STATE ETHICS LAW

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I

DEFINITIONS

(1) "<u>Amount</u>" means a category of value, rather than an exact dollar figure, as follows: greater than $1,000 but not more than $2,500; greater than $2,500 but not more than $5,000; greater than $5,000 but not more than $10,000; greater than $10,000 but not more than $25,000; greater than $25,000 but not more than $50,000; greater than $50,000 but not more than $100,000; greater than $100,000.

(2) "<u>Anything of value</u>" means anything which is not <u>de</u> <u>minimis</u> in value. "Anything of value" shall not include a lawful political contribution made in accordance with [cite appropriate state law].

(3) "<u>Business</u>" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint-stock company, receivership, or trust, whether or not organized for profit.

(4) "<u>Business with which one is associated</u>" means any business, including self-employment, in which the reporting person or a member of his/her immediate family is a general partner, proprietor, officer or other employee, or serves as a director, trustee or in any similar managerial capacity.

(5) "<u>Candidate for public office</u>" means any individual who seeks nomination or election to public office, as defined by this chapter. For the purposes of this chapter, an individual shall be deemed to be seeking nomination or election to public office if he/she has:

(5.1) received a political contribution or made an expenditure, or has given his/her consent for any other person or committee to receive a political contribution or make an expenditure, for the purpose of influencing his/her nomination or election to such office, whether or not the specific public office for which he/she will seek nomination or election is known at the time the political contribution is received or the expenditure is made; or

(5.2) taken the action necessary under the laws of the state to qualify him/herself for nomination or election to such office.

(6) "<u>Commission</u>" means the State Ethics Commission as established in section (1) of chapter (II) of this act.

(7) "<u>Compensation</u>" means any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered personally or by another.

(8) "Competitive bidding" means all bidding given and tendered to a state, county or municipal agency in response to an open solicitation of bids from the general public by public announcement or public advertising, where the contract is awarded to the lowest responsible bidder.

(9) "Equity" means any stock or similar ownership in a business.

(10) "Financial interest" means:

(10.1) any interest as a result of which the owner or member of his/her immediate family currently receives or is entitled to receive in the future more than $1,000 per year;

(10.2) any interest representing more than one percent ownership or any percentage of ownership which represents a fair market value of $10,000 or more of a corporation, partnership, sole proprietorship, firm, enterprise, franchise, organization, holding company, joint stock company, receivership, or trust;

(10.3) any interest denoted by a person's position as corporate officer or member of the board of directors or other governing board position in a business;

(10.4) any interest resulting from a position as debtor, creditor or guarantor of another person or business in the amount of $5,000 or more;

(10.5) any interest resulting from real property which is an equitable or legal ownership with a market value of $5,000 or more;

(10.6) provided, however, that financial interest shall not include:

(10.6.1) the authorized compensation paid to an official or employee for his lawful discharge of duties;

(10.6.2) any economic benefit provided equally to all residents of the state.

(11) "<u>Gift</u>" means any payment, entertainment, subscription, forbearance, services or anything of value, rendering or deposit of money, which is transferred to a donee directly or in trust for his/her benefit or by any other means. "Gift" shall not include a political contribution otherwise reported as required by law, a commercially reasonable loan made in the ordinary course of business, or a gift received from immediate family.

(12) "__High-level official__" means:

(12.1) the members of both chambers of the state legislature;

(12.2) the governor, lieutenant governor and the executive council (all secretaries of executive office, _e.g._ the cabinet);

(12.3) any other person holding a position for which one is nominated at a state primary or chosen at a state election;

(12.4) the executive or administrative head or heads of a state agency;

(12.5) the head of each division, bureau, or other major administrative unit within such state agency and persons exercising similar authority;

(12.6) any person whose salary equals or exceeds that of a state employee classified in state statute [cite appropriate state law] and who reports directly to said executive or administrative head; and

(12.7) any other persons occupying positions involving a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or the execution of other public trusts, including appointees to boards and commissions, so determined by a majority of the ethics commission.

(13) "Immediate Family" means: a spouse and any dependent children as well as a person who is related to an official or employee as any of the following, whether by blood or adoption:

*parent;

*child;

*brother, sister;

*grandparent;

*grandchild;

*father-in-law, mother-in-law;

*brother-in-law, sister-in-law;

*son-in-law, daughter-in-law;

*stepfather, stepmother;

*stepson, stepdaughter;

*stepbrother, stepsister;

*half brother, half sister.

(14) "Income" means income from whatever source derived, whether in the form of a fee, salary, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, capital

gain, or any other form of recompense or any combination thereof.

(15) "Legislative agent" means any person who for compensation or reward does any act to promote, oppose, or influence legislation, or to promote, oppose or influence the decision of any member of the executive and/or legislative branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, or rule of regulation pursuant thereto. The term shall include persons who, in the course of their employment, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services.

(16) "Official act" means any decision or action in a particular matter or in the drafting of, voting on, or enactment of legislation.

(17) "Official responsibility" means the administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal, or through subordinates, to approve, disapprove or otherwise direct agency action.

(18) "Participate" means participate in agency action or in a particular matter personally and substantially as a state employee or state official through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

(19) "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, decision, approval, disapproval, contract, claim, controversy, charge, accusation, arrest, recommendation, finding, rendering of advice, or investigation, including the drafting of and voting on special legislation, but excluding drafting of and voting on general legislation by the state legislature.

(19.1) For the purposes of this definition, special legislation shall be understood to mean any legislation which is directed at a specific situation, individual, or entity as distinct from general legislation which is directed at an entire group, class or segment of the state citizenry.

(20) "Person" means a business, individual, corporation, union, association, firm, partnership, committee, or other organization or group of persons.

(21) "<u>Political contribution</u>" means a contribution of money or anything of value, including in-kind transfers, to an individual, candidate, political committee, or person acting on behalf of an individual, candidate or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters, and shall include any:

(21.1) gift, subscription, loan, advance, deposit of money, or thing of value, except a loan or money to a candidate by a national or state bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business;

(21.2) transfer of money or anything of value between political committees;

(21.3) payment, by any person other than a candidate or political committee, or compensation for the personal services of another person rendered to such candidate or committee;

(21.4) purchase from an individual, candidate or political committee, or person acting on behalf of an individual, candidate or political committee, whether through the device of tickets, advertisements, or otherwise, for fund raising activities, including testimonials, held on behalf of said individual, candidate or political committee, to the extent that the purchase price exceeds the actual cost of the goods sold or services rendered;

(21.5) discount or rebate not available to other candidates for the same office and to the general public; and

(21.6) forgiveness of indebtedness or payment of indebtedness by another person.

(22) "Reporting person" means any person required to file a statement of financial interest pursuant to the provisions of section (1) of chapter (V) of this act.

(23) "State agency" means any department of a state government, including the executive, legislative and all councils thereof and thereunder, and any department, division, board, bureau, commission, council, instrumentality or agency, or other independent state authority, district, commission, instrumentality or agency which is primarily funded by or through state authority.

(24) "State employee" means any person performing services for or holding office, position, employment, or membership in a state agency or other independent state authority, district, commission, instrumentality or agency which is primarily funded by or through state authority whether by contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis.

(25) "State official" means any person holding office for which one is nominated at a state primary or chosen at a state election and any person appointed to office in a state agency or other independent state authority, district, commission, instrumentality or agency which is primarily funded by or through state authority, including members of the state legislature and executive council (cabinet).

II

STATE ETHICS COMMISSION

(1) Establishment of the State Ethics Commission

(1.1) The state ethics commission shall consist of seven members. No more than four of the members shall be of the same political party. Of the seven members and with consent of the Senate, five shall be appointed by the Governor, one by the State Secretary and one by the Attorney General. No member or employee of the commission shall:

(1.1.1) hold or be a candidate for any other public office while a member or employee of the commission or for one year thereafter;

(1.1.2) hold office in any political party or political committee;

(1.1.3) participate in or contribute to the political campaign of any candidate for state public office;

(1.1.4) be an employee of or be directly responsible to his/her appointing authority.

(1.2) Commission members shall be appointed to five-year staggered terms. The terms of the initial three of the five members appointed by the Governor shall expire after two years. The terms of the initial two members remaining appointed by the Governor shall expire after three years. The term of the initial member appointed by the Attorney General shall expire after four years. The term of the initial member appointed by the Secretary of State shall expire after five years. No member shall serve on the commission more than ten consecutive years nor be appointed for more than two full terms.

(1.3) Each member shall hold office from the date of his/her appointment until the end of the term for which he/she was appointed or until his/her successor qualifies for office. Any vacancy occurring on the commission shall be filled within 90 days by the original appointing authority.

(1.4) Members of the commission may be removed by the Governor for good cause, including substantial neglect of duty, inability to discharge the powers and duties of office, violation of section (1.1) of this chapter (I), gross misconduct or conviction of a felony.

(1.5) At its first meeting, the commission shall elect a chair. The chair shall serve as such until the end of his/her term as a commission member. The chair shall appoint, with approval of the majority of the full commission, a vice-chair, and an executive director. The vice-chair shall act as chairman in the absence of the chair or in the event of a vacancy of that position. The executive director shall be responsible for the administrative operation of the commission and shall perform such other tasks as the commission shall determine. The executive director shall appoint and discharge employees, including a general counsel, consistent with applicable civil service laws, and shall fix the compensation of employees and prescribe their duties. The general counsel shall be the chief legal officer of the commission and shall advise the commission on all legal matters and, on the instructions of the commission, may commence civil or criminal actions as may be appropriate.

(1.6) The commission may employ the services of such technical, professional and clerical services experts and consultants as are necessary to carry out its duties. The commission may also:

(1.6.1) contract for services which cannot be satisfactorily performed by its employees;

(1.6.2) request the Attorney General to provide legal advice and representation without charge to the commission, and the Attorney General shall comply with the request. The commission may also employ additional legal counsel; and

(1.6.3) request appropriate agencies of state government (e.g. the commissioner of public safety, the state auditor, the comptroller, and the director of the office of campaign and political finance) to provide such professional assistance as it may require in the discharge of its duties.

(1.7) The commission shall meet at least once each month. Five members of the commission shall constitute a quorum and the vote of a majority of the members present is required for any action or recommendation of the commission. The chair or any four members of the commission may call a meeting at any time provided that advance written notice is mailed to each member and public notice is made 72 hours prior to such meeting.

(1.8) Members of the commission shall be compensated for work performed for the commission at a rate of ____ and shall be reimbursed for their reasonable and necessary expenses.

(1.9) The commission shall annually report to the state legislature and the Governor concerning the actions it has taken, the names and salaries and duties of all individuals in its employ, and the money it has disbursed, and shall make such further reports on matters within its jurisdiction as necessary.

(2) Duties and Powers of the State Ethics Commission

The commission shall:

(2.1) prescribe and publish rules and regulations to carry out the purposes of this chapter, including rules governing the conduct of proceedings hereunder;

(2.2) prepare and publish, after giving the public an opportunity to comment, forms for the statements and reports required to be filed by this chapter and make such forms available to any and all persons required to file statements and reports pursuant to section (1) of chapter (V);

(2.3) prepare and publish uniform methods of accounting and reporting to be used by persons required to file statements and financial disclosure reports as required by section (2) of chapter (V);

(2.4) make statements and reports filed with the commission available for public inspection and copying during regular office hours upon the request of any individual free of charge or at a charge not to exceed the actual material costs incurred in reproducing said statements and reports;

(2.5) compile and maintain a computerized index of all reports and statements filed with the commission to facilitate public access to such reports and statements;

(2.6) prepare and publish regular summaries of statements and reports filed with the commission;

(2.7) review all statements of financial interests filed with the commission in order to ascertain whether any reporting person has failed to file such a statement or has filed a deficient statement, based on the following procedure:

(2.7.1) random review of ten percent of all statements;

(2.7.2) within 60 days, review of the members of both chambers of the State Legislature; the Governor, Lieutenant Governor and the Executive Council (all secretaries of executive office, <u>e.g.</u> the cabinet); any other person holding a position for which one is nominated at a state primary or chosen at a state election; the executive or administrative head or heads of a state agency; any person whose salary equals or exceeds that of a state employee classified in ____ of statute ____ and who reports directly to said executive or administrative head.

(2.8) If, upon auditing, it is found that a reporting person has failed to file a statement of financial interest, or if it is found that any such statement filed with the commission fails to conform with the requirements of sections (2) of chapter (V), then the commission shall, in writing, notify the delinquent of failure to comply and of:

(2.8.1) necessity to comply within fourteen days or face criminal and/or civil penalty;

(2.8.2) criminal penalties for any intentional or willing failure to comply, falsification of content, or fictitious response;

(2.9) preserve all statements and reports filed with the commission for a period of ____ years;

(2.10) in a timely fashion upon request from a person who is or may be subject to the provisions of this chapter and chapters (III), (IV), (V) and (VI), render advisory opinions on the requirements of said chapters. An opinion rendered by the commission, until and unless amended or revoked, shall be a defense in a criminal action brought under this and any other chapters and shall be binding on the commission in any subsequent proceedings concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for an opinion. Such requests shall be confidential; provided, however, that the commission shall publish such opinions, but the name of the requesting person and any other identifying information shall not be included in such publication unless the requesting person consents to such inclusion;

(2.11) act as the primary civil enforcement agency for violations of all sections of chapters (III), (IV), (V) and (VI).

(3) <u>Investigations by the Commission/Preliminary Investigation</u>

(3.1) Not later than ten days after the commission receives a sworn complaint signed under pains and penalties of perjury, or not later than ten days after the receipt of evidence deemed sufficient by the commission, the commission shall initiate a preliminary inquiry into any alleged violation of any section of chapters (III), (IV), (V) or (VI). At the beginning of a preliminary inquiry into any such alleged violation, the commission shall notify the Attorney General of such action. The commission shall notify any person who is the subject of a preliminary inquiry of the existence of such inquiry within 30 days of commencement of the inquiry.

(3.1.1) All commission proceedings and records relating to a preliminary inquiry shall be confidential, except:

(3.1.1.1) the commission may turn over to the Attorney General, the appropriate U.S. District Attorney or a district attorney of competent jurisdiction, evidence which may be used in criminal proceedings; and

(3.1.1.2) if the complainant or alleged violator publicly discloses the existence of a preliminary investigation, the commission may publicly confirm the existence of the inquiry and, in its discretion, make public any documents which were issued to either party.

(3.2) If a preliminary inquiry fails to indicate reasonable cause for belief that any section of chapters (III), (IV),

(V) or (VI) have been violated, the commission shall immediately terminate the inquiry and so notify, in writing, the complainant, if any, and the alleged violator, except:

(3.2.1) if the investigation fails to indicate reasonable cause, the commission may, in writing, confidentially inform the alleged violator of potential violations and provide information to ensure future compliance with the law. If the alleged violator publicly discloses the existence of such action by the commission, the commission may confirm the existence of the resolution and, in its discretion, make public any documents which were issued to the alleged violator.

(3.3) If a preliminary inquiry indicates reasonable cause for belief that any section of chapters (III), (IV), (V) or (VI) have been violated, the commission may, upon majority vote:

(3.3.2) due to mitigating circumstances such as lack of significant economic advantage or gain by the alleged violator, lack of significant economic loss to the state, or lack of significant impact on public confidence in government, in writing, confidentially reprimand the alleged violator for potential violations of the law and provide a copy of the reprimand to the alleged violator's appointing authority, if any. If the alleged violator publicly discloses the existence of such a resolution, the commission may confirm the existence of the resolution and, in its discretion, make public any documents which were issued to the alleged violator; or

(3.3.3) initiate an adjudicatory proceeding to determine whether there has been such a violation.

(3.4) For the purposes of carrying out a preliminary investigation according to section (3.1) and/or an adjudicatory proceeding, the commission may require by subpoena the attendance and testimony of witnesses and the production of books, papers and other records relating to any matter being investigated by it pursuant to this chapter or chapters (III), (IV), (V) or (VI). Such subpoenas may be issued by the chair or the majority of the members of the commission and shall be served in the same manner as subpoenas for witnesses in civil cases, and all provisions of law relative to subpoenas issued in such cases, including compensation of witnesses, shall apply to subpoenas issued by the commission. Upon petition by the commission, any superior court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpoena or order of the commission, issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as contempt thereof.

(3.5) All testimony in a commission adjudicatory proceeding shall be under oath. All parties shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses, to submit evidence, and to be represented by counsel and any other due process rights, privileges and responsibilities of a witness appearing before the courts of this state. Before testifying, all witnesses shall be given a copy of the regulations governing commission proceedings. All witnesses shall be entitled to be represented by counsel.

(3.6) Any person whose name is mentioned during adjudicatory proceedings of the commission and who may be adversely affected thereby may appear personally before the commission on said person's own behalf, with or without attorney, to give a statement in opposition to such adverse mention or file a written statement of such opposition for incorporation into the record of proceeding.

(3.7) All adjudicatory proceedings of the commission carried out pursuant to the provisions of this section shall be public, unless the members vote to go into executive session in accordance with [cite appropriate state statute].

(3.8) Within 30 days after the end of an adjudicatory proceeding pursuant to the provisions of this section, the commission shall meet in executive session for the purpose of reviewing the evidence before it. Within 30 days after completion of deliberations, the commission shall publish a written report of its findings and conclusions.

(3.9) The commission, upon a finding pursuant to an adjudicatory proceeding that there has been a violation of this chapter or chapters (III), (IV), (V) or (VI) may:

(3.9.1) issue an order requiring the violator to cease and desist such violation of this chapter or chapters (III), (IV), (V) or (VI);

(3.9.2) issue an order requiring the violator to file any report, statement or other information as required by section (4) of chapter (IV) and sections (1) and (2) of chapter (V);

(3.9.3) in writing, publicly reprimand the violator for potential violations of the law and provide a copy of the reprimand to the alleged violator's appointing authority, if any;

(3.9.4) in writing, recommend to the violator's appointing authority of removal or suspension from office of violator, as well as a recommendation for length of suspension, to be approved by the appointing authority, if any;

(3.9.5) issue an order requiring the violator to pay a civil penalty of not more than $2,000 for each violation of this chapter or chapters (III), (IV), (V) and (VI).

(3.10) In addition to any other remedies provided by law, any violation of any section of chapters III and IV, inclusive, which has substantially influenced the action taken by any state agency in any particular matter, shall be grounds for avoiding, rescinding or cancelling the action on such terms as the interests of the state and innocent third persons require.

(3.11) The state ethics commission may bring a civil action against any person who has acted to his/her economic advantage in violation of any section of chapters (III) and (IV), inclusive, and may recover on behalf of the state damages in the amount of three times the economic advantage or $500, whichever is greater. If there has been no final criminal judgement of conviction or acquittal of the same violation, upon receipt of the written approval of the Attorney General, the state ethics commission may, at the discretion of the court, so recover additional damages in an amount not exceeding twice the amount of economic advantage or $500, and a judgment for such damages shall bar any criminal prosecution for the same violation.

(3.12) The commission may file a civil action in superior court to enforce such an order.

(3.13) The commission shall refer to the Attorney General violations of the law which in its opinion merit prosecution. The Attorney General shall have responsibility for all prosecutions under the law and may request from the commission all evidence collected in its investigation. The commission may represent itself through the general counsel in all subsequent proceedings.

(3.14) Any final action by the commission made pursuant to this section (3) of this chapter shall be subject to review in superior court upon petition of any party in interest filed within 30 days after the action for which review is sought. The court shall enter a judgement enforcing, modifying or setting aside the order of the commission or it may remand the proceeding to the commission for such further action as the court may direct.

(4) <u>Whistleblower Protection</u>

(4.1) A state agency or appointing authority shall not discharge, threaten, or otherwise discriminate against a complainant, or state employee or state official acting on behalf of a complainant, regarding compensation, terms, conditions, location, or privileges of employment because:

(4.1.1) the complainant, or state employee or state official acting on behalf of the complainant, reports or is about to report, verbally or in writing, a violation or a suspected violation of this act or because;

(4.1.2) a complainant, or state employee or state official acting on a behalf of the complainant, is requested by the commission to participate in an investigation, hearing, or inquiry held by the commission or any related court action;

(4.1.3) provided, however, that this section shall not apply to a complainant, or state employee or state official acting on behalf of a complainant, who knowingly makes a false report.

(4.2) A complainant, or state employee or state official acting on behalf of a complainant, who alleges a violation of section (4.1) may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of section (4.1).

(4.2.1) A court, in rendering a judgement in an action brought pursuant to this act, shall order, as the court considers appropriate, reinstatement of the complainant, or state employee or state official acting on behalf of the complainant, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, or any combination of these remedies. A court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.

(5) <u>Multi-year Reauthorization</u>

(5.1) The state ethics commission is hereby authorized to carry out the provisions of this chapter with appropriations:

(5.1.1) not to exceed $_______ for the fiscal year ending _______;

(5.1.2) not to exceed $______ for each of the five fiscal years thereafter.

III

ANTI-BRIBERY AND ANTI-EXTORTION

(1) Bribery

(1.1) No person may, other than as provided by law for the proper discharge of official duty, directly or indirectly give, offer, or promise anything of value, including, but not limited to a gift, favor or promise of future employment, to any state employee or state official, including members of his/her immediate family, or to any person who has been selected to be such an employee or official, including members of his/her immediate family, or any other person or entity, with intent:

(1.1.1) to influence any official act or any act within the official responsibility of such employee or official or person who has been selected to be an employee or official; or

(1.1.2) to influence an employee or official, or person who has been selected to be such an employee or official, to commit or aid in committing, or collude in, or allow any fraud, or create the opportunity for commission of any fraud on a state agency; or

(1.1.3) to induce an employee or official, or person who has been selected to be such an employee or official, to do or omit to do any act in violation of his/her lawful duty.

(2) <u>Extortion</u>

(2.1) No state employee or state official, or a person selected to be such an employee or official, other than as provided by law for the proper discharge of official duty, may directly or indirectly ask, demand, exact, solicit, seek, accept, receive or agree to receive anything of value including, but not limited to a gift, favor or promise of future employment, for him/herself or any other person or entity, in exchange for:

(2.1.1) influencing his/her performance of any official act or any act within his/her official responsibility; or

(2.1.2) influencing him/her to commit or aid in committing, or collude in, or allow any fraud, or create opportunity for the commission of any fraud, on a state agency; or

(2.1.3) inducing him/her to do or omit to do any acts in violation of his/her official duty.

(3) Giving and Soliciting in General

(3.1) No person may, other than as provided by law for the proper discharge of official duty, directly or indirectly give, offer, or promise anything of value, including, but not limited to a gift, favor or promise of future employment, to any state employee or official, including members of his/her immediate family, or to any person who has been selected to be such an employee or official, including members of his/her immediate family, or any other person or entity, for, or because of, any official act performed or to be performed by such an employee or official, or person selected to be such an employee or official.

(3.2) No state employee or official, or person selected to be such an employee or official, other than as provided by law for the proper discharge of official duty, may directly or indirectly ask, demand, exact, solicit, seek, accept, receive or agree to receive anything of value including, but not limited to, a gift, favor or promise of future employment, for him/herself or any other person or entity, for, or because of, any official act or act within his/her official responsibility performed or to be performed.

(4) Limitations to this Chapter (III)

(4.1) Except as prohibited in sections (1), (2) and (3), nothing in this chapter shall prohibit any person from giving or receiving:

(4.1.1) an award publicly presented in recognition of public service; or

(4.1.2) commercially reasonable loans made in the ordinary course of the lender's business; or

(4.1.3) political contributions, consistent with applicable state law.

IV

RESTRICTED ACTIVITIES

(1) General Provision/Abuse of Office

(1.1) No state employee or state official may use his/her public office to obtain financial gain, other than compensation provided by law, whether for:

(1.1.1) personal gain;

(1.1.2) gain of state employee's or state official's immediate family; or

(1.1.3) gain of any business with which the state employee or state official is associated or any person or organization with whom the state employee or state official is negotiating or has any arrangement concerning prospective employment or has a financial interest.

(2) General Provision/Abuse of Information

(2.1) No state employee or state official may use or disclose, other than in the performance of official duties and responsibilities, or as may be required by law, confidential information acquired in the course of or by reason of such state employee's or official's position of employment, to obtain financial gain, other than compensation provided by law, whether for:

(2.1.1) personal gain;

(2.1.2) gain of state employee's or state official's immediate family; or

(2.1.3) gain of any business with which the state employee or state official is associated or any person or organization with whom one is negotiating or has any arrangement concerning prospective employment or has a financial interest.

(3) General Conflict-of-interest Provision

(3.1) No state employee or state official may participate as such in a particular matter concerning the state or a state agency in which the following has a financial interest:

(3.1.1) the state employee or state official;

(3.1.2) state employee's or state official's immediate family;

(3.1.3) a business with which the state employee or state official is associated; or

(3.1.4) any person or organization with whom the state employee or state official is negotiating or has any arrangement concerning prospective employment.

(3.2) Any state employee or state official so identified by section (3.1) whose duties would otherwise require the state employee or state official to participate in a particular matter concerning the state or a state agency shall advise the official responsible for appointment to the state employee's or state official's position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest. The appointing official shall thereupon either:

(3.2.1) assign the particular matter to another employee or official; or

(3.2.2) assume responsibility for the particular matter; or

(3.2.3) recommend the employee or official immediately eliminate any such financial interest as identified in section (3.1) and, only thereafter, continue to participate in the particular matter; or

(3.2.4) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the state or state agency of said employee or official may expect from the employee or official, in which case it shall not be a violation for the employee or official to participate in the particular matter. Copies of such written determination shall be forwarded to the employee or official and filed with the state ethics commission by the person who made the determination. The state ethics commission shall make such written determinations available to the public.

(3.3) Any legislator so identified by section (3.1) shall abstain from participating in such particular matters, including the drafting of and voting on special legislation, and shall disclose fully to the ethics commission and to the legislature the nature and circumstances of the particular matter requiring action and the nature of the financial interest in conflict with such action.

(4) **Conflict-of-interest Provision for High-level Officials**

(4.1) Any high-level official, as defined in section (12) of chapter (I), except for legislators, who in the discharge of his/her official duties would be required knowingly to take action which would substantially affect such official's financial interests as determined by section (3) of this chapter, unless the effect on the official is no greater than on the general public, shall abstain from such required action and shall disclose fully to the ethics commission the nature and circumstances of the matter requiring action and the nature of the financial interest in conflict with such action.

(4.2) If the financial interests of a legislator are affected by any general legislation as determined by section (3), the legislator, unless the effect on the legislator is no greater than on the general public, prior to a vote on such legislation, shall disclose to the ethics commission and the legislature the matter requiring action and the nature of the financial interest in conflict with such action.

(5) **Restrictions on Compensation and Representation**

(5.1) No state employee or state official may, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the state or agency, in relation to any particular matter in which the state or a state agency is a party or has a direct and substantial interest.

(5.2) No person may, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(5.3) No state employee or state official may, otherwise than in the proper discharge of official duties, act as agent or attorney for him/herself or anyone other than the state or a state agency for prosecuting any claim against the state or state agency, or as agent or attorney for him/herself or anyone else in connection with any particular matter in which the state or a state agency is a party or has a direct and substantial interest.

(5.4) A member of the state legislature shall not be subject to paragraphs (5.1) or (5.3). However, no member of the state legislature may personally appear for any compensation other than his/her statutory compensation for legislative duties before the state or any state agency, unless:

(5.4.1) the appearance is before a court of the state; or

(5.4.2) the particular matter before the state agency is ministerial in nature; or

(5.4.2.1) For the purposes of section (5.4.2), ministerial functions include, but are not limited to, the filing or amendment of:

* tax returns;
* incorporation papers;

(5.4.3) the appearance is in a quasi-judicial proceeding.

(5.4.3.1) For the purposes of this section (5.4.3), a proceeding shall be considered quasi-judicial if:

* the action of the state agency is adjudicatory in nature; and
* the action of the state agency is appealable to the courts; and

* both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

(6) <u>Contracts</u>

(6.1) A state employee or state official may not have, directly or indirectly, a financial interest in or be a party to a contract made by a state agency in which the state or a state agency is an interested party, if the state employee or state official is employed in the contracting agency and the contract is under his/her official responsibility. This section shall not apply if:

(6.1.1) the state employee or state official in good faith and within 30 days after he/she learns of an actual or prospective violation of this section makes full disclosure of said employee's or state official's financial interests to the contracting agency and the state ethics commission and terminates or disposes of the interest; or

(6.1.2) the contract is made after public notice or where applicable, through competitive bidding, and if the state employee or state official files with the state ethics commission a statement making full disclosure of said employee's or official's interest and the interests of said employee's or official's immediate family in the contract.

(7) Provision Concerning Employment of Relatives

(7.1) No state employee or state official shall employ or advocate employment in any state agency:

(7.1.1) any person who is a member of his/her immediate family;

(7.1.2) in exchange for or in consideration of the employment of any member of his/her immediate family by any other employee or official.

(7.2) No state employee or state official shall use or permit the use of his/her position to assist any member of his/her immediate family in securing employment or contracts with any state agency exercising contract authority over said employment or contract.

(8) Post-employment Restrictions

(8.1) No high-level official, as defined in section (12) of chapter (I), except members of the legislature, may, after retirement or termination of such employment:

(8.1.1) knowingly act as agent or attorney for, or otherwise represent any other person, except the state or a state agency, concerning any formal or informal appearance before; or

(8.1.2) knowingly make, with the intent to influence, any communication on behalf of any other person (except the state) to;

(8.1.3) the state or a state agency in connection with any particular matter in which the state is a party or has a direct interest and in which the official participated personally and substantially and which involved a specific party or specific parties at the time of such participation.

(8.2) No high-level official, as defined in section (12) of chapter (I), except members of the legislature, may, within two years of retirement or termination of such employment:

(8.2.1) knowingly act as agent or attorney for, or otherwise represent, aid, or advise any other person, except the state or a state agency, concerning any formal or informal appearance before; or

(8.2.2) knowingly make, with the intent to influence, any communication on behalf of any other person (except the state) to;

(8.2.3) the state or a state agency in connection with any particular matter in which the state is a party or has a direct interest and which was pending under his/her official responsibility and which involved a specific party or specific parties at the time it was so pending.

(8.3) A high-level official, as defined in section (12) of chapter (I), shall not, within one year of retirement or termination of such employment:

(8.3.1) act as agent or attorney or otherwise represent any person, other than the state or a state agency, in any formal or informal appearance before; or

(8.3.2) make, with intent to influence, any communication on behalf of any other person, other than the state or a state agency to;

(8.3.2.1) any agency of the state, except a court of law, in connection with any matter in which the state or a state agency is a party or has a direct interest, if the official is identified as "high-level" by sections (12.1) through (12.4) of chapter I.

(8.3.2.1) the agency of his/her former employment, in connection with any matter in which the state or a state agency is a party or has a direct interest, if the official is identified as "high-level" by sections (12.5) through (12.7) of chapter I.

(9) Restrictions on Acceptance of Honoraria

(9.1) No person while an elected or appointed officer or employee of the government shall accept any honoraria. The term "honoraria" means a payment of money or anything of value to such person for any appearance, discussion, speech or article by such person, or for travel and subsistence expenses in excess of any actual and necessary expenses in connection with such appearance, discussion, or speech.

V

FINANCIAL DISCLOSURE

(1) General Guidelines for Statement of Financial Interests

(1.1) Every candidate for public office shall file a statement of financial interest for the preceding calendar year with the commission on or before the date on which a certificate of nomination or nomination papers for such candidate are submitted to the state secretary.

(1.1.1) Every candidate for public office who has not filed nomination papers with the state secretary, but on whose behalf a statement of organization of a political committee has been filed with the director of campaign and political finance under section _____ and who is seeking public office by the so-called "write-in" or "sticker" method, shall, within three days after such filing, file a statement of financial interests with the commission.

(1.2) Every high-level official shall file a statement of financial interests for the preceding calendar year with the commission on or before the last Tuesday in May of each year that such official holds such office and on or before May 1 of the year after such official leaves such office; provided, however, that no official shall be required to file a statement of financial interests for any year in which he/she held public office for less than eight days.

(1.3) The commission shall, upon receipt of a statement of financial interests pursuant to the provisions of this section, issue to the person filing such statement a receipt verifying the fact that statement of financial interests has been filed and receipted copy of such statement.

(1.4) No candidate for public office or high-level official shall be allowed to take the oath of office, enter or continue in his duties, or receive compensation from public funds unless he/she has filed a statement of financial interests with the commission as required by this chapter.

(1.5) The statement of financial interests filed pursuant to the provisions of this section shall be on a form prescribed by the commission and shall be signed under penalty of perjury by the reporting person.

(2) <u>Content of Statement of Financial Interests</u>

(2.1) Reporting persons shall disclose, to the best of their knowledge, the following information for the preceding calendar year, or as of the last day of said year with respect to the information required by sections (2.1.1) through (2.1.10) below; such persons shall also disclose the same information with respect to their spouse and dependent children:

(2.1.1) The name and address of, the nature of association with, the share of equity in, if applicable, and the amount of income if greater than $1,000 derived from such business with which the reporting person is associated; and, if the business or entity has done business with or been regulated by the state or any political subdivision thereof, the date and the nature of such business or regulation;

(2.1.2) The identity of all securities and other investments with a fair-market value of greater than $1,000 which were beneficially owned, not otherwise reportable hereunder; and the amount of income if more than $1,000 from any such security which is issued by the state or any political subdivision thereof or any public agency or authority created by the state legislature;

(2.1.3) Except as provided in section (2.1.3.1), the amount of holdings in and/or income from a trust or other financial arrangement received. The reporting individual need not report the holdings of:

(2.1.3.1) Any trust that was not created directly by the reporting person, his/her spouse or dependent child; or the holdings or income of which the reporting person, his/her spouse or dependent children have no knowledge.

(2.1.4) The name and address of each creditor to whom more than $1,000 was owed and the original amount, the amount outstanding, terms of repayment, and the general nature of the security pledged for each such obligation;

(2.1.5) The name and address of the source, and the cash value of any reimbursement for expenses aggregating more than $50 in the calendar year if the source of such reimbursement is a legislative agent; or if the recipient is a high-level official and the source of such reimbursement is a person having a direct interest in a matter before the state agency by which the recipient is employed;

(2.1.6) The name and address of the source, the date of receipt, and the fair market value of any gift received, the value of which is in excess of $50; and the name and address of the source, the date of receipt, and the fair market value of a series of gifts from the same source received in the calendar year, the aggregate value of which exceeds $50, if the recipient is a high-level official and if the source is other than a member of his/her immediate family;

(2.1.7) The description, as appearing on the most recent tax bill, and the amount of assessed value of all real property located within the state, in which a direct or indirect financial interest was held, which has an assessed value greater than $1,000 and, if the property was transferred during the year, the name and address of the person furnishing consideration to the reporting person or receiving it from him or her in respect to such transfer;

(2.1.8) The name and address of any creditor who has forgiven an indebtedness of more than $1,000, and the amount forgiven; provided, however, that no such information need be reported if the creditor is a spouse, dependent child or member of his/her immediate family;

(2.1.9) The name and address of any business from which the reporting person is taking a leave of absence; the name and address of the source, and the amount, of any severance payments received from any business from which the reporting person is taking a leave of absence or retiring to become a candidate for public office, assume a public office or a position as a public employee; or if the recipient is a high-level official and the source of such payment is a person having a direct interest in legislation, legislative action, or a matter before a state agency; or if the recipient is a high-level official and the source of such payment is a person having a direct interest in a matter before the state agency by which the recipient is/was employed;

(2.1.10) The identity of any equity in a business with which the reporting person is associated that has been transferred to a member of the reporting person's immediate family; provided, however, that a member of the reporting person's family need not report any such transfer to the reporting person.

(2.2) Nothing in this section shall be construed to require the disclosure of information which is privileged by law.

(2.3) A reporting person must file a statement of financial interests within 30 days after receiving notice as provided in section (2.8) of chapter (II). A reporting person must file a complete statement of financial interests after receipt of such notice. Upon failure of reporting to fulfill either of these obligations, the commission may initiate appropriate proceedings pursuant to the provisions of section (3) of this chapter (II).

VI

RESTRICTIONS ON LEGISLATIVE AGENTS

(1) Giving and Legislative Agents

(1.1) No legislative agent shall knowingly and willfully offer or give any gift or gifts, act as an agent or intermediary in the giving of any gift or gifts, or arrange for the giving of any gift or gifts by any other person to a high-level official or a member of such person's immediate family, and no high-level official or member of such person's immediate family shall knowingly and willfully solicit or accept from any legislative agent, any gift or gifts, with an aggregate value of $50 or more in a calendar year, except when the source of such gift is a member of his/her immediate family.

(2) Prohibiting Contributions During the Legislative Session

(2.1) No legislative agent shall contribute to, act as agent or intermediary for contributions to, or arrange for the making of contributions to the campaign funds of any elected official during the legislative session.

VII

PENALTIES

AND

SEVERABILITY

(1) Penalties

(1.1) Any violation of a provision of any section of this act shall be punishable by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(2) Severability

(2.1) If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of this act and the application of such provisions to other persons and circumstances shall not be affected thereby.

THE FOLLOWING DOCUMENT HAS NOT BEEN FILMED BUT IS AVAILABLE IN THE ORIGINAL FILE

C O G E L

Council on Governmental Ethics Laws

Model Laws
Second Draft

For more information regarding COGEL, contact: Joyce Bullock, The Council of State Governments, P.O. Box 11910, Iron Works Pike, Lexington, Kentucky 40578-1910, (606) 231-1920.