

## MEMORANDUM

**TO:** Commission on Strengthening Utah's Democracy

**FROM:** Scott S. Bell of Parsons Behle & Latimer

**DATE:** March 2009

**SUBJECT:** Ethics Laws—Gifts to Officeholders and Public Employees, Conflicts of Interest, and Independent Ethics Commissions

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### **I. Gifts to Officeholders and Public Employees**

#### **A. Description of Utah's Current Laws**

##### **1. Gifts from All Sources**

By executive order, a Utah Executive Branch employee may not accept any “gift” that “might be intended to influence or reward the [employee] in the performance of official business.”<sup>1</sup> “Gift” is not defined, but campaign contributions, “food, refreshments, or meals of limited value” (without defining “limited value”), and gifts from personal friends are expressly permitted.<sup>2</sup> Please note that Utah Executive Branch employees must abide by the order’s restrictions and by the statutory provisions below.

By state statute, public officers<sup>3</sup> and employees may not solicit or accept any gift of “substantial value” if: (a) it would improperly influence a reasonable person in the officer’s or employee’s same position to not faithfully and impartially discharge public duties; (b) a reasonable person in the officer’s or employee’s position would know that the gift is to reward an official action taken; or (c) the public officer or employee has been, is now, or in the near future may be involved in any governmental action directly affecting the donor. Despite this statutory ban, public officers and employees may accept “an occasional nonpecuniary gift” worth \$50 or less.<sup>4</sup>

Utah law does not impose any bans on gifts from particular categories of persons (*e.g.*, lobbyists, vendors). Please note that gifts to executive and legislative officials and employees are not disclosed unless given by registered lobbyists.

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<sup>1</sup> Ut. Gov. Executive Order 2007-0001 § 2(a) (Feb. 14, 2007).

<sup>2</sup> Ut. Gov. Executive Order 2007-0001 § 2(b) (Feb. 14, 2007).

<sup>3</sup> “Public officer” means “all elected or appointed officers of the state or any of its political subdivisions who occupy policymaking posts,” but “does not include legislators or legislative employees.” Utah Code § 67-16-3.

<sup>4</sup> Utah Code §§ 67-16-5; 67-16-6. Some gifts are not prohibited if disclosed in writing to the appropriate agency head and to the attorney general.

## 2. Gifts from Lobbyists

During the 2009 session, the Utah Legislature passed legislation that amends Utah's gift law provisions as they relate to lobbyists. This bill will go into effect on May 12, 2009. The paragraph below discusses Utah law, as amended by this 2009 legislation.

Lobbyists are prohibited from giving "gifts" to public officials "if the public official has been, or is now, or in the near future may be involved in any governmental action directly affecting the donor."<sup>5</sup> For permissible gifts, lobbyists must file quarterly expense reports documenting the total amount of expenditures they have made to benefit any public official.<sup>6</sup> "Gift" means "a transfer of real property or tangible personal property for less than fair and adequate consideration," "cash," and "admission to a sporting, recreational, or artistic event whether as a spectator or a participant."<sup>7</sup> In addition, lobbyists must report any gift to a public official or employee worth more than \$10.<sup>8</sup> Lobbyists must also report all aggregate daily expenditures greater than \$25 for food and beverage that benefit a public official or employee, unless the food and beverage is offered or provided (1) to all members of the legislature, a legislative committee, or a party caucus; or (2) at an event related to a National Conference of State Legislatures (or comparable) meeting and all attendees from a house of the Legislature are invited to the event.<sup>9</sup>

### **B. Statistics Concerning Utah's Approach and Alternative Approaches**

- 12 states, unlike Utah, strictly ban all gifts from lobbyists;
- 33 states, unlike Utah, place a dollar limitation on gifts; and
- 23 states, including Utah, in some way specially exempt food and beverage costs from gift prohibitions.<sup>10</sup>

### **C. Examples of Alternative Approaches**

#### 1. Gift Limit—California

California allows government officials to accept gifts, and lobbyists to make gifts, but imposes broadly applicable and relatively strict limits on the monetary value of such gifts. California defines "gift" to include any payment that confers a personal benefit on the recipient when the recipient does not pay equal value in exchange.<sup>11</sup> Lobbyists are prohibited from giving public officials gifts worth an aggregate value of more than \$10 in any calendar month.<sup>12</sup> Candidates and government officials are prohibited from accepting gifts from any single source

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<sup>5</sup> Utah Code § 36-11-304 (a "lobbyist, principal, or government officer may not offer to or give any public official any gift or loan

<sup>6</sup> Utah Code § 36-11-201.

<sup>7</sup> Utah Code §§ 36-11-304, 36-11-102(4) *as amended by* Utah Legislature, S.B. 156 (2009 Session).

<sup>8</sup> Utah Code § 36-11-201(3)(e)(B) *as amended by* Utah Legislature, S.B. 156 (2009 Session).

<sup>9</sup> Utah Code § 36-11-201(3)(e)(C) *as amended by* Utah Legislature, S.B. 156 (2009 Session).

<sup>10</sup> National Conference of State Legislatures, <http://www.ncsl.org/programs/ethics/Gifts.htm>.

<sup>11</sup> California Gov't Code § 82028(a).

<sup>12</sup> California Gov't Code § 86203.

in a calendar year worth more than \$420.<sup>13</sup> Wedding gifts, payments for travel related to a government purpose, and gifts exchanged between individuals on holidays and other similar occasions are neither prohibited nor subject to the \$420 limit.<sup>14</sup> California does not exempt food and beverage from the definition of “gift” except under limited circumstances.<sup>15</sup>

## 2. No Gift Limit, Full Disclosure—Hawaii

Hawaii prohibits government officials and employees from accepting gifts in any form “under circumstances in which it can reasonably be inferred that the gift is intended to influence” the official or employee in his or her performance of official duties.<sup>16</sup> For gifts that are not prohibited, officials and employees must file an annual gift disclosure statement that reveals the source (including a non-lobbyist source) of a gift or gifts with a total value of more than \$200, including gifts to the official’s or employee’s spouse or dependent child.<sup>17</sup> Gift is not statutorily defined, but Hawaii law exempts certain types of value transfers (holiday gifts, gifts between individuals who are related, campaign contributions) from reporting requirements.<sup>18</sup> Hawaii law imposes no dollar limit on gifts.

## 3. Significant Exemptions from Definition of Gift—Nevada

In Nevada, a gift does not include the “cost of entertainment, including the cost of food or beverages.”<sup>19</sup> Nevada prohibits public officers and employees from accepting any gifts, favor, or economic opportunities which would tend to influence them to depart from the faithful and impartial discharge of their duties.<sup>20</sup>

### **D. Pros and Cons of Approaches**

Gift prohibitions and limits, their advocates say, help eliminate both the possibility and appearance of improper influence over public officials and employees. Excessive gift-giving, especially if not reported, may raise the appearance that government officials favor people or organizations that provide them with gifts.<sup>21</sup> One criticism of gift statutes is that they are burdensome for both donor and donee. No state has entirely banned all forms of gifts; instead, gift laws typically exempt certain types of gifts from regulation. Some states allow gifts below a certain dollar level, some allow gifts between individuals with certain established relationships, and some states exempt certain types of events or activities—such as meals—from the prohibition. These exemptions can create confusion about disallowed activities and benefits,

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<sup>13</sup> California Gov’t Code § 89503. The gift limitation is adjusted every two years to reflect changes in the consumer price index and rounded to the nearest ten dollars. Cal. Gov’t Code §89503; Cal. Code Regs. tit. 2, §18940.2

<sup>14</sup> Cal. Code Regs. tit. 2, §18942.

<sup>15</sup> California Gov’t Code § 82028(b). Under the “home hospitality” exception, non-lobbyist individuals may host an official at home when the host’s immediate family is present. Cal. Code Regs. tit. 2, §18942(a)(7).

<sup>16</sup> Hawaii Code § 84-11.

<sup>17</sup> Hawaii Code § 84-11.5

<sup>18</sup> Hawaii Code § 84-11.5(d).

<sup>19</sup> Nev. Rev. Stat. § 218.908.

<sup>20</sup> Nev. Rev. Stat. § 281A.400.

<sup>21</sup> See Appendix A at 4.

making compliance difficult.<sup>22</sup> Critics of gift laws also believe that, if too stringent, regulation needlessly stifles valuable activities, such as fact-finding travel and community events.

As compared to other matters the Commission will examine, little controversy surrounds requiring disclosure of gifts to public officials and employees—partly because gift-disclosure requirements are common and partly because, unlike campaign contributions, gifts raise fewer First Amendment concerns. The policy behind disclosure laws has been explained as follows: “There are three key assumptions under the disclosure heuristic. The first is that enough incentive can be given to encourage public officials and lobbyists to report their behavior. The second is that disclosure laws will encourage public officials to avoid undue influence rather than simply to avoid the appearance of undue influence by hiding the identities of benefactors. The third assumption is that the public will use disclosed information to assess the presence or absence of undue influence and vote accordingly.”<sup>23</sup>

### **E. Description of How to Amend Utah Law**

Utah’s gift laws are mostly statutory, meaning that most changes may be effected by amending the Utah Code. The governor may also unilaterally amend rules that apply to Utah Executive Branch officials and employees by amending his existing 2007 executive order.

## **II. Conflict of Interest Rules for Office Holders and Candidates**

### **A. Description of Utah’s Current Law**

Utah state legislators may not: (a) “engage in any employment or other activity that would destroy or impair their independence of judgment;” (b) lobby other members of the legislature for compensation; or (c) use any information obtained by reason of their official position to gain an advantage in competition for activities with the state. Legislators may engage in business or professional activities with the state if the activities are entered into under the same conditions applicable to private citizens engaged in similar activities.<sup>24</sup>

Utah public officials and employees are not forbidden from holding employment outside of the government. Legislators may serve as both a legislator and a public employee so long as the legislator does not receive double compensation for hours worked.<sup>25</sup> Executive branch employees may engage in outside employment so long as it does not interfere with the employee’s duties and does not conflict with the state’s interests or give reason for suspicion of conflicting interests.<sup>26</sup>

Utah state legislators must annually file a Declaration of Conflict of Interest form, which requires the disclosure of: (a) businesses worth \$10,000 or more in which a legislator holds a position such as director, officer, owner, member, partner or employer; and (b) legislative subject

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<sup>22</sup> See Appendix B at 3.

<sup>23</sup> See Appendix C at 7.

<sup>24</sup> Utah Leg. Joint Rule 6-1-102.

<sup>25</sup> Utah Code § 67-19-19.

<sup>26</sup> Utah Dept. of Human Resource Management Rule 477-9-2.

areas in which a legislative action could cause direct financial benefit to the legislator, his spouse, or his children living in the household. Legislators are not prohibited from voting on any legislation that presents a conflict of interest. However, it is a criminal offense for a legislator to fail to disclose a known conflict of interest relating to a bill pending before the legislature.<sup>27</sup> Utah's conflict forms do not specifically require a legislator to list income-amount categories, creditors, or debtors.<sup>28</sup> Utah Executive Branch officials are not required to file any personal financial disclosure forms or conflict-of-interest forms.<sup>29</sup>

## **B. Statistics Concerning Utah's Approach and Alternative Approaches**

- 15 states, unlike Utah, place significant restrictions on holding two positions of public employment;
- 16 states, unlike Utah, require legislators to both disclose income amounts and categorize those income amounts;
- 30 states, unlike Utah, specifically require legislators to list creditors and/or debtors; and
- 46 states, unlike Utah, require executive branch officials to file personal financial disclosure forms or conflict-of-interest forms.<sup>30</sup>

## **C. Examples of Alternative Approaches**

### **1. Outside Employment—Alaska and Rhode Island**

In Alaska, the state constitution prohibits legislators from holding another government job while serving as a legislator. The constitution states: "No legislator may hold any other office or position of profit under the United States or the State."<sup>31</sup>

Rhode Island prohibits elected officials from seeking or accepting employment from a state agency while the elected official holds office and for one year thereafter. An elected official may maintain employment with a state agency that existed prior to the official's election, and there is no prohibition against employment with a municipality.<sup>32</sup>

### **2. Personal Financial Disclosure—Oregon, Massachusetts, Colorado, and Washington**

Oregon requires public officials to make a detailed disclosure of income sources. Public officials must annually file a form that discloses the five most significant sources of income received during the preceding calendar year by the official and by each member of the official's

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<sup>27</sup> Utah Code § 76-8-109.

<sup>28</sup> National Conference of State Legislators, [http://www.ncsl.org/programs/ethics/fd\\_income\\_requirements.htm](http://www.ncsl.org/programs/ethics/fd_income_requirements.htm).

<sup>29</sup> See The Center for Public Integrity, <http://projects.publicintegrity.org/StateDisclosure/report.aspx?aid=925>.

<sup>30</sup> National Conference of State Legislators, [http://www.ncsl.org/programs/ethics/fd\\_income\\_requirements.htm](http://www.ncsl.org/programs/ethics/fd_income_requirements.htm). See The Center for Public Integrity, <http://projects.publicintegrity.org/StateDisclosure/report.aspx?aid=925>.

<sup>31</sup> Alaska Const. art. II § 5.

<sup>32</sup> R.I. Gen. Laws § 36-14-5(n).

household, including a description of the income source, the income type, and the income-recipient's name.<sup>33</sup>

Massachusetts requires candidates for public office, public officials, and public employees to file statements of financial interest for the preceding calendar year. In these statements, candidates, officials, and employees must disclose, among other things, the name of each business with which the person is associated and the amount of income above \$1,000 that the person received from the business.<sup>34</sup>

In Colorado, public officials must disclose the name of each creditor to whom the official or a member of the official's immediate family owes more than \$1,000, along with the interest rate.<sup>35</sup>

Washington requires elected and appointed officials, including the governor and other executive branch officials, to file a statement of financial affairs that discloses: (1) their employers' names; (2) their bank accounts and insurance policies worth more than \$5,000; (3) the name of each creditor to whom they owe more than \$500 and the amount of the debt; and (4) a list of all real property owned in the state that is valued at over \$250,000.<sup>36</sup>

#### **D. Pros and Cons of Approaches**

One advantage that has been noted for citizen legislatures, like those in the United States, is that where members earn incomes in occupations and businesses that are unrelated to their duties as lawmakers it brings real world experience to the crafting of laws that can have a significant impact on citizens. Citizen legislatures have potential drawbacks as well: "There may be a temptation, or at least an unconscious tendency, to put one's own private interests ahead of what is objectively in the best interest of one's constituents. Additionally, even a vote that is undeniably beneficial to one's constituency may create the *appearance* of a conflict of interest."<sup>37</sup>

Statutes requiring a detailed disclosure of personal financial information have generated some controversy among legislators and raised questions of constitutionality. These types of statutes may also have aided in avoiding conflicts of interest and increasing public confidence in government.<sup>38</sup> However, disclosure laws may also lower the number of candidates who run for office.<sup>39</sup>

#### **E. Description of How to Amend Utah Law**

Statutory provisions must be changed by amending the Utah Code.

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<sup>33</sup> Oregon Code § 244.060.

<sup>34</sup> Mass. Gen. Laws Part IV, Title I, ch. 268B § 5.

<sup>35</sup> Colo. Stat. § 24-6-202.

<sup>36</sup> Rev. Code Wash. § 42.17.241.

<sup>37</sup> See Appendix D at 1.

<sup>38</sup> See Appendix E at 722.

<sup>39</sup> See Appendix F at 622.

The regulation discussed above is administered by the Department of Human Resource Management. In order to make, amend, or modify a regulation, the administrative agency must comply with the notice and comment requirements of the Administrative Rulemaking Act.<sup>40</sup> Of course, the legislature may pass a bill requiring the administrative agency to alter its regulations.

The Utah Legislature's Joint Rules are adopted at the beginning of each legislative session. A two-thirds vote of all Senators and Representatives is required to adopt a joint rule. After the initial adoption of rules, the legislature may adopt additional rules or repeal or amend existing rules by a majority vote of the legislature.<sup>41</sup>

### **III. Independent Ethics Commission**

#### **A. Description of Utah's Current Law**

Utah has no independent ethics commission.

#### **B. Statistics Concerning Utah's Approach and Alternative Approaches**

- 40 states, unlike Utah, have ethics commissions;
- 36 states' commissions oversee legislative branch activities;
- 40 states' commissions oversee executive branch activities;
- 8 states' commissions oversee state vendor activities; and
- 26 states' commissions examine reports, 36 states' commissions have subpoena power, and 11 states' commission orders are enforceable in court.<sup>42</sup>

#### **C. Examples of Alternative Approaches**

##### **1. Commission with Broad Mandate and Powers—Texas**

Some states have granted independent ethics commissions broad mandates and powers. Texas is one such state. The Texas Ethics Commission ("TEC") is an eight-member body (four members are appointed by the governor, two members by the lieutenant governor, and two members by the Speaker of the Texas House of Representatives) with four members from each major political party serving overlapping four-year terms.<sup>43</sup> The TEC administers and enforces important Texas statutes regarding:

- Campaign finance limits and disclosure requirements;
- Lobbyist registration, reporting, and activities;
- Personal financial disclosure requirements for state officers; and

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<sup>40</sup> Utah Code § 63G-3-301.

<sup>41</sup> Utah Leg. Joint Rule § 1-1-102.

<sup>42</sup> National Conference of State Legislatures, [http://www.ncsl.org/programs/ethics/ethics\\_commissions.htm](http://www.ncsl.org/programs/ethics/ethics_commissions.htm).

<sup>43</sup> Tex. Const. Art. 3, § 24a.

- Ethics rules for state officers and employees, including “revolving door” and conflict of interest provisions.<sup>44</sup>

The TEC’s powers are significant. It may issue advisory opinions, subpoena documents and witnesses, develop training materials, conduct audits, and impose penalties.<sup>45</sup> Actions typically must garner six of the eight commissioners’ votes to move forward. The TEC’s jurisdiction covers lobbyist, candidates, local-level officials, and executive and legislative branch officials and employees.

## 2. Multiple Entities—Illinois

Illinois divides ethics administration and enforcement tasks among four separate and distinct government bodies:

- The Legislative Ethics Commission—An eight-member body that receives complaints, conducts administrative hearings, prepares and publishes guides regarding the ethics laws, issues subpoenas, and imposes administrative fines. The Commission has jurisdiction over the Legislative Branch’s employees and officers;
- The Office of Legislative Inspector General—An office that investigates General Assembly members for fraud, waste, mismanagement, and other ethics violations;<sup>46</sup>
- The Executive Ethics Commission—A nine-member body that receives complaints, conducts administrative hearings, prepares training materials, issues subpoenas, and makes rulings and recommendations in disciplinary cases. The Commission has jurisdiction over the Executive Branch’s employees and officers; and
- The Office of Executive Inspector General—An office that investigates Executive Branch officials and employees for fraud, waste, mismanagement, and other ethics violations.<sup>47</sup>

It is not unusual to split ethics-related tasks among multiple entities, but Illinois’ four-way division is notable.

## 3. Advisory Commission—Michigan and U.S. House

The Michigan State Board of Ethics is a seven-member body appointed by the Governor with the advice and consent of the Michigan Senate to serve staggered four-year terms. No more than four Board members may belong to the same political party. The Board has jurisdiction only over Executive Branch officers and employees. The Board plays an advisory and investigatory role only—it may not take direct action against any person.<sup>48</sup>

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<sup>44</sup> Texas Ethics Commission, *Constitutional and Statutory Duties* (2008), <http://www.ethics.state.tx.us/tec/duties.htm>.

<sup>45</sup> Tex. Gov’t Code § 571.121 et. seq.

<sup>46</sup> 5 Ill. Comp. Stat. 430/25.

<sup>47</sup> 5 Ill. Comp. Stat. 430/20.

<sup>48</sup> Mich. Stat. § 4.1700(71) et. seq.

A slightly different model is that used by the U.S. House of Representatives. The Office of Congressional Ethics (“OCE”) is an independent office *within* the House. OCE is led by a panel of six board members appointed *jointly* by the House Speaker and the Minority Leader. OCE screens ethics allegations made against House members and passes matters along to the House Ethics Committee for their review. Previously, the general public had no means to file an ethics complaint against a Member of Congress. OCE makes findings of fact regarding a potential ethics matter and may recommend (with the approval of only 3 OCE members) further review of the matter by the House Ethics Committee. OCE does not offer conclusions regarding the validity of the allegations or the guilt or innocence of the person subject to the review—such matters are solely under the Ethics Committee’s purview.<sup>49</sup>

#### **D. Pros and Cons of Approaches**

Supporters of independent ethics commissions argue that public officials cannot police themselves. As the group Common Cause stated while campaigning for Congress to create an independent ethics commission (which the U.S. House later did): “For decades, the ethics process in Congress has been stymied by the fact that it is very difficult for Members to judge their colleagues. Peer review simply is not the answer when it comes to a fair, firm process that ensures that Members live by the ethics rules on the books.”<sup>50</sup> Independent commissions serve a valuable purpose, proponents believe, by separating individuals who investigate and penalize ethics violations from those who are accused.

Among other things, opponents of independent ethics commissions argue that commissions too often serve only as forums to score political points and therefore play no constructive role in making public officials and employees behave more ethically. They point out that other professions, such as doctors and lawyers, self-police so legislators should have that opportunity as well. Opponents also assert that “independence” comes at the price of public accountability and that ethics procedures should be crafted and administered by elected officials.<sup>51</sup>

#### **E. Description of How to Amend Utah Law**

Utah’s Code must be amended in order to create an independent ethics commissions.

Prepared by:  
Scott S. Bell  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111  
801-536-6706  
sbell@parsonsbehle.com

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<sup>49</sup> H.Res.895, Establishing within the House of Representatives an Office of Congressional Ethics (110th Cong. passed Mar. 11, 2008).

<sup>50</sup> See Appendix G.

<sup>51</sup> See Robert Bauer, “Independence” and Accountability in Ethics Enforcement, More Soft Money Hard Law Blog (Mar. 5, 2007), [http://www.moresoftmoneyhardlaw.com/updates/federal\\_candidates\\_officeholders.html?AID=945](http://www.moresoftmoneyhardlaw.com/updates/federal_candidates_officeholders.html?AID=945).