

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BRUCE D. CRIPPEN, on February 1,
1995, at 10:00 a.m.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 115
Executive Action: None

HEARING ON SB 115

Opening Statement by Sponsor:

SENATOR DOROTHY ECK, Senate District 15, Bozeman, presented SB 115. The Constitution did require a bill of ethics to be enacted and the legislature has not been able to get that passed. This needs to be a bipartisan effort. They considered ways to implement an ethics bill which would save costs and would not create any new bureaucracy. They tried to place this function in the Secretary of State's Office. An interim committee was not appropriate to handle this, because it included just legislators. The Montana Ethics Advisory Council has had full public

participation. They have met all over the state. **SENATOR ECK** stated she especially likes the part of the bill which speaks to advisory opinions. In this way, public officials will have someone they can ask whether or not an action is ethical. The educational component is also very important. It is important for legislators, public employees and public officials to be sensitive to conflict of interest issues. Montana does not have a serious ethics problem. That is probably why it was defeated in the last session. We do have a very real problem in making sure that the government in Montana has the trust of the people. That is the real reason for initiating and passing this act at this time. She remembered a statement that Montana has laws that deal with illegal behavior, however, we have ethical concerns which are pretty fuzzy. The problem really is that most of the actions which are questioned under the current provisions aren't illegal or unethical; however, they are just plain tacky. This bill clarifies what is unethical.

Proponents' Testimony:

Mike Cooney, Secretary of State, stated his support of SB 115. Public confidence in the government is at an all time low. Here in Montana we have been spared the embarrassment that other states have faced. That does little to ease the public perception that those of us involved in government are good and decent hard working individuals. The relationship between people and our government is extremely complex. It is about equal parts of trust, accountability, competence, diligence and honesty. Nearly two years ago he appointed the Ethics Advisory Council to develop an enforceable code of ethics for public officials to present to this legislature. SB 115 is the product of their work. Montana is one of a few states without an enforceable ethics law. The one currently on the books was challenged in the early 1980s and the district court has prohibited its full implementation. It doesn't make good sense to wait for a wreck to happen if we can take reasonable steps to prevent the accident. Reactionary ethic legislation is not the best public policy. Government is for the benefit of the people it serves, not for the benefit of special interests. SB 115 is about the development of a meaningful set of regulations by which we, as public officials, can hold ourselves accountable to the people who pay our salaries. It will help bring accountability to government and it will implement a meaningful code of conduct for the many hard working employees and elected officials of Montana. SB 115 deals with five basic issues. The first issue is ethics enforcement. The bill establishes a vehicle for the enforcement of any ethics violation through use of the existing Office of Political Practices and the establishment of a citizen based ethics commission. The second issue is financial disclosure. SB 115 tightens financial interest reporting requirements for public officials including high ranking government appointees. The third issue is limitation on gifts. This act limits the value of business related gifts which can legally be received by public

officials. The fourth issue is guidance for the legislature. This measure provides a guide for the legislature to avoid conflicts of interest while allowing it the ability to develop its own rules to resolve specific problems. The fifth measure is education. This proposal mandates the publication and distribution of educational materials covering what public employees can and cannot do. The Council held nine public hearings in six cities throughout Montana. It was the input from the people of Montana that guided them in their efforts to develop this reasonable approach that works for Montana. **Mr. Cooney** presented the committee with handout entitled "The Montana Ethics Act",

EXHIBIT 1.

John Vincent, Ethics Advisory Council, stated there is a great deal of public support for ethics legislation that addresses both the legislature and state employees in general. Secretary of State Mike Cooney responded to the failure of ethics legislation in the last session by creating the Montana Ethics Advisory Council. The Council entered this process with an open mind and with a commitment to taking in as much public comment as we possibly could. The Council did not receive any compensation. They held nine meetings and included the public to the greatest possible extent in those deliberations. This committee was a nonpartisan committee. They had two former legislators, David Hoffman and Mr. Vincent, as well as a crosssection of citizens from around Montana who had expressed to the secretary of state profound interest in ethics legislation. Local government has been excluded from the provisions of this bill in the spirit of Governor Racicot's initiative in regard to unfunded mandates. Local government being the closest to the people is fully capable of taking on matters such as ethics legislation in its own jurisdictions. The Council feels that they have developed a fair and balanced bill which takes into careful consideration the fact that Montana has a citizen's legislature as opposed to a full time professional legislature. Montana's state employees have a first rate record of ethical conduct and behavior. They didn't come up with the strictest ethics bill they could devise. They began and completed their work in the spirit of developing a piece of legislation that established reasonable guidelines. The City of Bozeman's code of ethics states that no official or employee shall accept a gift, gratuity, or favor from any person or entity. SB 115 contains a different set of standards and different criteria which is much more reasonable. There is a provision for educational trips which would involve lobbyists taking legislators to view or consider certain things that they feel need to be seen in order to make intelligent decisions on issues that face legislators. There is legislative authority to adopt rules in this bill relative to conflict of interests. The bill mandates that rules be adopted, however, it does not stipulate how to do it. Financial disclosure, the revolving door provision, and the educational aspects of this bill also reflect a reasonableness and a flexibility that is tailored to this legislature, given its record. The Council found out in its

research that states which have real problems in regard to ethics usually had no rules or regulations in place when those problems developed. When there are no rules, no one knows what parameters to use. A serious problem inevitably develops. There is strong public reaction to that and it is usually a very angry reaction. Then, almost inevitably, a very strict ethics law is passed. The public expects legislators and state employees to hold themselves to the same ethical standards and rules which they live and work under every day. The U. S. Congress just passed legislation that holds the institution of Congress accountable for the same work place laws that they have decided the rest of America needs to live under. **Mr. Vincent** submitted the written testimony of David Hoffman and Bernd Hoffman, **EXHIBIT 2.**

Garth Jacobson, Chief Legal Counsel to the office of Secretary of State, presented his written testimony, **EXHIBIT 3.** One of the key focuses is on education. If this act accomplishes nothing more than provide education, a lot will be accomplished by it. The definition "anything of value" is a key definition. That provides the details of what is reportable and may be received for gifts. Consultants are required to file reports. A consultant is strictly a person who is involved in a contract process of deciding who the contracts go to. A high level public employee is a person who is in a policy making decision. Representation by public officials and public employees is a moonlighting provision which talks about what forms of moonlighting are permitted or not permitted. Under conflicts of interest in votes, deliberations and discussions, the legislature has the latitude and flexibility to deal with this issue on its own. Postemployment restrictions follow the logic that top level elected officials have greater restrictions in comparison to those lower on the ladder. Personal financial disclosure has five categories which require disclosure statements. The Commissioner of Political Practices handles the disclosure statements. **Mr. Jacobsen** noted that the establishment and composition of the Ethics Commission in section 19 is identical in structure to the reapportionment commission. There is a balance of two members from each party and the fifth member being approved by both parties. The Commissioner of Political Practices serves as a prosecutor and the Ethics Commission adjudicates these matters as well as providing ethics advisory opinions and education. The potential sanctions will include fines up to \$2,000 and the recommendation for the person being removed from office, if appropriate.

Betsy Horsman-Wiitala, Assistant Attorney General, stated she is present as a member of the Ethics Advisory Council. There are procedures for advisory opinions which are confidential, section 46. The confidentiality may be waived by the person who requests the advisory opinion or by a majority vote of the Commission if a person makes public the substance of the advisory opinion. In the event that a complaint is made before the Commission, the Commission may ask the Commissioner of Political Practices to

investigate the matter. At the conclusion of the investigation, the Commissioner of Political Practices may enter findings of fact, describing the violations to the Commission and also to the person against whom the complaint has been made. The Commissioner of Political Practices can recommend other informal disposition. In the event that findings of fact are entered by the Commissioner of Political Practices there is a hearing held before the Commission. The procedures will follow MAPA. After the complaint is filed with the Commissioner of Political Practices and he makes a recommendation for hearing to the Commission, the person can come before the Commission and ask for a preliminary hearing. That preliminary hearing is confidential. The formal hearing is open to the public and those records are available for public review pursuant to Section 46 of the ethics act. There are provisions to create ramifications for frivolous complaints. If there are insufficient facts to constitute a violation, the Commissioner of Political Practices can dismiss the complaint. The statute of limitations is three years in this case. After the investigation by the Commissioner of Political Practices, the complaint can be dismissed if there is no clear and convincing evidence of a violation or if the claim is frivolous. If the Commissioner finds that the complaint is frivolous, there are substantial penalties as found in Section 42 (6). There are aspects of this bill which will create parallel criminal ramifications. You could have a criminal and civil proceeding at the same time.

{Tape: 1; Side: B}

Bill Olson, AARP, stated that they endorse SB 115. **EXHIBIT 4** was handed to committee.

Verner Bertelsen, Common Cause, stated that he supports SB 115. It provides a very inexpensive manner, a commission, to oversee the implementation of rules. The natural tendency is to resist anything which seems to restrict our actions. We need to assure the citizens of the state of Montana that this is the kind of conduct we can condone.

Pam Merrell, Ethics Advisory Committee, presented her written testimony, **EXHIBIT 5**.

James Polzin, Ethics Advisory Committee, stated he decided to join the Commission because he was tired of complaining about what the legislature was doing and asked himself if he could contribute anything. There is a system which says that the longer a bill or a constitution is, the more likely it is to be amended. He finds this bill not specific, yet specific enough to allow the legislature to function under it a long time. When he elects a legislator he elects that person because of his expertise. This bill addresses that and says that is fine as long as you are a member of a class. As a citizen and member of

this committee he wondered if an ethics bill could be put together. The result is extremely positive.

Leo Giacometto, Governor's Office, stated they rise in support of SB 115.

Alec Hanson, League of Cities and Towns, announced their support of this bill. There is nothing compelling the legislature to act on ethics legislation. This provides an environment to put together a very fair and balanced ethics bill.

Bob Towe, Public Service Commissioner, presented his written testimony, **EXHIBIT 6.**

Howard Gipe, Flathead County Commissioner, stated that MACO supports SB 115.

J. V. Bennett, MontPIRG, stated that they rise in support of SB 115.

Rusty Harper, State Auditor's Office, stated that State Auditor Mark O'Keefe encourages passage of this bill as a beginning of restoring public trust in the political process.

Beth Baker, Department of Justice, stated they support this bill because they think their employees and the public they serve should be able to know the rules that govern their conduct. She highlighted the advisory opinion, Section 26, stating it is a good provision. The attorney general has been requested for an opinion on the ethics laws, but the opinion process they have doesn't work well for these situations because it is not designed to address specific factual issues. It is a public process and there is no room for confidentiality. The advisory opinion process would be much better to address ethical issues.

Amy Pfeifer announced her support of the bill. There are a couple of concerns. She and her coworkers are concerned about the impact should they be designated high level public employees by a department director who is a political appointee and changes every few years. As attorneys hired because of their previous family law experience and practicing strictly family law, which is what they do in the Child Support Enforcement Division, given the fact that their division has 42,000 cases in this state, their concern is should they quit their public employment there would be a severe restriction on their ability to practice family law for the year after they quit. If they were a high level public employee, they would be subject to the financial disclosures required in the bill and this leads them to concern about their privacy interests. Section 14 states that the financial disclosures are kept for five years unless you are a public or elected official. Public or elected officials' disclosures would be kept for three years. That would mean the public employees financial statement would be kept for two years longer than the higher level elected official.

Debbie Smith, Common Cause, commented that they support SB 115. She pointed out to the committee that this Commissioner has already asked for substantial resources in order to implement Initiative 118 and proposed SB 98. We believe that all of those resources should be considered together.

Jeff Miller, Administrator of Income and Miscellaneous Tax Division, Department of Revenue, stated that he approached **SENATOR ECK** regarding an amendment. They would like to make explicit the annual filing of income tax returns.

Opponents' Testimony:

Michael J. Gonsior presented his written testimony, **EXHIBIT 7**. On behalf of Montanans for Better Government he stated that their organization is concerned about three major ethical problems. First is public employees serving in partisan political positions. Second is the use of taxpayer funds to influence ballot issues. Their third concern is the use of taxpayer funds to pay for lobbying. SB 136 better addresses their concerns.

Dick Mojja commented that he is here out of frustration of the open meeting laws and elections laws. One of the things missing from the ethics bill is the position of the citizen and his ability to bring a complaint. If you bring a suit against a public official, someone will have to represent them. The county attorney would represent the individual public employee. He has a complaint filed with the Office of Political Practices since last June. It hasn't gone anywhere. If this bill is passed, there will have to be additional staffing. He feels this bill establishes another judiciary system over and above the present judicial system. We are establishing a bureaucracy which may or may not do the job. In the case of Conrad v. State, which dealt with opening meeting laws, there were penalties of \$500 and/or six months in jail. The Supreme Court held that to be vague. The problem with that situation is mixing criminal penalties with civil law. That is what is being done here. You cannot legislate ethics anymore than you can legislate morals. We need a simplistic law.

Ross Best stated that for the last year and a half he has been looking at the Montana conflict of interest situation. He opposes SB 115. He recommends adoption of **SENATOR BAER'S** proposal with some revisions. This committee was told by **Mayor Vincent** that under the current code of ethics, there is no enforcement capability whatever. This committee was also told by **Mr. Jacobsen** that the current code of ethics is a dead body of laws. That is because county attorneys and the attorney general have been unwilling to enforce. There is nothing inherently wrong with the current code of ethics except that in specific areas more detail may be appropriate. The Montana Constitution requires that the legislature establish a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and

employees. In response to that, the legislature adopted the current code of ethics in 1977. This states that when conduct departs from the fiduciary duty, the public officer or employee is liable to the people of the state as a trustee of property and a beneficiary, and shall suffer such other liabilities as a private fiduciary would suffer for a breach of trust. The county attorney of the county where the trust is violated may bring appropriate judicial proceedings. The public trust and this code of ethics have been radically misunderstood. The code states that violation of the rules of conduct constitute breach of fiduciary duty. There is no Montana Supreme Court decision or Montana Attorney General's Opinion addressing the code of ethics. There is no case law which says that this code of ethics is a dead body. **SENATOR ECK'S** bill has a defect in that it excludes local government. The Constitution clearly says that the code of ethics is to prohibit conflict for members of the legislature and all state and local officers and employees. Unless you set in motion the process of amending the Constitution and the people vote for it, any code of ethics which does not cover public employees will be unconstitutional. **Mr. Best** believes that the best way to achieve proper enforcement, attention and education about ethics in Montana is to allow citizens an active role. Most county attorneys are not interested in prosecuting their peers. He feels that a citizen should have a right to ask the district court to deal with ethics violations.

Tony Tweedale stated he noticed that the language in the bill on public trust had been dropped. Putting it back in the bill would make the law more enforceable.

SENATOR BRUCE CRIPPEN announced that a subcommittee has been appointed. After consultation with the Vice Chair **SENATOR AL BISHOP** and Senate Minority Leader **SENATOR MIKE HALLIGAN**, the Chair appointed **SENATOR LORENTS GROSFIELD** to chair the subcommittee. Other members of the committee will be **SENATOR AL BISHOP**, **SENATOR LARRY BAER**, **SENATOR SUE BARTLETT**, and **SENATOR LINDA NELSON**. The committee will look at both bills to see if there is a possibility of combining the two. The public will be noticed. **SENATOR DOROTHY ECK** and someone from the Secretary of State's Office, possibly **Mr. Jacobson**, should be involved. The subcommittee will have the opportunity for continued examination and questioning of witnesses who have testified.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR BAER thanked **SENATOR ECK** and everyone in the Secretary of State's Office for their efforts in bringing forth this bill. He has concerns with the bill although he agrees with the major body of it. He is concerned about what it does not do. Hopefully combining the two bills will create a quality product.

{Tape: 2; Side: A}

SENATOR RIC HOLDEN, in reference to the financial disclosure section, questioned how far that section would reach for school board members, county commissioners, and other public officials. **SENATOR ECK** commented that financial disclosure applies to state officials only. It does not apply to local officials or school boards, etc. They may come up with their own regulations. **SENATOR HOLDEN** questioned what kind of social programs would need to be cut to fund this project. **SENATOR ECK** stated she would not cut a single one. She recognized that the fiscal note is a problem. State government funds a lot of advisory committees. She doesn't feel that very many of them are as important to building public trust and confidence as ethics legislation.

SENATOR STEVE DOHERTY asked **Mr. Gonsior** whether he believed that spouses of the legislators should be barred from working for the legislature. **Mr. Gonsior** asked if they were full time employees and whether they were a part of the state retirement system and received salaries all year long. **SENATOR DOHERTY** stated "no". Both parties have had spouses of sitting legislators working at the legislature. Is that a conflict of interest? **Mr. Gonsior** stated that was a thorny issue. If that legislator is voting on how much that employee would be paid, that presents a problem. The legislator would have to abstain from voting.

SENATOR HALLIGAN stated the fiscal note indicates the need for a full time prosecutor and investigator, however, in neither of these assumptions there is no revenue attributed to fines to pay for this. **Mr. Cooney** stated that if these matters were prosecuted properly there would be fines levied and those dollars would be used to support the function of this operation. **SENATOR HALLIGAN** asked **Ed Argenbright, Commissioner of Political Practices**, if he could explain the fiscal note in more detail. **Mr. Argenbright** stated that he purposefully did not testify on the bill because it will impact his office, however, he did participate in preparing the fiscal note. He has no way of knowing what kind of revenue would be generated in fines. The thrust of his work in developing the fiscal note was in terms of staffing. His office is staffed by two assistants and himself. They are at the point where another straw breaks the camel back. They were looking at the additional investigative requirements, the prosecutorial requirements before the commission, and they came up very conservatively with the FTE. **SENATOR HALLIGAN** stated that he assumed he supported the ethics reform. **SENATOR HALLIGAN** asked **Mr. Argenbright** if the legislature could handle this without a price tag. Is enforcement necessary if it costs money? **Mr. Argenbright** answered that if the impact will be felt on his staff and his office, he could not possibly handle it with his current level of resources.

SENATOR NELSON, in referring to the gift section, questioned whether a \$25 check to cover mileage at a speaking engagement

would be acceptable under this section. **Mr. Cooney** stated it would be acceptable, however, under this law, after meeting the \$500 aggregate limit, this would have to be reported on her financial disclosure. There is nothing in the bill preventing her from accepting those types of things. If the \$500 was not exceeded, those gifts would not have to be reported.

SENATOR HALLIGAN asked for clarification of the conflict of interest section for a legislator who is an attorney or CPA. He may need to call the Secretary of State to ask about incorporation papers he filed for a client or he may need to call the Department of Labor regarding another case. He feels he would not be able to represent a client with a routine call to check on the status of anything for a client during the session. **Ms. Horsman-Wiitala** commented the consideration of that is whether you are a sitting legislator at the time attempting to use influence. It also deals with ministerial acts versus acts of discretion. **SENATOR HALLIGAN** further commented that while serving in the legislature he needs to check on cases. He does not know whether the state employee would consider that ministerial or attempting to use his influence.

SENATOR DOHERTY asked **Mr. Cooney** if there was any way to have significant ethics reform without a price tag in Montana. **Mr. Cooney** stated the counsel looked at this in great detail. They examined a number of different models which might be used. Walking the fine line as well as being able to enforce ethics laws, they came to the conclusion that this was about the only reasonable way to do it.

Closing by Sponsor:

SENATOR ECK stated that she appreciates the fact that a subcommittee has been set up to do some real work on the two bills. By working together they should be able to come up with some solutions, probably even to the cost. The Governor's Office is interested in seeing if they can't shave off some of the costs since this will assign a number of duties to the Commissioner of Political Practices.

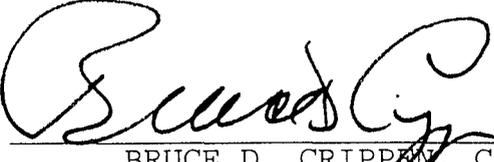
EXHIBIT 8 and 9, additional handouts.

EXECUTIVE ACTION ON SB 13

Motion/Vote: **SENATOR HALLIGAN** moved SB 13 BE TAKEN OFF THE TABLE. The motion CARRIED UNANIMOUSLY on oral vote.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:05.



BRUCE D. CRIPPEN, Chairman



JUDY J. KEINTZ, Secretary

BC/jjk

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 2/1/95
BILL NO. SB 115

THE MONTANA ETHICS ACT

SENATE BILL 115

*As prepared by the Montana Ethics Advisory Council,
and presented to the 54th Legislative Assembly*



The original of this document is stored at the Historical Society at 225 North Roberts Street, Helena, MT 59620-1201. The phone number is 444-2694.

(report)

THE MONTANA ETHICS ACT

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**HOFFMAN
&
SUENRAM**



MARK DAVID HOFFMAN
ANDREW P. SUENRAM
JERI L. HOFFMAN, CLA

(406) 683-2391
FAX: (406) 683-2233

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2DATE 2/1/95CASE NO. SB 115

224 NORTH MONTANA
P.O. BOX 1366
DILLON, MONTANA 59725

February 1, 1995

Senate Judiciary Committee
Capital Building
Helena, MT 59720

Dear Chairman Crippen and Members of the Committee:

Please accept this letter as my testimony in support of Senator Eck's Senate Bill 115, the Montana Ethics Act.

I served on Secretary of State Cooney's Ethics Advisory Council and participated in drafting the Legislation. The Committee put a lot of thought and effort into the Bill, and I support the proposed legislation in its entirety.

However, I particularly support the enforcement provisions contained within the Bill. Enforcement was a problem in every piece of model legislation and existing law from other states that we reviewed. It is certainly a problem with the ethics laws currently on the books in Montana.

This Bill is designed to create a two-tiered approach to enforcement. The first tier I refer to as "prospective enforcement". This means that anyone affected by the legislation has the opportunity to ask the Commission for an advisory opinion regarding conduct prior to engaging in the conduct.

The Advisory opinions also serve to educate all people affected by the Bill through the issuance of opinions,

Senate Judiciary Committee
February 1, 1995
Page Two

and the opinions will certainly help to shape the direction of ethical behavior for the future.

The second tier of the enforcement provisions I refer to as "actual enforcement". This Bill is designed to put teeth into the law and punish those who choose to engage in illegal conduct, both civilly and criminally.

It is very important that enforcement ultimately be separated from the Commission to provide neutral and dispassionate imposition of justice. This Bill does exactly that.

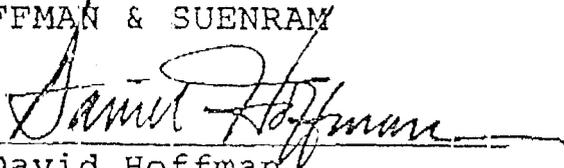
As a former prosecutor, I am extremely comfortable with the enforcement provisions contained within this Bill and I urge you to move the Bill onto the Senate floor with a "do pass" recommendation for further discussion.

Thank you for considering this testimony and I apologize for not being here in person.

Yours very truly,

HOFFMAN & SUENRAM

BY


David Hoffman

DH/dk

Statement of Bernd Hoffmann
Member, Ethics Advisory Council

EXHIBIT 2
DATE 2-1-95
SB 115

I've lived in Montana for over twenty years and worked for both State and Federal Government. I am currently employed by the Internal Revenue Service where among other duties I serve as the Ethics Coordinator for the Montana District. When I heard about the Ethics Advisory Council being formed, I volunteered to serve and provide whatever value my training knowledge and prior experience could bring to the Council. I would like to offer my comments for the record regarding the proposed Ethics Legislation.

I am proud of the efforts of the members of the Council, and the support we received from the Secretary of State, Mike Cooney and his staff. I won't belabor that the Council worked hard at combining all the best ideas available from existing ethics legislation and from the perspective of each member of the Council, nor that we made every effort to solicit public input, or used a reasonable approach to the final language of the proposed Ethics Act.

All this was done of course, and more. But I would like you to consider my perspective of what I believe is the intent of the Ethics Act. It is an act of commitment, a promise to the people of Montana. It is a declaration of intent by all those who serve at the will of the people, either directly through elected office, or through government employment.

For those who question the need for such a promise, for such a commitment to the public, I would invite them to read any public opinion poll. The public trust in government is at an all time low. The perception that government is unresponsive to the will of the people echos only the sentiment that government employees are lazy, unethical and self serving.

I feel like I may sound somewhat patronizing, because I know you have heard all of these concerns or opinions expressed by those you are here to serve. Are these perceptions real? are they justified? You tell me. And then tell me what difference it makes if their perceptions are real or unjustified. People vote with their heads and their hearts. They may know what's right, but they sense something is wrong in the way government works. For the IRS, what people perceive, or what people believe, costs the government billions of dollars annually. It is estimated that for each percent of people perceiving the income tax system to be unfair and fail to file a tax return, the government loses between \$7 and \$10 Billion. I don't have to detail what that means to the rest of us who try to pay our fair share, but are expected to cover the shortfall, or the services that go unfunded because of revenue shortages.

In Montana people are trying to tell you what they perceive about state government. Are they telling you by the way they vote and by the initiatives they create? I believe a major underlying cause for many of the issues facing us is the public's perception and lack of faith in government. I believe a self imposed set of rules and expectations such as those proposed in the Ethics Act will go a long way towards responding to the public mistrust of government. The Act alone, won't restore the public confidence in government or government service. It is a declaration of good intention that must be supported by deeds. It is a statement of honor and commitment to ethical behavior in conducting the public's business. I believe this act symbolizes a handshake, an act of good faith between all of us who serve in government and the people of Montana.

Testimony of Garth Jacobson
Before the Senate Judiciary Committee
February 1, 1995

Mr. Chairman and members of the Senate Judiciary Committee. For the record I am Garth Jacobson, Chief Legal Counsel to the office of the Secretary of State. I also appear today as a member of the Ethics Advisory Council, (EAC) which drafted SB 115. In addition, my educational background includes a Masters in Public Administration degree from the University of Montana with a masters professional paper entitled "Conflict of Interest Laws in the State of Montana" (1993).

The focus of my testimony in support of SB 115 today centers around the history of the ethics laws and a brief overview of the act.

In the history of the ethics laws in Montana, the attitude of many early day officials can be summed up in a quote from Molly Ivins describing the Texas Legislature, "As they say around the legislature, if you can't drink their whiskey, screw their women, take their money, and vote against them anyway, you don't belong in office."¹ Certainly during the early days of statehood, the battles of the copper kings developed a public perception that good money was to be made by serving in public office and not just from the salary received. While there existed some ethics laws, the paucity of court cases suggests that either there was little enforcement of these statutes or there was never a challenge to the proceedings.

¹Molly Ivins, Molly Ivins Can't Say That, Can She? (1991), 1.

In 1972 the Montana Constitutional Convention dealt with the issue of conflict of interest. After having discussed different approaches to dealing with ethics issues the delegates took a more general approach to read in its present form found at Article XIII, Section 4.

Code of ethics. The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees.

In describing the purpose of the provision Delegate Vermillion said:

"I think Mr. Aronow has brought up a very important area here, the conflict of interest; but as you can see from the questions that have been raised tonight that it is a difficult area to deal with in a constitution. . . . The 1989 Constitution has several sections on it and I think perhaps this broad area in the proposed section might mandate the Legislature to have conflict of interest laws but that for us to spell them out here might prove to be a difficult task. But if we do mandate, we do ask the Legislature to have conflict of interest laws, as in the case of Florida, I think that the Legislature would see fit to follow up on this and give us some good, workable laws to take care of some of the problems that Mr. Aronow has pointed out, and some of the other delegates here have pointed out. Conflict of interest is an important area; it's a problem that has been developed and [sic] think with this section that I propose, we would not find ourselves getting into an area of problem, but instead leave it up to the Legislature."²

What is most revealing about Delegate Vermillion's comments is his recognition of the difficulty of the subject matter. It may not be hard to recognize a conflict of interest when it occurs, but it is hard to establish provisions to prohibit it.

Five years after the enactment of the 1972 Montana

²Mont. Const. Con. 1972, Trans. Vol. IV at 796.

Constitution the 1977 legislature tried to implement this provision. The 1977 legislature passed HB 462 which established "The code of ethics for elected officials and prohibited conflicts of interest." However, despite the enactment of a code of ethics, the legislature failed to establish any workable enforcement mechanism. The original form of the bill, which contained enforcement procedures, failed on second reading in the House on a 46-48 vote. After the bill failed to pass the House, it was sent back to committee. Almost all of its teeth were pulled, including the **entire** section dealing with enforcement. The bill then passed and remains the law today.

The legislature created a limited enforcement section that gave the Secretary of State the authority to: (1) issue advisory opinions, (2) keep and permit public access to voluntary disclosure statements and (3) "make rules for the conduct of his affairs under this part."³

In 1982, the First Judicial District Court ruled this limited enforcement to be unconstitutional. Judge Bennett issued an "Opinion and Order," dated July 9, 1982, which found unconstitutional the statutes that granted the Secretary of State authority to issue advisory opinions.⁴ Judge Bennett, in a cleverly worded opinion, expressed the entire matter as follows:

Conceding, for the sake of argument only, that the legislature intended the opinions called for by

³See Mont. Code Ann. § 2-2-132.

⁴State, ex rel. Hegsted et al. v. Jim Waltermire, et al., First Judicial District, Cause No. 47692 (1982).

Sections 2-2-132(1) to have something to do with the code of ethics laid down in the rest of the statute, one is left to speculate as to whether these are opinions as to the rules of conduct and the violation of a fiduciary duty (covered by Sections 2-2-104, 2-2-111, 2-2-121 and 2-2-125), in which case they would be legal opinions, or whether they are opinions having to do with ethical principles (covered by Sections 2-2-105 and 2-2-122), in which case they would be moral opinions, not having to do with the legal concept of breach of public trust. And it would seem that if the opinions were legal in nature they would be trenching on the prerogative, generally considered up until now to be exclusive, of the attorney general. (Section 2-15-501(7) and the common law antedating out statehood.) If, on the other hand, the opinions were moral in nature it would seem they would be trenching on the prerogative of the Pope and other ecclesiastical authority. It is difficult to believe that the legislature intended to establish the Secretary of State as either an auxiliary attorney general or the state's vicar of morality, yet those seem to be the two functions assigned by the section in question. Nothing, nothing at all, is provided the hapless Secretary of State in the way of guidance as to why, what, when, where or how these opinions are to be generated. The mystery created by the cryptic legislative command is so deep the Secretary was moved to ask the legal advice of the individual he apparently was intended to replace, the attorney general, on not one but nine principal issues and approximately 36 sub-issues before he could proceed with any confidence to sanitize the body politic. (July 24, 1981 letter.) The attorney general shrewdly limited his answers to three (Opinion 39-31, 9/01/81). He advised the Secretary had no choice, he must issue some kind of opinion to anybody that might ask about anything without mentioning anybody's name. Whereupon, the Secretary provided his own guidance by way of promulgating an extensive body of law, in the form of rules, and establishing an advisory commission, presumably to provide the advice and direction denied him by the legislature and the attorney general.

All to the point that no one, however insightful of legislative intent, could possibly provide administrative implementation of the section in question with any confidence that he was carrying out the will of either the electorate, expressed in their approval of the 1972 Montana Constitution, or of the forty-fifth legislative assembly. By simply authorizing the Secretary of State to "issue advisory

opinions" the legislature ceded nearly its entire constitutional obligation and authority to effectuate a code of ethics to that officer and, we hope, wished him well.⁵

With that opinion the conflict of interest statutes met a major blow. There now exists little if any enforcement capabilities in the code of ethics. In essence the Montana code of ethics is a dead body of laws. Only public shame through the press provides negative sanctions against public officials who might violate the laws.

Legislators from both parties have made many attempts to enact understandable and enforceable ethics laws. However those attempts have always come up short. The difficulty in enactment of these laws comes from these major concerns. First, no set of laws can change the character of all the individuals asked to follow them. Second, not all conflict of interest situations can be identified or prevented. Third the laws must be balanced and reasonable and not overly restrictive to be respected and enforceable. This balance is extremely difficult to achieve and causes much disagreement amongst reasonable people as to what is the minimal acceptable behavior of public officials and employees. Finally the enforcement of ethics law must promote ethical politics and avoid political ethics.

Given this history and difficulty of the task of trying to avoid previous failed attempts, the EAC developed the legislation before you today. This legislation was developed from model

⁵Ibid., 3, 4.

legislation prepared by the Council of State Governments, through its subgroup the Council on Governmental Ethics Laws (COGEL). The EAC believes that the "Model Law for Campaign Finance, Ethics and Lobbying Regulation" (Model Act) offers a balanced and comprehensive approach to addressing conflict of interest issues identified. However the EAC made adjustments where necessary to recognize the attitude of the people of the state and its part time citizen legislature.

The following is an overview of this legislation. Other committee members will explain in more detail certain provisions and logic of the proposals.

SB 115 addresses three integrated concerns. First it tries to prevent ethics violations through education, advisory opinions and disclosure of gifts and financial interests. Second it establishes definable minimum standards for the treatment of conflicts of interest. These provisions include prohibitions against the acceptance of gifts that would influence a decision, the misuse of office, revolving door limitations, limitations of moonlighting outside employment, and related matters. Third it establishes an enforcement procedure which mitigates the politics that can enter the process.

The section analysis contained in the blue booklet provides an executive summary of the sections. Let me just hit the high points. See Blue book page 14.

In conclusion the history of the ethics laws in Montana shows that up to today no one has resolved the problem of how to

EXHIBIT 3
DATE 2-1-95
SB 115

get meaningful conflict of interest legislation passed. It resembles the children's story about, "Who will bell the cat?" Through efforts of the EAC we have taken on the seemingly impossible task of preparing reasonable comprehensive ethics legislation. We now urge your passage of SB 115.



Bringing lifetimes of experience and leadership to serve all generations.

MONTANA STATE LEGISLATIVE COMMITTEE

ACTING CHAIR
Mr. Lloyd Bender
2014 S. Tracy Avenue
Bozeman, MT 59715
(406) 587-0069

ACTING VICE CHAIR
Lloyd Erickson
4170 5th Avenue South
Great Falls, MT 59405
(406) 727-2951

SECRETARY
Vacant

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 4

DATE 2/1/95

BILL NO. SB 115

**Montana State Legislative Committee
1995 Position Paper**

ETHICS

POSITION: Endorse passage of legislation regarding ethical standards similar to those proposed by the Montana Ethics Advisory Council for state elected officials and public employees.

PROBLEM: The call for accountability of government officials and employees is a direct result of the drop in public confidence in government to an all time low.

Montana's ethics in government laws were struck down by the court a decade ago. None exist in the state codes, and no recent legislative session has agreed on an ethics code.

While the vast majority of government officials and employees are dedicated and ethical public servants, acceptable guidelines of conduct will aid public servants.

SOLUTION: The proposed "Montana Ethics Act" provides a framework for ethics legislation. Some of its features include:

- Ethical standards and guidelines
- Financial disclosure
- Gift limits
- Ethical enforcement

CONTACT: Lloyd Bender
Acting Chairman
2014 South Tracy Avenue
Bozeman, MT 59715
(406) 587-0069

Statement of Pam Merrell
Ethics Act--SB 115

Good morning. My name is Pam Merrell. I am a Vice President and the Secretary of Montana Power Company. As part of my work with Montana Power, I share responsibility with the General Counsel for the Company's Code of Conduct and ethics matters.

For all of the reasons that have already been described to you, I heartily endorse this legislation which will create for Montana a real, enforceable and useful ethics program. I think it is important for me to note that our Council did not conclude that Montana needed such a program because of widespread ethical violations or ethical problems. Rather, we determined that having an ethics program was necessary to prevent ethical problems in State government through having definitive rules of the game, having mechanisms for educating people about ethical concerns and the rules of the game, for enforcing the rules, and, importantly, through providing a process and a place where ethical questions and issues can be addressed before they ever become a problem. As Garth Jacobsen has already explained an ethics program of this type does not currently exist in Montana.

How does this state of affairs in Montana compare to the business world? Ethics in business is a very high profile issue today. And, most larger companies, such as Montana Power, have Ethics Codes, or Codes of Conduct, which set out the rules for ethical behavior in a company. These Codes cover many of the same issues covered by this legislation--e.g., conflicts of interest, acceptance of gifts and entertainment, and disclosure of interests which may conflict with the interests of the company. Further, these Codes are enforceable through employment sanction remedies. And, just as is proposed in this legislation, companies often have ethics officers who are responsible for administering company ethics programs, training employees about the code and ethical conduct generally. These ethics officers are also responsible for interpreting the Codes and for providing "advisory opinions" about potential ethical problems. It makes sense to me that ethics are no less important in the conduct of government than in business, and, arguably, more important in government. I believe that Montana should have at least as full an ethics program as most large business.

Garth has also asked me to spend a few minutes discussing the provisions in the Act concerning gifts and gratuities. The Act prohibits the acceptance of anything of value by state elected officials or state employees, unless it can be clearly shown that the acceptance was unrelated to the holding of public office and unrelated to any matters pending before the relevant government body. Section 8 (6). The purpose of this provision, is, of course, to avoid the fact of and the appearance of improper influence of government officials in the performance of their duties.

This blanket prohibition, however, is subject to various exceptions, which are explicitly excluded from the definition of "anything of value". The exceptions include various things such as gifts from relatives, meals or entertainment with a value of \$25 or less per occasion, or other gifts of nominal value. Another exception to the prohibition is for certain educational activities (for example trips) where, prior to the activity, it can be shown that it does not place the recipient under obligation, serves the public good and is not lavish or extravagant. Section 3 (1)(b).

Additionally, as part of the reporting provisions, Section 15, gifts must be reported to the extent that in the aggregate they exceed \$500 in a year. However, receipts from lobbyists need not be reported because they are required to be reported by lobbyists already. Thus, anything of value received as a gift, must be reported to the extent that the things of value, in the aggregate, exceed \$500 in a year.

Thank you for your consideration, and I hope that you will assure that Montana has a effective, enforceable government ethics program by voting to enact this legislation.

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**TESTIMONY OF BOB ROWE
IN SUPPORT OF SENATE BILL 0115**

FEBRUARY 1, 1995

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 2/1/95
BILL NO. SB 115

Mr. Chairman and Members of the Committee:

My name is Bob Rowe. I am the Public Service Commissioner from Northwestern Montana.¹ I strongly support the Montana Ethics Act.

I have followed the work of the Ethics Advisory Council over the past eighteen months. I testified before the Council, provided it copies of work being done at the Public Service Commission, observed the Council's meetings, and read its reports. The citizens of Montana were very well served by this diverse group of volunteers.

The Council's work parallels my own interest in ethics and work I have done at the Commission. I am fairly new both to public employment and to elective office. You have probably all experienced the powerful sense of responsibility and duty which comes with serving the public. This duty is one source of ethical principles and the best guide to ethical action. In part, the concept of duty is a specific example of the obligations of "citizenship" which led many of you to serve as legislators.

Ethics does not mean just avoiding bad acts. More importantly, ethics is a positive obligation of public service, and should be built into our ongoing work. At the PSC, this meant drafting our own set of ethical guidelines. The PSC Guidelines are the product of many months of thoughtful discussion and debate among Commissioners and staff. My initial proposal to the Commission was based on the Code of Judicial Conduct, a sometimes complicated document. The challenge was to identify core principles and state those principles simply and memorably. The work leading up to the Guidelines helped strengthen an ethical environment as much as do the Guidelines themselves.

¹I am speaking for myself, and not for the Public Service Commission.

Since adopting the Guidelines, we have continued to "build in" ethics. Commissioners and senior staff met with a leading ethicist, Michael Josephson.² Individual commissioners and staff have participated in and presented training on ethics at various professional events. I frequently discuss the ethical implications of various decisions with other commissioners and staff.

Some form of enforcement is important. The lack of effective enforcement is one reason individual agency guidelines are important but not by themselves sufficient. However, to the extent ethics is made a part of how one conducts oneself, and how an organization conducts its business, situations requiring enforcement will decrease. Much like "zero defects manufacturing," whenever enforcement is required, there has been a failure.

The better approach is to create work settings where basic ethical principles are "part of the culture." Public servants should be encouraged to ask questions about their own conduct and the actions of their agencies. It's always good to raise ethical questions. Often, those questions will have more than one answer.

Ethical rules for public servants build in part on some basic concepts of citizenship (the Jeffersonian concept of "civic virtue"). In addition to responding to public concern, the Advisory Council's volunteer work shows that Montanans do have a strong sense of "citizenship" as Montanans.

The Montana Ethics Act and the process which produced it are important parts of continuing to build strong ethics in public service. I sincerely thank Secretary of State Cooney, members of the Ethics Advisory Council, Senator Eck, and the members of this Committee for your important service.

²Montana Power Company deserves credit for making this opportunity possible. Mr. Josephson was invited to Montana to speak with MPC's board of directors and shareholders.

Testimony of Michael J. Gonsior presented to the Senate Judiciary Committee in re Senate Bill 115, The Montana Ethics Act, 2/1/95
Serial No. 7
DATE 2/1/95
CASE NO. SB 115

As I said in my testimony regarding Senate Bill 136 last week, I am among those who think that public employees should be barred from political candidacy; so my support for Senate Bill 136 was not unqualified. I am even less enthusiastic about Senate Bill 115. Among my concerns are that Senate Bill 115 applies only to state employees, candidates, and commissioners, and not to local governments, school boards, or other public entities. Nor does Senate Bill 115 require public employees to take leave without pay while serving in their elective political capacities. Nor am I convinced of the necessity or desirability of yet another state government commission, as would be established by Senate Bill 115. Perhaps most importantly, the wording of paragraph 2 of Section G renders Senate Bill 115 virtually impotent with respect to certain conflict of interest problems about which many Montanans are so deeply concerned.

Although I am a member of Montanans for Better Government, I am representing only myself today. The issue of ethics is one about which there are widely varying opinions--in the public at large as well as among the members of Montanans for Better Government--so I cannot speak for all our members on this matter. Some of us favor continuing to allow public employees to seek and serve in partisan elective positions without first resigning their civil service jobs, provided there are rules to prevent "double-dipping" and to deal with conflicts of interest (as proposed by Senator Baer in his Senate Bill 136). Others, like myself, prefer that state and local government employees be barred from political candidacy without first entering the private sector. Still others would go so far as to prevent even the spouses and relatives of public employees from seeking election to political positions.

I think that state and local government employees should be restricted in their political activity essentially to the same degree that federal employees are so restricted. Indeed, many state and local government employees are already so restricted by the Hatch Act. For example, I understand that many (if not all) employees of Montana's Department of Fish, Wildlife and Parks cannot seek partisan political office because of their involvement in programs financed in whole or in part by federal loans or grants. Nowadays there are probably few state or local government employees that are not in some way supported by federal funds, including those in public education. Unfortunately, and for reasons that I don't understand, employees of public educational and research institutions are exempt from the Hatch Act.

As part of my testimony, I am submitting a copy of a 1992 booklet entitled "Political Activity and the State and Local Employee", which describes the Hatch Act and its effect on state and local government workers. I urge that Hatch Act provisions be extended to all state and local government employees in Montana, including those in public education and research, regardless of whether they are engaged in activities supported by federal funds.

In the introductory paragraphs of the aforementioned booklet, it says that:

The political activity of government employees has been a concern of elected officials since the earliest days of the Republic. Thomas Jefferson, the nation's third President, was among the first to express concern about this issue.

In response to Jefferson's concern, the heads of the executive departments issued an order which stated that while it is "the right of any officer (federal employee) to give his vote at elections as a qualified citizen . . . it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution . . ."

However, despite the concerns of Jefferson and other American statesmen, almost a century and a half elapsed before Congress enacted a comprehensive law regarding the political activities of government employees.

In 1939, Congress approved landmark legislation known as the Hatch Act which limits the political activities of federal employees, employees of the District of Columbia government and certain employees of state and local governments.

In passing the Hatch Act, Congress determined that partisan political activity by [such government employees] must be limited for public institutions to function fairly and effectively.

It seems to me that, if the reasoning of Jefferson and of those who drafted the Hatch Act was sound with respect to the federal government, then similar reasoning with respect to state and local governments should likewise be considered sound.

Note that the Hatch Act bars affected state and local government employees from very few political activities. It even allows active participation in political management and campaigning. As was emphasized during the hearing on Senate Bill 136 last week, nobody wants to deprive public employees of their rights to express opinions or to openly support political issues and candidates, provided they do so on their own time and at their own expense.

Other than barring political candidacy, the Hatch Act also prohibits affected government employees from using their authority or influence to interfere with or affect election results. I urge an even broader Montana statute prohibiting use of public funds and resources to support lobbying in the legislature, patterned somewhat after Section 87-1-204 MCA (which apparently now applies only to the Department of Fish, Wildlife and Parks). Of course, such a lobbying restriction should not constrain public employees who are invited by the governor or members of the legislature to provide information or expert testimony.

Testimony of Michael J. Gonsior in re Senate Bill 115
Senate Judiciary Committee, 2/1/95

p. 3 of 3

Incidentally, I think it's unfair that some public employees (such as those in the Department of Fish, Wildlife and Parks) are restricted in their political activities, whereas others (such as public school teachers or university professors) are under no such restrictions.

Apart from the aforementioned issues pertaining to the political activities of public employees, I have few concerns regarding ethics and conduct of politicians in Montana. I suspect there are already enough laws prohibiting bribery, influence peddling, and other corruptions; and I am confident that a diverse and genuine citizen legislature--i.e., one composed only of those from the private sector and not dominated by representatives of any particular occupation or special interest--can be trusted. Besides, a vigilant press and periodic elections provide ample safeguards and remedies. Otherwise, perhaps the thorniest issue regards political office holders who are the spouses or relatives of public employees. For instance, I imagine that a legislator who is married to a public employee would find it difficult to deliberate and vote on matters affecting the well-being of his or her spouse, for improving the well-being of one improves the well-being of the other; but improving their combined well-being might conflict with the interests of most of the legislator's constituents. It is undoubtedly a good idea to have ways to deal with such interest conflicts (and the appearance thereof). However, I'm not sure how such matters should be handled; as Ross Perot would say, "the devil is in the details!" (Incidentally, government retirees might also face ethical dilemmas in the political arena.)

In summary, I urge legislation that extends provisions of the Hatch Act to all public employees in Montana, including those employed in public education. If this requires amending Montana's constitution, then so be it. Such legislation also should forbid use of public resources to influence ballot issues, and it should prohibit use of tax dollars to pay for lobbying here in the legislature. Beyond this, I am inclined to favor letting the legislature rely on an honor system and common sense to deal with issues like conflict of interest on a case-by-case basis. Rather than establishing a new commission and promulgating more rules, I prefer that members of the legislature establish a process for dealing among themselves with ethical matters pertaining to themselves that are not already covered by existing laws. And, for all other state and local public employees, I would suggest regulations and handbooks modelled after those governing the behavior of federal employees (see accompanying example) with responsibility for counseling and compliance assigned to existing personnel management and judicial officials.

I apologize for the length of this testimony and for its departure from Senate Bill 115, but this is perhaps my best and last opportunity to bring these thoughts to the attention of this committee. On several occasions during the past year or so I attempted to communicate my concerns and suggestions to the Ethics Advisory Council, but evidently without success. Thank you for your patience and consideration.

POLITICAL ACTIVITY

AND THE STATE AND LOCAL EMPLOYEE

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IMPORTANT NOTE

This booklet summarizes the laws, regulations and policies governing the political activities of certain employees of state and local governments. Its intent is to provide a basic overview of permissible and prohibited political activities. Employees should not rely on the opinions of friends or co-workers when they have questions with regard to a specific political activity. Ignorance of the law does not excuse an employee's violation of the Hatch Act. Reliance on incorrect or unofficial information also does not excuse a violation. Employees with additional questions may obtain an advisory opinion by telephoning the Office of the Special Counsel or by submitting their questions, in writing, to the address listed below.

U.S. Office of Special Counsel

1120 Vermont Avenue, N.W.
Suite 1100
Washington, D.C. 20005
202/653-7188

The Hatch Act

Its Importance to State and Local Government Employees

2 The political activity of government employees has been a concern of elected officials since the earliest days of the Republic. Thomas Jefferson, the nation's third President, was among the first to express concern about this issue.

In response to Jefferson's concern, the heads of the executive departments issued an order which stated that while it is "the right of any officer (federal employee) to give his vote at elections as a qualified citizen . . . it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution. . . ."

However, despite the concerns of Jefferson and other American statesmen, almost a century and a half elapsed before Congress enacted a comprehensive law regarding the political activities of government employees.

In 1939, Congress approved landmark legislation known as the Hatch Act which limits the political activities of federal employees, employees of the District of Columbia government and certain employees of state and local governments.

In passing the Hatch Act, Congress determined that partisan political activity by federal employees, employees of the District of Columbia government and certain employees of state and local governments must be limited for public institutions to function fairly and effectively.

Before 1979, the U.S. Civil Service Commission had primary responsibility for enforcing the Hatch Act. However, the Civil Service Reform Act of 1978 transferred the Commission's investigative and prosecutorial authority to the Office of the Special Counsel of the U.S. Merit Systems Protection Board (MSPB). Among other things, the MSPB is the administrative body which adjudicates formal disciplinary actions filed by the Special Counsel against alleged violators of the Hatch Act.

Who Is Covered?

The Hatch Act restricts the political activity of individuals principally employed by state or local executive agencies in connection with programs financed in whole or in part by federal loans or grants.

The following list offers examples of the types of programs which frequently receive financial assistance from the federal government: public health, public welfare, housing, urban renewal and area redevelopment, employment security, labor and industry training, public works, conservation, agricultural, civil defense, transportation, anti-poverty, and law enforcement programs.

Usually, employment with a state or local agency constitutes the principal employment of the employee in question. When an employee holds two or more jobs, principal employment is generally deemed to be that job which accounts for the most work time and the most earned income.

Hatch Act provisions also apply to employees of private, nonprofit organizations which plan, develop and coordinate federal Head Start, Community Services Block Grant or Economic Opportunity programs.

Employees of certain private, nonprofit single purpose organizations which receive federal assistance are covered only to the extent that they may not solicit contributions or use official authority to influence or interfere with the outcome of elections or nominations. Among these are organizations which receive federal assistance under the Head Start or Community Services Block Grant programs.

State and local employees subject to political activity laws continue to be covered while on annual leave, sick leave, leave without pay, administrative leave or furlough.

Who Is Not Covered?

Hatch Act provisions do not apply to:

- 1) individuals who exercise no functions in connection with federally financed activities; or
- 2) individuals employed by educational or research institutions, establishments, or agencies which are supported in whole or in part by state or political subdivisions thereof, or by recognized religious, philanthropic or cultural organizations.

The law also exempts certain specified employees from the prohibition on candidacy for elective office. These exemptions include:

- 1) the governor or lieutenant governor of a state, or an individual authorized by law to act as governor;
- 2) the mayor of a city;
- 3) a duly elected head of an executive department of a state or municipality who is not classified under a state or municipal merit or civil service system; and
- 4) an individual holding public elective office. The latter exemption applies only when the elective office is the position which would otherwise subject the employee to the restrictions of the Hatch Act.

Political Do's & Don'ts For State and Local Employees

An individual principally employed by a state or local executive agency in connection with a program financed in whole or in part by federal loans or grants. . .

- **May** be a candidate for public office in a nonpartisan election
- **May** campaign for and hold elective office in political clubs and organizations
- **May** actively campaign for candidates for public office in partisan and nonpartisan elections
- **May** contribute money to political organizations or attend political fundraising functions
- **May** participate in any activity not specifically prohibited by law or regulation
- **May not** be a candidate for public office in a partisan election
- **May not** use official authority or influence for the purpose of interfering with or affecting the results of an election or a nomination for office
- **May not** directly or indirectly coerce contributions from subordinates in support of a political party or candidate

An election is partisan if any candidate for an elective public office is running as a representative of a political party whose presidential candidate received electoral votes at the preceding presidential election.

CAUTION: An employee's conduct is also subject to the laws of the state and the regulations of the employing agency. Prohibitions of the Hatch Act are not affected by state or local laws.

Questions and Answers

General Provisions

- Q. Which state and local employees are restricted in their political activity?
- A. Executive branch employees in any agency of a state or local government whose principal employment is in connection with an activity financed in whole or in part by federal loans or grants are covered by the law.
- Q. What does "principal employment" mean?
- A. If an employee has only one position or job, that is his principal employment. When an employee holds two or more jobs, principal employment is usually deemed to be the job which accounts for more work time and earned income than any other job.
- Q. Which officers or employees of a state, territorial or municipal government are not prohibited from participating in political management or political campaigns?
- A. The governor, the lieutenant governor, the mayor of a city or other elected officials of a state or local government are exempt if the elective office is their principal employment.
- Q. Are there any other employees excepted by the statute?
- WHY EDUCATIONAL? A. Yes. Officers and employees of educational and research institutions, establishments, agencies or systems supported in whole or in part by state or local governments or by recognized religious, philanthropic or cultural organizations are exempted from the statute.

Prohibited Activities

5

- Q. What does federal law provide concerning the political activity of certain state or local employees?
- A. State or local employees subject to the provisions of the Hatch Act may not:
- (1) use official authority or influence for the purpose of interfering with or affecting the result of elections or nominations for office;
 - (2) directly or indirectly coerce, attempt to coerce, command or advise a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes; or
 - (3) be candidates for elective office.
- Q. Does the law cover employees in the executive branch of the territorial governments of Puerto Rico, the Virgin Islands, Guam and American Samoa?
- A. Yes. For purposes of the law the term "state" includes states, territories and possessions of the United States.
- Q. What type of activity is prohibited by the restrictions against misuse of official authority and coercion?
- A. These prohibitions are aimed at activities such as threatening to deny promotion to any employee who does not vote for certain candidates; requiring employees to

5 contribute a percentage of their pay to a political fund influencing subordinate employees to buy tickets to political fund raising dinners and similar events; and advising employees to take part in partisan political activity. These prohibitions principally affect supervisors but are applicable to any covered employee. For instance, employees still may not coerce, command or advise other covered employees to make political contributions or to contribute their time or anything of value for partisan political purposes.

Q. What is meant by the prohibition against candidacy "for elective office"?

A. State or local employees subject to the Hatch Act may not be candidates for public office in partisan elections. Primary and run-off elections to nominate candidates of partisan political parties are partisan elections for purposes of the law even though no party designation appears on the ballot. However, candidacy for political party office is not prohibited by this provision.

Q. Does this mean that covered state or local employees cannot be candidates for public office in any election?

A. No. The law permits officers and employees to be candidates in nonpartisan elections. These are elections in which none of the candidates are nominated or elected as representatives of political parties whose presidential candidates received electoral votes at the last preceding presidential election.

Q. Who enforces the law for covered state and local employees?

A. The Special Counsel is responsible for enforcing the Hatch Act. The MSPB has authority to adjudicate disciplinary actions brought by the Special Counsel against covered state and local employees who are alleged to have violated the law.

Permitted Activities

Q. What types of political activity are permitted under the Hatch Act?

A. State or local employees subject to the provisions of the Hatch Act may take an active part in political management and political campaigns.

Q. What types of permitted activities are included in the term "political management"?

A. Employees may be members of and may hold office in political parties, organizations or clubs. Employees may attend meetings, vote on candidates and issues, and take an active part in the management of clubs, organizations or parties. Also, employees may be candidates for party office.

Attendance at political conventions and participation in the deliberations or proceedings are permitted activities. Employees may be candidates for, or serve as delegates, alternates or proxies at such conventions.

Volunteer work for partisan candidates, campaign committees, political parties or nominating conventions of political parties is permitted.

Q. What types of permitted activities does the term "political campaigns" include?

A. Employees may campaign for candidates in partisan elections by making speeches, writing letters and speeches for candidates or soliciting voters to support or oppose candidates.

Employees may attend political meetings or rallies including committee meetings of political organizations, and may serve on committees that organize or direct activities at partisan campaign meetings or rallies.

Q. May employees make financial contributions to political parties or organizations?

A. Yes. Employees may make financial contributions to political parties or organizations. The employees may solicit and collect voluntary political contributions. They may not solicit, coerce, command or advise other covered employees to make such contributions.

Q. Does the law prohibit employees from holding public elective office?

A. No. The law that prohibits candidacy for elective office does not prohibit holding office. Therefore, if an employee holds elective office when appointed to a covered state or local position, the employee may continue to serve. However, such an employee may not be a candidate for reelection in a partisan election. Likewise, an employee may accept appointment to fill a vacancy in an elective public office while concurrently serving in a covered position. Such an employee should ascertain from his or her employing agency if acceptance of such an appointment constitutes a conflict of interest.

Q. May employees work at the polls on election day?

A. Covered state or local employees may serve at the polls as election officials, clerks, checkers, watchers or as challengers for political parties and candidates in partisan elections.

Penalties for Violation

Q. What is the penalty for violating the Hatch Act?

A. If the Merit Systems Protection Board finds that the offense warrants dismissal from employment, the employing agency must either: (1) dismiss the employee or (2) forfeit a portion of the federal assistance equal to two years salary of the employee.

If the Board finds the violation does not warrant the employee's discharge, no penalty is imposed.

8 Q. Where is the law found which restricts political activity of state, territory, possession and local agency employees?

A. Sections 1501-1508 of title 5, United States Code; Part 151 of title 5, Code of Federal Regulations.

Special Considerations for Employees of Private, Nonprofit Agencies Receiving Federal Assistance

Q. Are any political restrictions applicable to employees of private, nonprofit organizations?

A. Yes. Employees of private, nonprofit organizations which plan, develop and coordinate federal Head Start, Community Services Block Grant or Economic Opportunity programs are subject to the same political activity restrictions that apply to covered state and local employees.

Employees of private, nonprofit single purpose organizations which receive assistance under the federal Head Start, Community Services Block Grant or Economic Opportunity programs are covered to the extent that they may not coerce contributions or use official authority to influence or interfere with the outcome of elections and nominations.

Q. Do the political activity restrictions apply equally for a full-time or part-time employee?

A. Yes, provided the employee's position with the federally financed agency is his or her principal employment.

Q. Is everyone employed under the Comprehensive Employment and Training Act (CETA) covered by the Hatch Act?

A. No. Participants may or may not be covered depending on the particular activity in which they are employed. Those individuals, including participants, involved in the administration of CETA programs are covered.

The Office of Special Counsel

The Office of Special Counsel is responsible for investigating reports or complaints of Hatch Act violations by covered employees of state and local governments.

If an investigation uncovers evidence of a violation of the law warranting prosecution, a written complaint for disciplinary action may be filed with the U.S. Merit Systems Protection Board (MSPB). A copy of the complaint is served on the charged employee.

Full opportunity is provided to contest the charges, including a right to a hearing before the MSPB. The employee may be represented by counsel at all stages of the proceedings.

After consideration of the entire record, the MSPB will notify the employee and the employing agency of its decision.

If the MSPB finds the offense warrants dismissal from employment, the employing agency must either: (1) dismiss the employee or (2) forfeit a portion of the federal assistance equal to two years' salary of the employee. If the MSPB finds the violation does not warrant the employee's discharge, no penalty is imposed.

In order to better acquaint those state and local government employees with the provisions regarding political activity, attorneys from the Office of Special Counsel are available to brief officials of state and local agencies on political participation by covered employees.

Past experience has shown that briefing programs are most effective with groups of 30 to 60 people. Arrangements for personal briefing sessions may be made by contacting the Office of the Special Counsel, U.S. Merit Systems Protection Board, Washington, D.C.

Title 5. United States Code

10 Chapter 15—Political Activity of Certain State and Local Employees

Sec.

- 1501. Definitions.
- 1502. Influencing elections; taking part in political campaigns; prohibitions; exceptions.
- 1503. Nonpartisan candidacies permitted.
- 1504. Investigations; notice of hearing.
- 1505. Hearings; adjudications; notice of determinations.
- 1506. Orders; withholding loans or grants; limitations.
- 1507. Subpenas and depositions.
- 1508. Judicial review.

§ 1501. Definitions

For the purpose of this chapter—

- (1) "State" means a State or territory or possession of the United States;
- (2) "State or local agency" means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;
- (3) "Federal agency" means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System; and
- (4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include—
 - (A) an individual who exercises no functions in connection with that activity; or
 - (B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

§ 1502. Influencing elections; taking part in political campaigns; prohibitions; exceptions

- (a) A State or local officer or employee may not—
 - (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
 - (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
 - (3) be a candidate for elective office.
- (b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.
- (c) Subsection (a)(3) of this section does not apply to—
 - (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;
 - (2) the mayor of a city;
 - (3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil service system; or
 - (4) an individual holding elective office.

§ 1503. Nonpartisan candidacies permitted

Section 1502(a)(3) of this title does not prohibit any State or local officer or employee from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

§ 1504. Investigations; notice of hearing

When a Federal agency charged with the duty of making a loan or grant of funds of the United States for use in an activity by a State or local officer or employee has reason to believe that the officer or employee has violated section 1502 of this title, it shall report the matter to the Special Counsel. On receipt of the report or on receipt of other information which seems to the Special Counsel to warrant an investigation, the Special Counsel shall investigate the report and such other information and present his findings and any charges

based on such findings to the Merit Systems Protection Board, which shall—

- (1) fix a time and place for a hearing; and
- (2) send, by registered or certified mail, to the officer or employee charged with the violation and to the State or local agency employing him a notice setting forth a summary of the alleged violation and giving the time and place of the hearing.

The hearing may not be held earlier than 10 days after the mailing of the notice.

§ 1505 Hearings; adjudications; notice of determinations

Either the State or local officer or employee or the State or local agency employing him, or both, are entitled to appear with counsel at the hearing under section 1504 of this title, and be heard. After this hearing, the Merit Systems Protection Board shall—

- (1) determine whether a violation of section 1502 of this title has occurred;
- (2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and
- (3) notify the officer or employee and the agency of the determination by registered or certified mail.

§ 1506 Orders; withholding loans or grants; limitations

(a) When the Merit Systems Protection Board finds—

- (1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Board that he violated section 1502 of this title and that the violation warrants removal; or
- (2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency;

the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation. When the State or local agency to which appointment within 18 months after removal has been made is one that receives loans or grants from a Federal agency, the Board order shall direct that the withholding be made from that State or local agency.

(b) Notice of the order shall be sent by registered or certified mail to the State or local agency from which the amount is ordered to be withheld. After the order becomes final, the Federal agency to which the order is certified shall withhold the amount in accordance with the terms of the order. Except as provided by section 1508 of this title, a determination or order of the Board becomes final at the end of 30 days after mailing the notice of the determination or order.

(c) The Board may not require an amount to be withheld from a loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of that amount would jeopardize the payment of the principal or interest on the bonds or notes.

§ 1507. Subpenas and depositions

(a) The Merit Systems Protection Board may require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter before it as a result of this chapter. Any member of the Board may sign subpoenas, and members of the Board and its examiners when authorized by the Board may administer oaths, examine witnesses, and receive evidence. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at the designated place of hearing. In case of disobedience to a subpoena, the Board may invoke the aid of a court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. In case of contumacy or refusal to obey a subpoena issued to a person, the United States District Court within whose jurisdiction the inquiry is carried on may issue an order requiring him to appear before the Board, or to produce documentary evidence if so ordered, or to give evidence concerning the matter in question; and any

12 failure to obey the order of the court may be punished by the court as a contempt thereof.

(b) The Board may order testimony to be taken by deposition at any stage of a proceeding or investigation before it as a result of this chapter. Depositions may be taken before an individual designated by the Board and having the power to administer oaths. Testimony shall be reduced to writing by the individual taking the deposition, or under his direction, and shall be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence before the Board as provided by this section.

(c) A person may not be excused from attending and testifying or from producing documentary evidence or in obedience to a subpoena on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify, or produce evidence, documentary or otherwise, before the Board in obedience to a subpoena issued by it. A person so testifying is not exempt from prosecution and punishment for perjury committed in so testifying.

§ 1508. Judicial review

A party aggrieved by a determination or order of the Merit Systems Protection Board under section 1504, 1505, or 1506 of this title may, within 30 days after the mailing of notice of the determination or order, institute proceedings for review thereof by filing a petition in the United States District Court for the district in which the State or local officer or employee resides. The institution of the proceedings does not operate as a stay of the determination or order unless—

- (1) the court specifically orders a stay; and
- (2) the officer or employee is suspended from his office or employment while the proceedings are pending.

A copy of the petition shall immediately be served on the Board, and thereupon the Board shall certify and file in the court a transcript of the record on which the determination or order was made. The court shall review the entire record including questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that the additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce this evidence in the hearing before the Board, the court may direct that the additional evidence be taken before the Board in the manner and on the terms and conditions fixed by the court. The Board may modify its findings of fact or its determination or order in view of the additional evidence and shall file with the court the modified findings, determination, or order; and the modified findings of fact, if supported by substantial evidence, are conclusive. The court shall affirm the determination or order, or the modified determination or order, if the court determines that it is in accordance with law. If the court determines that the determination or order, or the modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Board with directions either to make a determination or order determined by the court to be lawful or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court are final, subject to review by the appropriate United States Court of Appeals as in other cases, and the judgment and decree of the court of appeals are final, subject to review by the Supreme Court of the United States on certiorari or certification as provided by section 1254 of title 28. If a provision of this section is held to be invalid as applied to a party by a determination or order of the Board, the determination or order becomes final and effective as to that party as if the provision had not been enacted.

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How To Keep Out of Trouble

... Ethical Conduct
for Federal Employees ...
in Brief

PUBLIC SERVICE - PUBLIC TRUST

Office of Government Ethics

OGE

March 1986

Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044
(FTS) 632-7642

FOREWORD

The Office of Government Ethics has Federal statutory responsibility to promote understanding of ethical standards in executive agencies. The laws and regulations that make up those government-wide standards are found in Title 18 of the United States Code, sections 202 through 209, and Executive Order 11222, as implemented by Part 735 of Title 5 of the Code of Federal Regulations.

This pamphlet is an effort to explain the thrust and practical applications of these ethical laws and regulations. It is not intended to be all-inclusive of the various ethical restrictions placed on you, nor should it be used as a basis for definitive interpretation of the criminal law provisions or the Executive Order. Additionally, you may be subject to other agency-specific restrictions. The question and answer format is designed to anticipate and answer some of the more common concerns facing Federal employees. I hope it will be a useful reference guide to you as you carry out your official responsibilities.

The pamphlet was prepared with the assistance of the President's Council on Integrity and Efficiency. Special recognition is extended to the Inspector General Offices of the Departments of Defense and Housing and Urban Development, and the Assistant Secretary for Personnel of the Department of Health and Human Services for providing representatives to compile the pamphlet. The Department of Health and Human Services also provided materials used in its preparation.

David H. Martin

David H. Martin
Director
Office of Government Ethics

INTRODUCTION

As officers and employees of the Federal Government, we must all conform to high standards of ethical conduct. We are judged not only by our official actions and conduct, but also by our personal activities when they are related to our work for the Government. The Government relies on us as its representatives to perform Government business properly, to protect Government interests, and to meet the high ethical standards of public service.

The purpose of this pamphlet is to present the basic laws and regulations on ethical conduct in an easy-to-read, easy-to-understand format. This pamphlet condenses the regulations into a concise document that you can use as a ready reference for answering questions. The pamphlet does not replace existing laws and regulations which should be consulted for the precise requirements.

For the most part, the standards of conduct and conflict of interest laws apply to all Government officers and employees including special Government employees, such as experts, consultants, and advisory committee members. You are responsible for knowing these laws and regulations as well as the specific policies and procedures of your own agency.

Employees, supervisors, and management officials all share the responsibility for ensuring that high standards of ethical conduct are maintained within the Government. You are required to become familiar with the standards of conduct regulations and to exercise judgment to avoid any action that might result in or create the appearance of misconduct or conflict of interest. Supervisors and managers must become familiar with the standards of conduct regulations and apply the standards to the work they do and supervise.

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THE HATCH ACT

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ETHICAL CONDUCT FOR ALL EMPLOYEES

WHERE CAN YOU GET GUIDANCE ON THE ETHICS LAWS AND REGULATIONS?

You are encouraged to seek guidance whenever you are unsure whether your actions or planned actions are in accordance with the standards. There are several sources within the Government that you can rely on for guidance on ethical matters. Among them are:

- The Office of Government Ethics
- The Office of the General Counsel
- The Designated Agency Ethics Official
- The Personnel Office
- The Office of the Inspector General



WHAT ARE THE GENERAL STANDARDS OF CONDUCT?

An employee must avoid any action that might result in or create the appearance of:

- Using public office for private gain;
- Giving preferential treatment to anyone;
- Impeding Government efficiency or economy;
- Losing complete independence or impartiality;
- Making a Government decision outside official channels; or
- Affecting adversely the confidence of the public in the integrity of the Government.

Employees must be particularly careful that private interests and activities do not impact adversely on or conflict with their public duties. The following sections address specific questions that you may have.

ARE YOU ALLOWED TO USE GOVERNMENT PROPERTY FOR PERSONAL REASONS?

No. You have a positive duty to protect and conserve Federal property and to obey all rules and regulations regarding its use. You cannot directly or indirectly use or allow the use of Government property for other than officially approved activities. This includes property leased to the Government. (5 C.F.R. 735.205)

A few examples of the improper use of Government property include:

- Using Government envelopes to send payroll checks to the bank or for other personal matters.
- Using Government photocopy equipment for personal matters.
- Using a Government-owned, leased, or rented vehicle or aircraft for non-official purposes.
- Using Government telephones to make personal telephone calls. (This includes local and long distance calls over both commercial facilities and the Federal Telecommunications System.)
- Selling commercial products in a Government building.
- Using Government computers and word processors for personal matters.



WHAT IS THE GOVERNMENT'S POLICY ON THE ACCEPTANCE OF GIFTS, ENTERTAINMENT, AND FAVORS?

You may not solicit or accept anything of monetary value, including gifts, gratuities, favors, entertainment or loans from any person who:

- Has or is seeking to obtain contractual or other business or financial relations with your agency.

- Conducts operations or activities that are regulated by your agency; or
- Has interests that may be substantially affected by the performance or nonperformance of your official duties. (5 C.F.R. 735.202)

Your agency may have additional restrictions or may provide exceptions for the following:

- Gifts, gratuities, favors, entertainment, loans or similar favors of monetary value that stem from a family or personal relationship when the circumstances make it clear that it is that relationship rather than the business of the person concerned that motivates the gift;
- Loans from banks or other financial institutions on customary terms;
- Unsolicited advertising or promotional material of nominal value such as pens, note pads, and calendars;
- Food or refreshments of nominal value, served on infrequent occasions, in the ordinary course of a luncheon or dinner meeting and only if you are properly in attendance and there is not a reasonable opportunity to pay, or if the food is offered to all participants attending the meeting or convention.
- Travel and subsistence expenses in certain cases when authorized by your agency.

Listed below are examples of instances when you may be offered gifts or favors and the proper action to take in each case:

You are on the premises of Company X participating in a meeting at lunchtime. A representative of Company X provides a meal for all meeting participants from a Company X facility and there is no established method for payment. You may accept the meal, unless your agency specifically prohibits it.

You are on the premises of Company X and you go to a restaurant for lunch with a Company X salesperson. The salesperson offers to pay the bill. Since it is expected that employees pay for their own lunches, you may not accept the salesperson's offer to buy lunch.

You should be aware that there are criminal provisions relating to the acceptance of gifts, entertainment, and favors found in Title 18 of the United States Code.

One provision is Title 18 U.S.C. 209, which prohibits you from receiving any salary as compensation for services as an employee of the Government from any source other than the United States.

Example:

You are asked to give a speech in your official capacity. You may not accept a fee for a speech given as part of your Government duties.

This law does not prohibit you from continuing to participate in a bona fide employee welfare or benefit plan maintained by a former employer. It also does not prohibit you from receiving compensation from a state, county, or municipality, unless prohibited under your agency's Standards of Conduct.

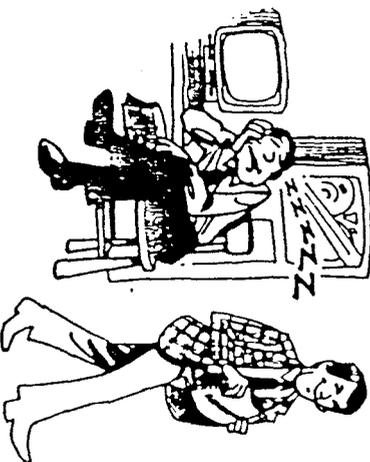


Example:

Your office decides to take up a collection for your boss who is being promoted within the office. This would not qualify for the exception for special occasions because it involves a continuing workplace relationship.

WHAT ABOUT USING INFORMATION PICKED UP ON THE JOB?

You may not use, for furthering a private interest, information obtained through your Government job that has not been made available to the general public. (5 C.F.R. 735.206) For example, you would not be free to use information that has not been dispersed by the agency or is available to a member of the public only by special request.



WHAT HAPPENS IF YOU FAIL TO PAY YOUR DEBTS?

You should meet your just financial obligations in a proper and timely manner. Failure to do so reflects adversely on the Government and on your agency and is considered improper conduct. (5 C.F.R. 735.207)

Gifts to superiors:

You may not solicit a contribution from another employee for a gift to an official superior, or make a donation to a superior. Also, you may not accept a gift from an employee receiving less pay than you. (5 U.S.C. 7351)

Most agencies allow voluntary gifts of nominal value or donations in a nominal amount on a special occasion such as marriage, illness, or retirement.

CAN YOU GAMBLE WHILE ON DUTY?

No. You are not allowed to participate in any gambling activity while on Government-owned or leased property or while on duty for the Government. This includes the operation of a gambling device in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a number's slip or ticket. (5 C.F.R. 735.208)



CAN YOU HAVE A SECOND JOB OUTSIDE OF THE GOVERNMENT?

You may engage in outside employment, with or without compensation, but only if it will not affect adversely the performance of your official duties and will not conflict with your duties. Such work may include civic, charitable, religious, and community undertakings. You may not participate in outside employment which:

- Tends to impair your mental or physical capacity to perform Government duties and responsibilities in an acceptable manner;
- Is likely to result in criticism or cause embarrassment to your agency;
- Creates a real or apparent conflict of interest;
- Takes your time and attention during your official work hours. (5 C.F.R. 735.203)

If you are considering outside employment, you may be required to obtain advance administrative approval for certain activities as required by your agency.

There are other types of outside activity that you may be interested in pursuing such as teaching, lecturing, and writing. Advance approval may be required by your agency. A few of the most important restrictions on outside activities are as follows:

- You may not use Government-financed time or supplies;
- You may not use or allow the use of official information that has not been made available to the general public;
- You may not promote the use of your official title or affiliation with your agency, and allow no suggestion of official endorsement.

Title 18 U.S.C. 203 and 205 prohibit you from representing another person before an agency or court of the Federal or D.C. Governments, and from receiving payment for someone else's representation before an agency of the Federal or D.C. Governments. Your representation is prohibited even when uncompensated. For example:

Unless specifically prohibited by your agency, you may prepare income tax returns for others in your free time, but you may not argue before the Internal Revenue Service on behalf of your client, if there is a dispute over the return.

You may not represent a non-profit organization of which you are a member before a Federal agency in a request for a grant even though you would not be paid for the representation.

Exceptions:

Generally, you are allowed to represent your parents, your spouse or child, or anyone for whom you serve as a guardian.

You also may provide testimony under oath.

CAN YOU OBTAIN PERSONAL GAIN FROM YOUR OFFICIAL POSITION OR ACTIONS?

Generally speaking, you cannot participate personally and substantially as a Government employee in a matter in which you have a financial interest. There is no minimum amount of value or control that constitutes a financial interest. This prohibition also applies if any of the following individuals or organizations have a financial interest in the matter:

- Your spouse;
- Your minor child;

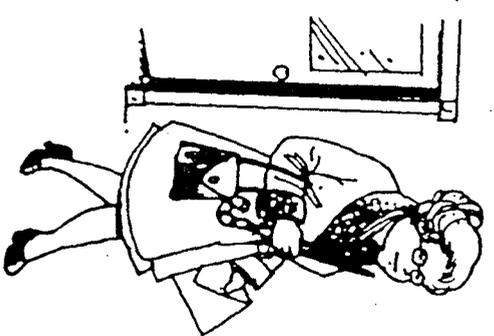
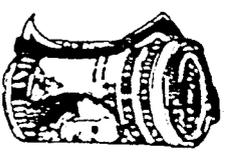
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- Your partner;
 - An organization in which you serve as an officer, director, trustee, partner or employee; or
 - A person or organization with which you are negotiating for prospective employment or have an arrangement for prospective employment. (18 U.S.C. 208)
- The standards of conduct regulations go further in prohibiting you from having a financial interest that conflicts or even appears to conflict with your Government duties and responsibilities. (5 C.F.R. 735.204)

The following cases are examples of conflict of interest situations:

- You own a single share of stock in a widely-held corporation. If the corporation is likely to be affected by a matter in which you will participate as a Government official, you may violate 18 U.S.C. 208.
- You have a paid part-time position with a non-Federal organization. If the organization is likely to be affected by a matter in which you will participate as a Government official, you would violate 18 U.S.C. 208.
- You are administering a Government contract with a firm owned by your brother-in-law. You probably would not violate 18 U.S.C. 208 because your brother-in-law's financial interests are not considered to be yours, but you would have the appearance of a conflict, which would violate the standards of conduct.
- You are conducting an audit of a private organization in the course of your Government job. The head of this private organization asks you to meet with her to discuss leaving Government to join her organization. Unless you immediately reject the offer, you would have to disqualify yourself from further participation in the audit in order not to violate 18 U.S.C. 208.

The head of your agency can grant you a waiver under 18 U.S.C. 208 if your financial interest is found to be not so substantial as to affect the integrity of your services. A general waiver can also be granted to a group of employees for certain interests found to be too remote or inconsequential to affect the integrity of the employees' services. The general waivers must be published in the Federal Register.



WHAT ARE POST-EMPLOYMENT RESTRICTIONS?

Post-employment restrictions can be found in Title 18 of the United States Code. Title 18 U.S.C. 207 prohibits former Government employees from "switching sides." For example, as a former employee, you would be prohibited permanently from acting as another person's representative to the Government in certain matters in which you have been involved substantially while in Federal service. Also, for two years you would be prohibited from representing another person to the Government in certain matters which were pending under your official responsibility during your last year of Government service.

Examples:

As a former Government employee, you would be prohibited from representing another person on a contract you administered while with the Government, but you could work on the contract in the contractor's office.

As a former supervisor with the Government, you would be prohibited for two years from representing another person before the Government on a case that was under your official responsibility during your last year of Government service even if you did not actually work on the case yourself.

115

S.B. 115 -- ETHICS, CONFLICT OF INTEREST, AND PERSONAL FINANCIAL DISCLOSURE ACT

SENATE ETHICS COMMITTEE
EXHIBIT NO. 8
DATE 2/1/95
FILE NO. SB 115

I. Provisions specifically establishing CONFIDENTIALITY:

- A. **Advisory opinions are confidential.** Section 26 (2), (3), (4), (5), (9), (10).

Confidentiality may be waived by the person who requested the advisory opinion or by a majority vote of the Commission if a person makes public the substance of the advisory opinion. Section 26 (11).

- B. **Complaints and investigations by the Commissioner of Public Practices.** Sections 27 (Investigations), 36 (Complaints), 38 (Right to appear, with or without legal counsel), 30 (Cooperation by agencies and regulated individual with investigation is required), and 34 (Subpoena powers of the Ethics Commission.)

Hearings are confidential. Section 38 (2). Section 46 (2).

II. Provisions specifically addressing ramifications for FRIVOLOUS COMPLAINTS:

- A. **Complaint of violation not alleging sufficient facts to constitute a violation (in the judgment of the commissioner of political practices) may result in dismissal of the complaint.** Section 36 (3).
- B. **Statute of limitations (3 years, generally).** Section 40.
- C. **After investigation, complaint may be dismissed if no clear and convincing evidence of a violation evident, or if the claim is frivolous.** Section 42 (2), (4).
- D. **Substantial penalties for frivolous complaints.** Section 42 (6).

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III. Provisions with parallel criminal ramifications under Title 45, or, referral to appropriate authority of evidence of violation of law. Section 41. Examples:

- A. Misuse of Office, Section 5. [Official Misconduct, MCA 45-7-401.]
- B. Restraints on solicitation or acceptance of gifts and gratuities, Section 8. [(1), (2) Bribery, MCA 45-7-101; (3), (4) Tampering with a Witness or Evidence, MCA 45-7-206.]
- C. Contract [Section 9] violations. Section 53 (Revisions to Section 18-4-141).
- D. Threats to Public officials. MCA 45-7-102.

IV. Of Special Interest

- A. Misuse of Public Office, Section 5 (3) allowance for state entity (agency) adoption of rules covering permissible pro bono activities.

1/5/95

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9/13
DATE 2/1/95
BILL NO. SB 115

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Lou.
Willi
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Debi

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Code of ethics would be good place to begin

It's time the Montana Legislature cleans up its act and enacts a proper code of ethics.

Article 8, section 4 of the Montana Constitution says, "...The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees."

Sounds simple and clear cut, right? That language has been part of the Montana Constitution since it was adopted in 1972. The Legislature has scoffed at it for 22 years.

The "code of ethics" adopted by previous legislatures — the one that is now in place — is full of loopholes.

The current code of ethics says, in part, "The principles in this section are intended only as guides to legislative conduct and do not constitute violations as such of the public trust..."

"...When a legislator must take official action on a legislative matter as to which he has a conflict created by a personal or financial interest which would be directly and substantially affected by the legislative matter, he should consider disclosing or eliminating the interest creating the conflict or abstaining from the official action."

That's pretty loose language. In truth it's a license to have — not a prohibition against — unethical behavior.

We doubt the legislators would approve such language if it applied to anyone but themselves. The double standard needs to end.

Montanans and Americans are tired of our elective leaders passing one set of laws for the general public and another — watered-down — version for themselves.

Sen. Larry Baer, R-Bigfork, is introducing a bill that will take the ambiguity out of the code of ethics.

The bill also proposes tougher restrictions on conflicts of interests for public employees — often a substantial problem in the Legislature.

This bill ought to be one of the first taken up by the newly convened Legislature.

Quick passage of this code of ethics would set an excellent tone for the rest of the legislative session. It would be nice to see the Montana Legislature in compliance with the Montana Constitution — at long last.

DATE 2/1/95
 SENATE COMMITTEE ON Judiciary
 BILLS BEING HEARD TODAY: SB 115

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Bill Olson	AARP	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Warner Bertelsen	Common Cause	SB 115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Rusty Hays	State Auditor	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Deborah Smith	Common Cause	"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Ed Argenbright	Commissioners of Pol Practices	SB 115	<input type="checkbox"/>	<input type="checkbox"/>
Beth Fikes	Dept of Justice	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
TBS Rowe	PSC	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Paul Jacobson	SOS	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HOWARD GIFE	MACG	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Michael Goussior	Self and MBG	SB115	<input type="checkbox"/>	<input checked="" type="checkbox"/>
MIKE COONEY	SOS	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Ross Best		SB115	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Pam Merrell	Ethics Adv. Council	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Elizabeth (Betsy) Horsman-Wiitala	" " "	SB115	<input checked="" type="checkbox"/>	<input type="checkbox"/>

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DATE 2/1/95

PAGE TWO

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 115

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Check One

Name	Representing	Bill No.	Support	Oppose
Jim Polzin	Ethics Adv. Council	SB 115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
John Vincent	Ethics Adv. Council	SB 115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Gordon Morris	MACo	SB 115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
J.V. Bennett	Mont PTRG	SB 115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Amy Pfeifer	Self + other employees		<input checked="" type="checkbox"/>	<input type="checkbox"/>
E INGRAM	SELF	SB 115	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Jeff Miller	DCR	"	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PICK MATTA	SELF		<input type="checkbox"/>	<input checked="" type="checkbox"/>
Leo Giacometto	Governors Office	SB 115	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Laurie Koutnik	Christian Coalition of NJ	SB 115	<input type="checkbox"/>	<input type="checkbox"/>
Tony Weeale	SELF	"	<input type="checkbox"/>	<input type="checkbox"/>

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