A Proposal to Apply Ethics Agreements on the State and Local Government Level

The Committee on Government Ethics

INTRODUCTION

An ethics agreement is an oral or written promise by a reporting individual, typically a candidate or nominee for public office or employment, to undertake specific actions in order to remedy an actual or apparent conflict of interest.[1] These agreements aim to set forth the specific actions that a nominee or other candidate agrees to undertake to remedy actual or potential conflicts of interest with his or her proposed public duties. Much like an opinion from an ethics board, the ethics agreement provides useful, individualized guidance to the nominee as to what he or she must do, in light of his or her financial situation or outside activities, in order to meet the applicable ethical standards while in government.

Although widely used by the federal government, such agreements are rarely, if ever, used by state and local governments. We consider here whether such agreements would be useful at the state and local level. In considering the application of ethics agreements at the state and local level, we examine how the federal nominee ethics agreements function; what remedial measures for nominees' conflicts of interest ethics agreements contemplate; and whether the replication of the federal requirement of financial disclosure reports and ethics agreements at the state and local levels might prove valuable.

[1] *See* 5 C.F.R. § 2634.802(a); *see also* Public Financial Disclosure: A Reviewer's Reference, U.S. Office of Government Ethics (1996).

Ethics Agreements in the Federal Government

In 1951, under the direction of Senator Paul Douglas, the Senate Committee on Labor and Public Welfare produced one of the first comprehensive reports on ethical abuses in government. Senator Douglas further explored the theme of ethical standards in his 1952 Godkin lecture series at Harvard University and in his book reprinting these lectures, entitled *Ethics in Government*. The Godkin lectures focused on unethical behavior in lobbying, campaign finance, regulation of the economy, procurement practices, and tax policies, and provided an important foundation for later legislation relating to the fiscal accountability of public officials, both elected and appointed.

Following Douglas's lead, Congress enacted the loosely worded *Code of Ethics for U.S. Government Service* in 1958.[2] The Code invoked general ethical and legal principles without specifying rules, procedures, or prohibited conduct. In the wake of the Watergate scandal, the Senate and the House of Representatives debated new ethical codes in 1977;[3] the following year, Congress enacted the Ethics in Government Act of 1978, with the goal of "preserv[ing] and promot[ing] the integrity of public officials and institutions."[4]

The Ethics in Government Act and its subsequent amendments mark the cornerstones of the movement to promote and ensure ethics in government.[5] At the heart of the Act is the requirement that legislative, executive, and judicial personnel at the federal level file periodic

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[2] H.R. Con. Res. 175, 85th Cong. (1958).
[3] *See* Public Officials Integrity Act of 1977, Blind Trusts, and Other Conflict of Interest Matters: Hearings Before Senate Comm. on Governmental Affairs, 95 th Cong.
[4] Pub. L. 95-521 (S 555), 92 Stat. 1824, 95th Cong., 2nd Session.
[5] The Office of Government Ethics Reauthorization Act of 1988, Pub. L. 100-598, 102 Stat. 3031; Ethics Reform Act of 1989, Pub. L. 101-194, 203 Stat. 1716; Office of Government Ethics Authorization Act of 1996, Pub. L. 104-179, 100 Stat. 1566.

financial and conflict of interest reports. The Act also requires that presidential nominees file financial disclosures and, in most circumstances, sign ethics agreements prior to their Senate confirmation proceedings. Finally, the Act establishes the Office of Government Ethics ("OGE"), an independent executive agency that enforces conflict of interest laws and works to prevent and resolve the conflicts of interest of federal employees. OGE accomplishes this through policy-making and by monitoring the ethics agreements, financial disclosures, and conflict of interest reports signed by government officers and nominees.

A. Executive Nominee Financial Disclosure Reports & Ethics Agreements: Structure and Function

Prior to their Senate confirmation proceedings, presidential nominees generally receive several forms from the White House's legal counsel requiring full disclosure of their personal and financial history. These confidential forms include the "Personal Data Statement Questionnaire"; the "Questionnaire for National Security Positions"; an FBI background check consent form; a credit check authorization; a medical release authorization; a "tax check waiver"; and the OGE's Standard Form 278, "Public Financial Disclosure Report."[6] The Public Financial Disclosure Form requires the nominee to report certain interests in property, earned and non-investment income, gifts and reimbursements, liabilities, ongoing relationships with a prior employer, and outside positions in organizations.

The Public Financial Disclosure Report is forwarded on to the Designated Agency Ethics Official ("DAEO") within the executive agency for which the nominee will work. The DAEO reviews the report and, in accordance with criminal conflict of interest statutes[7] and regulatory

[6] Standard Form 278, Executive Branch Personnel, Public Financial Disclosure Report.
[7] *See* 18 U.S.C. §§ 201-209.

standards of conduct for executive branch officials,[8] prepares an ethics agreement for the nominee if such an agreement is deemed necessary by the DAEO in light of the nominee's disclosures.

Ethics agreements prepared by the DAEO are submitted to the OGE, which, in higher profile cases, will vet the public disclosure reports and ethics agreements and make its own determination as to whether the nominee's holdings or activities pose potential conflicts of interest.[9] Compliance with ethics agreements must be secured no later than three months from the date of the agreement (or of Senate confirmation, if applicable).[10] The DAEO then forwards the signed ethics agreement to the Senate along with a letter from the OGE stating that the nominee is in compliance with conflict of interest laws and regulations.[11] At this point, a nominee's financial disclosures and ethics agreement generally become public record.[12]

The DAEOs are responsible for continuing to monitor compliance with ethics agreements after nominees enter office. The Ethics in Government Act of 1978 and the Code of Federal Regulations emphasize the importance of compliance with ethics agreements in the confirmation and appointment process, expressly recognizing this in the requirement that individuals provide written notice "of any action taken by the individual pursuant to [the] agreement."[13] Both the

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[8] *See* Executive Order 11222 and regulations promulgated pursuant thereto.
[9] DAEOgram DO-01-013, March 28, 2001; Public Financial Disclosure, U.S. Office of Government Ethics (1996); Presidential Appointee Initiative, Brookings Institution, http://pai.brookings.edu/sg/c2-1.htm.
[10] 5 C.F.R. § 2634.802(b).
[11] DAEOgram DO-01-013, March 28, 2001; Public Financial Disclosure, U.S. Office of Government Ethics (1996); Presidential Appointee Initiative, Brookings Institution.
[12] Exceptions include: (1) nominees requiring Senate confirmation who file financial disclosure forms (SF 278s) but are exempt from public reporting because they will perform their agency duties less than 60 days per calendar year, and (2) nominees who have not physically attached their ethics agreements to their SF 278s or incorporated the agreements by reference into their financial disclosure reports. In the second situation, the financial disclosure report will become a public document, but the ethics agreement will remain confidential.
[13] 5 U.S.C. § 110(a); Pub. L. 95-521 (S 555), 92 Stat. 1824, 95th Cong., 2nd Session; 5 C.F.R. § 2634.804; DAEOgram DO-01-013, March 28, 2001.

2001 "DAEOgram" issued by the OGE and the Code of Federal Regulations list the kinds of evidence that are generally acceptable for common actions required by ethics agreements.[14]

It is important to note that not all presidential nominees must enter into ethics agreements. Only nominees with conflicts of interest, as determined by their DAEOs, are asked to enter into such agreements, which may be written or oral. However, those nominees requiring Senate confirmation must have their agreements reduced to "some form" of writing, so that they can be transmitted with the financial disclosure reports to the OGE.[15] The written forms that these ethics agreements may take include a letter or memorandum from the nominee to the DAEO or to the OGE, or a letter from the DAEO to the OGE summarizing the nominee's promised actions.[16] Although the OGE has drafted a model ethics agreement, the agency also emphasizes that "DAEOs remain free to develop and use their own ethics agreement language, provided, of course, that any agreements adequately describe the specific actions that would be required for the given nominee to avoid any actual or apparent conflicts of interest."[17]

In 2001, President Bush nominated to executive positions many individuals with significant financial interests and/or involvement in activities that posed a potential conflict of interest with the agencies they might soon represent. In response, the OGE issued a DAEOgram to the DAEOs clarifying the form and scope of nominee ethics agreements.[18] Ethics agreements, the DAEOgram emphasized, "are established so that the steps the individual must take in order to insulate himself and protect the agency processes from conflict of interest are clear, not only to the individual, the agency and the public, but to the Senate committee responsible for holding the confirmation hearing. These agreements, therefore, serve an important purpose and should

[14] 5 C.F.R. § 2634.804(b); DAEOgram DO-01-013, March 28, 2001.
[15] 5 C.F.R. § 2634.803(a)(1); DAEOgram DO-01-013, March 28, 2001.
[16] DAEOgram DO-01-013, March 28, 2001.
[17] DAEOgram DO-01-013, March 28, 2001.
[18] *Id.*

not be taken lightly by the individuals making them."[19] OGE will often make an ethics agreement a "necessary condition," the DAEOgram continued, for the agency's certification of a nominee's financial disclosure statement.[20]

B. Remedial Measures for Nominees' Conflicts of Interest

Remedial measures in ethics agreements include recusal from a matter of official action, divestiture of a financial interest, and resignation from a non-Federal position. Other, less common, remedial measures such as waiver (if determined that the conflict is not "substantial" or it is outweighed by the individual's services), establishment of a qualified trust (blind or diversified), and outside earned income limitations, are also incorporated depending on the specific circumstances.[21] OGE has underscored the importance that "ethics agreement be sufficiently specific to make clear − to the nominee, the agency, OGE, and the Senate – precisely what measures will be undertaken" to remedy potential or actual conflicts.[22] Without such specificity, the usefulness of an ethics agreement would be significantly compromised because the nominee may not understand what curative actions are being required of him.[23]

Compliance with an ethics agreement is a key component of successful completion of the confirmation and/or appointment process. Under the federal model, when a nominee or candidate takes any action under an ethics agreement, he or she is required to provide written notice of that action and provide sufficient evidence of compliance.[24] The nominee or candidate has three months from the date of confirmation or appointment, unless extensions are provided,

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[19] DAEOgram DO-01-013, March 28, 2001 (*citing* OGE Informal Advisory Opinion 88 x 13 (Sept. 12, 1988)).
[20] *Id.*
[21] 5 C.F.R. § 2634.802(a); Public Financial Disclosure, U.S. Office of Government Ethics (1996); 18 U.S.C.A. § 208(b).
[22] DAEOgram DO-01-013, *Nominee Ethics Agreements*, March 28, 2001; 5 C.F.R. § 2634.802(a).
[23] *Id.* (*citing* H.R. Rep. 89, 98th Cong., 1st Sess. 20 (1983)).
[24] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804.

to produce evidence to the DAEO that the terms of the ethics agreement have been satisfied.[25] In turn, the DAEO transmits the evidence to OGE, which has general oversight of ethics agreement compliance by nominees.[26]

Ethics agreements explicitly provide for the types of evidence that the nominee or candidate is required to submit to demonstrate compliance.[27] Generally acceptable evidence for divestitures would include a written statement that an item has been sold, along with the sale date or copy of sale document;[28] for resignations, a written statement documenting the resignation along with the date and a copy of the resignation letter (not required for nominees leaving full-time private employment for full-time government service);[29] for recusals, a copy of the recusal document identifying the matters from which the appointee will be recused and detailing the recusal screening process naming those individuals who will screen matters from the appointee and to whom they will be referred for action (OGE recommends that such written recusals be updated regularly to reflect changed circumstances, and be provided to the appointee's superiors and subordinates);[30] for a statutorily authorized waiver, a copy of the waiver signed by the appropriate official;[31] and, for a qualified (blind or diversified) trust, all information required by rule for certification.[32]

Allegations involving breach of ethics agreements have led to investigations of government officials. For example, in 2004 the Office of the Inspector General ("the "OIG") of the Department of the Interior ("DOI") issued a report of its findings after an investigation into

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[25] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.802(b).
[26] *See* 5 C.F.R. § 2634.801 et seq.
[27] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804(a).
[28] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804(b)(2).
[29] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804(b)(2).
[30] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804(b)(1).
[31] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804(b)(3).
[32] DAEOgram DO-01-013, March 28, 2001; 5 C.F.R. § 2634.804(b)(4).

allegations that J. Steven Giles, then Deputy Secretary of DOI, violated the terms of his written agreement to restrict his involvement from matters involving his former employers and clients.[33] After his nomination as Deputy Secretary, Griles had executed an ethics agreement in which he described the steps that he would take to avoid actual or perceived conflicts of interest. Griles specifically promised to resign from his firm within a specified period of time, sell his interest in the firm, and recuse himself from any particular matter that involves his former clients or that would have a direct and predictable effect on his former firm's ability to make annual severance payments to him.[34] It was alleged that while he was Deputy Secretary of DOI Griles arranged meetings between his former clients and government officials and that he participated in matters that affected his former clients and firm. In a report issued in March 2004, the OIG determined that Griles had not been sufficiently briefed about his obligations under his ethics agreements and that there was generally lax oversight of ethics matters at the agency. The OIG reported its findings to the OGE.

Value of Ethics Agreements at the State and Local Level

State and local governments have little, if any, history utilizing ethics agreements in their appointment processes. Indeed, New York State and New York City are two examples of jurisdictions that do not use them for individuals nominated by the Governor or Mayor for positions requiring approval by the State Legislature or City Council, let alone for other high-level public officials not subject to legislative confirmation. Although many jurisdictions, including New York State and New York City, have ethics or conflicts of interest laws that

[33] A copy of the OIG report is available at http://www.oig.doi.gov/upload/Griles%20Final%203-27-04%20REDACTED.pdf.

[34] Griles, a former lobbyist and consultant for the oil, gas, and coal industries, held an interest in the firm for which he worked. When he was confirmed as Deputy Secretary, he sold his interest back to that firm and received, for four years, an annual severance payment from his former firm.

govern the conduct of public officials, the introduction of ethics agreements as a tool might be an effective means to help insulate the nominee from potential conflicts of interest by requiring recusal, divestiture, and other appropriate steps prior to appointment with appropriate guidance and deadlines.

Currently, under the New York State Ethics Law, individuals who are nominated by the Governor for positions requiring approval by the Legislature are not considered employees or officers of the state, for the purposes of application of the law, until they are actually sworn in.[35] Only after an individual is deemed an employee or officer of the State do the financial disclosure provisions of the law, requiring annual filing of financial disclosure statements with the State Ethics Commission, apply.[36]

Similarly, in New York City, individuals who are nominated by the Mayor or other elected officials for positions, some of which may require advice and consent of the City Council, are not considered "city employee[s]" for the purpose of application of the City's Conflicts of Interest and Financial Disclosure Laws, until after they are appointed.[37]

Thus, neither State nor City law formally requires that conflicts of interest be identified or resolved prior to appointment. This leaves the appointee and the government to resolve any actual or apparent conflicts only after the fact, unless there are administrative protocols in place designed to identify and provide prescriptions for resolving such conflicts before appointment. Absent such protocols, state and local governments could potentially find themselves with an appointee who, depending upon specific circumstances, may be unable or unwilling to resolve a conflict of interest, or who after appointment may simply forget to do so in a manner that would

[35] Under the Public Officers Law, § 73(5), however, the restrictions on gifts do apply to an individual whose name has been submitted by the Governor to the Senate for confirmation.
[36] *See* Public Officers Law §§ 73 & 74.
[37] New York City Charter § 2601(19) and Administrative Code § 12-110(a)(2).

foster accountability, transparency and best serve the public interest. As a consequence, completion of important public work could be stalled, or otherwise impaired, while the conflict is either being resolved, negatively played out in the press, or a new appointee is sought.

As an example of informal procedures currently in place, the Bloomberg Administration has established rigorous pre-appointment protocols to screen each nominee for advice and consent, or for direct appointment, for conflicts of interest regardless of the position for which he or she is being considered.[38] In particular, for nominations that require the advice and consent of the City Council, both the Administration, working with the City's Department of Investigation, and the City Council require the nominee to complete a common 40-page background investigation questionnaire. If any potential conflicts are identified, the nominee is either asked to remedy the conflict prior to appointment, or shortly thereafter, and often after consultation with, or after an advisory opinion is received from, the Conflicts of Interest Board.[39]

Requiring formal pre-appointment review and ethics agreements at the state and local government level, however, might add a useful measure of clarity to the process of unwinding and safeguarding against potential and actual ethical conflicts for political nominees more generally. In addition, for some state and local governments, requiring formal ethics agreements could also make the appointment process more substantive by giving the executive and legislative branches an opportunity to be probative with the nominee about the full extent of his or her general background, including business and other financial ties. Ethics agreements could

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[38] *Source* Anthony Crowell, Counselor to the Mayor.

[39]; *See e.g.*, Conflicts of Interest Board Advisory Opinion No. 2003-07 (2003) (in response to a request from New York City Deputy Mayor Daniel Doctoroff for advice regarding his private financial interests, the Conflicts of Interest Board determined that Deputy Mayor Doctoroff should recuse himself from certain matters and that a blind trust established by the Deputy Mayor would satisfy the conflicts of interest law). The Governor's Office oversees a similar informal procedure whereby nominees going before the Legislature complete a background investigation administered by the State Police and the Governor's office will consult the Ethics Commission when questions arise as a result of this investigation or based on the papers submitted by the nominee.

also make the appointment process more transparent if, as with the federal level, they were treated as public documents subject to freedom of information laws, or even open to public inspection by statute.

Although on the federal level ethics agreements are used in a process whereby the executive nominates the candidate and the Senate confirms him or her, their use on a state and local government level could be applied to direct appointments by the executive or another branch of government of certain candidates for high-level office. For example, state and local appointees could enter into ethics agreements with the appropriate ethics agency as a condition of their appointment where necessary. The determination of which appointees would be potentially required to submit such agreements would be based on their rank within the government hierarchy and their official responsibilities.[40] As with the federal model, the state and local appointees would agree to take the action set forth in the ethics agreement within a specified period after their appointment, or in some cases even prior to their appointment. The appointee would also agree to provide to the state or local agency that has jurisdiction over ethics and conflicts of interest of public servants documentary proof that he or she has taken corrective or preemptive action pursuant to the ethics agreement. Most importantly, the ethics agreements would provide clear guidance to the new appointee by identifying the actions that the appointee will need to take with respect to his or her private interests. Requiring ethics agreements at the state and local government level should not place an undue administrative or financial burden on these governments since the agreements would be required from a relatively limited number of appointees, as determined by the state and local ethics agencies, and could be made to

[40]Even high-ranking appointees and those vested with substantial contracting responsibilities and discretion would of course only be required to submit such ethics agreements if their private financial interests created a actual or potential conflict of interest.

complement and/or formalize mechanisms that already used to assist newly appointed public servants.

Pre-appointment financial disclosure statements and formal ethics agreements would serve to identify actual and potential conflicts of interest at the outset and establish a transparent course of action both to resolve existing conflicts and avoid others prospectively. By setting forth the specific remedial measures and backup documentary evidence required of a nominee, ethics agreements can establish the appropriate parameters for public servants either to wind down their private businesses or completely separate their business from their official public duties by clear deadlines, and thereby give everyone involved a measure of comfort that the ethics laws are being satisfied.

CONCLUSION AND RECOMMENDATIONS

Ethics agreements could add significant value to state and local government appointment processes. In New York State and New York City, changes to state and local law would be needed both to make the relevant ethics and conflicts laws formally apply to nominees or other candidates prior to appointment, as well as to mandate the use of ethics agreements to help guide the nominee or candidate in the resolution of his or her conflicts of interest.

Although such changes in the law are worthy of recommendation, it is important to note that nothing under current law prevents either the State, the City, or other localities from establishing a voluntary program under which ethics agreements could be administered during the pre-appointment process. Such voluntary programs could be governed by basic principles of contract law, fashioned on a case-by-case basis to fit the specific circumstances of each candidate, and establish the appropriate time frames for resolving conflicts of interest, taking into

account the time requirements of the appointing authority who may have a need to fast-track certain appointments, especially at the beginning of an administration. Indeed, perhaps such a program is the next logical step for appointing authorities, like the State and the City, to ensure that actual and apparent conflicts are identified and remedied in a timely and transparent fashion to safeguard the public's confidence in the appointment of public officials.

June 2006

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The committee thanks Astrid Gloade and Marjory Herold for their contributions to this article.