

*As given to the Commissioners 12/14/09 meeting
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MEMORANDUM

To: Tom Greene
Executive Director
Financial Crisis Inquiry Commission

From: Gary J. Cohen
Special Business Counsel
Financial Crisis Inquiry Commission

Date: ~~December 10, 2009~~ January 20, 2010

Re: Ethics Guidelines for Commissioners

Overview

Further to discussions among the Commissioners and presentations from the staff of the House Committee on Standards of Official Conduct at Commission meetings in August, ~~and~~ September and December 2009, this memorandum has been prepared at the request of the Chairman and the Vice Chairman to offer for the Commission's review-adoption a set of Ethics Guidelines for Commissioners in the performance of their duties.

The Commission is unique among governmental entities in many ways. Its mandate is quite broad:

“to examine the causes, domestic and global, of the current financial and economic crisis in the United States” (§5(a) of the Fraud Enforcement and Recovery Act of 2009, or “FERA.”)

And it is expressly contemplated that the Members will be:

“prominent United States citizens with national recognition and significant depth of experience in such fields as banking, regulation of markets, taxation, finance, economics, consumer protection, and housing” (§5(b)(2)(A) of FERA.)

who voluntarily accept appointment to the Commission.

The statute contemplates that Members of the Commission may have or have had relationships with entities in the financial services and related industries.

January 15, 2010

The Members are not employees of the House or Senate, nor are they subject to Congressional ethics guidelines (other than those which by statute apply to all government employees). Pursuant to the Commission's prior discussions, I have prepared the attached guidelines for the ethical conduct of the Commission and Commissioners for consideration by the Commissioners.

I have attached to this memorandum ~~a draft~~final "Financial Crisis Inquiry Commission/Ethics Guidelines for Commissioners," ~~proposed~~ to serve as the Commission's ethics policy. If adopted by the Commission, these guidelines are intended to meet those statutory requirements which are applicable to the Commission and Commissioners, and to set forth the Commission's voluntary policy in non-statutorily mandated areas. These Guidelines, if adopted, would apply to all Commissioners.

~~Because~~ ~~†~~The Guidelines were prepared assuming that the Commission had requested and received a delegation of authority to act as its own supervising ethics office, and the delegation was granted on December 31, 2009. ~~(see below), I recommend that the Commission defer adopting these Guidelines, if it determines to do so, until after the delegation is granted.~~

A separate memorandum ~~will~~has been prepared for Commission review and approval to guide the Commission's full time staff, consultants and part-time staff.

Because the Commissioners are expected to work on Commission business for no more than 130 days per year, they are "special government employees" ("SGEs") and as such are exempt from certain otherwise applicable statutes. (The Commissioners, on August 19, 2009, resolved to designate themselves as SGEs through August 18, 2010, and should resolve to continue that designation (if the facts so permit) next August.) Should a Commissioner determine that he or she will not qualify as an SGE in the future, the Commission's Ethics Officer (see below) should be notified immediately to determine what additional restrictions might be imposed.

As the Commission was formed in an odd calendar year, those statutes which do apply to the Commission and Commissioners are currently interpreted by the House Committee on Standards of Official Conduct. At the August 19, 2009 Commission meeting the staff of the House Committee on Standards of Official Conduct suggested that the Commission consider requesting a "delegation of authority" from the Committee on Standards of Official Conduct to become its own supervising ethics office to create, interpret and enforce its own ethics guidelines. Status as a supervising ethics office will enable the Commission to administer its own ethics policy in a manner consistent with the Commission's stated purpose, rather than be bound by the statutes as interpreted by the House Committee. ~~(I recommend~~ ~~†~~The Commission limited the request to ask that the Commissioners' Financial Disclosure Statements, which they have agreed voluntarily to file, continue to be filed with the Office of the Clerk of the House of Representatives, and reviewed and certified by the House Committee on Standards of Official Conduct. The request was granted on this basis.)

I also suggest that the Commission consider designating a responsible senior staff member as the Commission's Ethics Officer to assist Commissioners and staff members in implementing and administering the Commission's Ethics Guidelines.

January 15, 2010

On August 18, 2009, the Commission received a memorandum from the staff of the House Committee on Standards of Official Conduct concerning ethical considerations, which memorandum was discussed by the Commission at ~~two~~-three Commission meetings thereafter. (Another copy of that memorandum is available to the Commissioners on request.) The key teachings from that memo are incorporated in the Ethics Guidelines proposed below.

Finally, this memorandum and the Guidelines do not touch upon restrictions applicable to Commissioners by virtue of their prior or other government service.

Background of the Ethics Guidelines (the following sections explain the corresponding sections of the Guidelines.)

A. The Code of Ethics for Government Service.

On July 11, 1958, the Congress of the United States adopted the Code of Ethics for Government Service. The Code is now quoted in several portions of the Code of Federal Regulations and has been adopted by many States and other governmental bodies. The Code may be thought of as the Ten Commandments of Government Service.

B. Bribery.

The elements of bribery in respect to public officials are set forth in a number of federal laws, including 18 USC §201(b)(2):

Whoever -- being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person....

The statutory provision prohibiting bribery of “public officials” applies to “an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof,” and includes SGEs.

C. Gifts to Commissioners.

5 USC §7353, Gifts to Federal employees, provides:

(a) Except as permitted by subsection (b), no Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person—

- (1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or
 - (2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.
- (b) (1) Each supervising ethics office is authorized to issue rules or regulations implementing the provisions of this section and providing for such reasonable exceptions as may be appropriate [emphasis added].
- (2) (A) Subject to subparagraph (B), a Member, officer, or employee may accept a gift pursuant to rules or regulations established by such individual's supervising ethics office pursuant to paragraph (1).
- (B) No gift may be accepted pursuant to subparagraph (A) in return for being influenced in the performance of any official act.

In keeping with the focus of the Commission's work, the Commission should consider determining as a policy matter to restrict certain gifts that the Commissioners may receive as set forth in the Guidelines. Given the Commission's mandate, I suggest that the Commission also consider expressly allowing the Commissioners and Commission to solicit and receive "informational material," i.e., items which serve primarily to convey information and which are provided for the purpose of assisting the recipient in the performance of his or her official duties. Informational material may include, but is not limited to, books, reports, pamphlets, calendars, periodicals, videotapes, or free or discounted admission to informational conferences or seminars and on-site demonstrations, tours, or inspections designed specifically for the purpose of assisting the recipient Commissioners in the performance of their official duties.

D. Financial Disclosure.

While the Commission is not bound by the House of Representatives' financial disclosure process, the Commission has elected voluntarily to file Financial Disclosure Statements on the form prescribed by the House. Each Commissioner shall file with the Clerk of the House the completed initial Financial Disclosure Statement, and file a Financial Disclosure Statement for 2009 on or before May 17, 2010. In addition, an exit filing will be required within 30 days of the end of each Commissioner's service.

E. Conflicts of Interest.

Due to the nature of the Commission's mandate, conflicts of interest may arise during the course of the life of the Commission. Therefore, the Commission should consider adopting a process to deal with conflicts which requires identifying the potential conflict, determining the potential for material financial consequences to the Commissioner (or his or her spouse and minor children), and either creating an ethical wall to insulate the Commissioner from the Commission's work in the area of the conflict, or having the Commissioner dispose of the interest that gives rise to the conflict. (I propose that the Commission consider defining a "Subject Entity" as an individual or entity which is the focus of the Commission's work, or which is seeking official action from, or doing business with, the Commission.)

I do not suggest that the Commission adopt a specific dollar threshold to determine materiality, preferring to leave that to the judgment of each Commissioner in consultation with the Ethics Officer, should he or she so desire.

It should also be noted that a “material financial interest” does not include dealings between the Commissioner and the Subject Entity which are generally available to members of the public similarly situated to the Commissioner (other than his or her status as a Commissioner) on similar terms, such as home or other loans from banks and other financial institutions on terms that are available based on factors other than Commission membership, or opportunities and benefits, including favorable rates and commercial discounts, that are available based on factors other than Commission membership.

F. Public Speaking and Public Statements.

The Commission should consider adopting guidelines concerning speaking engagements of the individual Commissioners which prohibit speaking engagements paid for by Subject Entities (including reimbursement for travel expenses), but allow Commissioners to accept other speaking engagements at their discretion (which may include speaking before associations which may have as members Subject Entities) with due care in the choice of audience and nature of their presentation.

G. Non-disclosure of Information.

It is expected that the Commission will receive confidential, non-public information from multiple sources, and it will create its own confidential and proprietary information in its work, including information about ongoing investigations, confidential financial and business information, and similar material. It is fundamental that a Commissioner not disclose confidential non-public information created or received by the Commission or use his or her access to such information for personal gain, including any gain that would accrue to the individual in the form of outside investment activities. Due regard should also be given to Rule 10b-5 of the General Rules and Regulations promulgated under the Securities Exchange Act of 1934 concerning the use of material non-public information in the purchase and sale of securities.

The Commission should consider adopting the confidential information policy set forth in the Guidelines.

H. Outside employment and activities.

18 USC §202(a) provides, in part:

“For the purpose of sections 203, 205, 207, 208, and 209 of this title the term "special Government employee" shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis,

“As used in this chapter, the term ... (3) "legislative branch" means - (A) the Congress;, and any other agency, entity, office, or commission established in the legislative branch.” [such as the Commission]

Classification of a Commissioner as an SGE limits the reach of 18 U.S.C. sections 203, 205, 207, 208, and 209, but parts of those sections have continued applicability. Section 203 refers to compensation to Members of Congress, officers, and others in matters affecting the Government, section 205 refers to activities of officers and employees in claims against and other matters affecting the Government, section 207 refers to restrictions on former officers, employees, and elected officials of the executive and legislative branches, section 208 refers to acts affecting a personal financial interest, and section 209 refers to salary of Government officials and employees payable only by United States.

As noted, since the Commissioners are SGEs, they do not have to comply with a number of the general limitations on income, outside activities and employment imposed on government employees in the above referenced sections. Thus, since it is expected that Commissioners will continue to have outside employment and income, the Commission should consider adopting guidelines dealing with the same as set forth in the Guidelines.

Finally, the Constitution prohibits any federal official from receiving an “emolument” of “any kind whatever” from a foreign government or a representative of a foreign state, without the consent of the Congress (Article I, Section 9, clause 8). As the Comptroller General has noted, “it seems clear from the wording of the Constitutional provision that the drafters intended the prohibition to have the broadest possible scope and applicability.” Thus, an “emolument” has been defined as any “profit, gain, or compensation received for services rendered.”

Any Commissioner who has a question concerning the propriety of potential outside activities and whether compensation and income derived from such employment are consistent with the proposed Guidelines and federal law may wish to consult with the Ethics Officer.

Financial Crisis Inquiry Commission Ethics Guidelines for Commissioners

A. The Code of Ethics for Government Service.

Each Commissioner shall adhere to the Code of Ethics for Government Service (House Concurrent Resolution No. 175, July 11, 1958, 72 Stat. B12). The Code provides:

Any person in Government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.
2. Uphold the Constitution, laws, and regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving earnest effort and best thought to the performance of duties.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.
7. Engage in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.
8. Never use any information gained confidentially in the performance of governmental duties as a means of making private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.

B. Bribery.

It is wrongful for a Commissioner in the performance of his or her services on the Commission directly or indirectly, corruptly to demand, seek, receive, accept, or agree to receive or accept anything of value personally or for any other person or entity, in return for being influenced in the performance of any official act, being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or being induced to do or omit to do any act in violation of the official duty of such Commissioner.

C. Gifts to Commissioners

Commissioners may not solicit, accept or receive gifts from entities (or individuals employed by entities) which are known to him or her to be either the focus of the Commission's work, or which are seeking official action from, or doing business with, the Commission ("Subject Entities"). Such entities may include, but are not limited to, financial services firms, ratings organizations, financial regulatory bodies and providers of professional services to such entities. A rule of reason shall apply.

The prohibitions are not intended to apply to gifts from close relatives who may be otherwise restricted, consistent with past practices, or to de minimis gifts, i.e., under \$50. Nor do they restrict the solicitation and receipt of "informational material" -- items which serve primarily to convey information and which are provided for the purpose of assisting the recipient in the performance of his or her official duties, including, but not limited to, books, reports, pamphlets, calendars, periodicals, videotapes, or free or discounted admission to informational conferences or seminars and on-site demonstrations, tours, or inspections designed specifically for the purpose of assisting the Commissioners in the performance of their official duties.

The United States Constitution prohibits government employees from accepting personal gifts from foreign governments unless consented to by Congress.

D. Financial Disclosure.

Each Commissioner shall file with the Clerk of the House for certification by the House Committee on Standards of Official Conduct and update as required the Financial Disclosure Statement on the form prescribed by the House Committee on Standards of Official Conduct.

E. Conflicts of Interest.

A conflict of interest may arise if a Commissioner (or his or her spouse and minor children), has a material financial interest (which may include material stock or other equity ownership or creditor/debtor relationships, profit participations, employment or consulting relationships, or material transactions) in or with a Subject Entity.

1. Once it becomes known to a Commissioner that an entity or individual in which he or she (or his or her spouse and minor children), may have a material financial interest is a Subject Entity, the Commissioner shall disclose to the Ethics Officer the existence of the potential conflict and the facts of the relationship between the Commissioner and the Subject Entity.

2. The Commissioner, in consultation with the Ethics Officer, shall determine whether his or her actions as a Commissioner with respect to a Subject Entity could have material financial consequences to the Commissioner, thereby creating a conflict of interest.

3. If it is so determined, then either the Commissioner (a) shall divest him or herself of the interest or relationship with the Subject Entity, or (b)(i) the Ethics Officer will disclose the conflict to the staff and the other Commissioners, (ii) the Commissioner will recuse him or herself from the area of dealing, and (iii) the staff and other Commissioners will create an ethical wall to restrict the affected Commissioner from participating in discussions and viewing Commission work product concerning the Subject Entity.

Pending determination of the potential conflict the Commissioner shall avoid any involvement with the Commission's consideration of matters concerning the Subject Entity

A "material financial interest" does not include dealings between the Commissioner and the Subject Entity which are generally available to members of the public similarly situated to the Commissioner (other than his or her status as a Commissioner) on similar terms, such as home or other loans from banks and other financial institutions on terms that are available based on factors other than Commission membership or opportunities and benefits, including favorable rates and commercial discounts, that are available based on factors other than Commission membership.

F. Public Speaking and Public Statements.

Compensated speaking engagements paid for by Subject Entities (including reimbursement for travel expenses) should be avoided as inappropriate. Commissioners may accept other speaking engagements at their discretion with due consideration for the choice of audience and nature of the presentation.

G. Non-disclosure of Information.

All confidential information obtained by the Commission during the course of its investigations, and confidential non-public work product of the Commission, shall be maintained as "Commission Confidential Information," and shall be held in confidence and not disclosed outside of the Commission.

Information the Commission receives from other persons under confidentiality agreements must also be treated as Commission Confidential Information in accordance with the terms of such agreements.

Exceptions to classification as Commission Confidential Information include:

1. If the Chairman or the Commission authorizes the release of the information; or
2. The information is otherwise publicly available.

H. Outside employment and activities.

In accordance with 18 U.S.C. sections 203, 205, 207, 208, and 209, as modified by the Commissioners' status as special government employees ("SGEs"), the Commissioners are: (i) prohibited from receiving or sharing in compensation for representational activities, or acting as an "agent or attorney," with or without compensation, on behalf of private parties before the Federal Government, but only to the extent that the SGE represents someone or shares in fees for representing someone before the Government on a "particular matter involving a specific party or parties" on which the employee had worked "personally and substantially," or on a matter before the Commission; and (ii) may not "lobby" or try to influence the Commission for one year after leaving Government employment, but are not prevented from lobbying in general. Persons who are covered by this one-year "cooling off" period are also barred for one year from representing any foreign interests before the United States. (A Commissioner should consult with the Ethics Officer if this issue arises and the Commissioner has provided less than 60 days service in the prior year.)

The Commission has also determined that it is improper for a Commissioner to accept new outside employment (arising after the effective date of these Guidelines) from persons known to the Commissioner to be Subject Entities due to the conflicts which may arise. Outside employment should be construed broadly and includes paid speeches, honoraria, consulting arrangements and the like.

If a Commissioner is already employed by an organization that deals with matters before the Commission, or that deals with Subject Entities on matters before the Commission, the Commissioner shall take steps (in consultation with the Ethics Officer) to ensure that the income from such activities does not inure to the benefit of the Commissioner, or the Commissioner shall treat the matter as a conflict of interest in the manner set forth in

Paragraph E above (examples may include a Commissioner who is a partner in a professional services organization and who shares in the profits of that organization, which includes receipts for representing Subject Entities before the Commission).

No Commissioner may receive compensation from a foreign government.