Statement to the Ethics Reform Task Force
City of Chicago

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I have been asked by Jones Day, as staff for the City of Chicago Ethics Reform Task Force, to submit a statement on ethics reform. I should note that the views expressed herein do not necessarily reflect those of the New York City Conflicts of Interest Board.[1]

At the outset, one must emphasize that any attempt to enact or revise a government ethics (conflicts of interest) law is doomed to failure unless one first understands the purpose, principles, and structure underlying such laws. Without that understanding, the efforts at reform will certainly flounder, if not entirely founder.

Purpose, Principles, and Approaches of Government Ethics Laws

The purpose of government ethics laws lies in promoting both the reality *and the perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur. Accordingly, government ethics laws

- Promote both the reality *and the perception* of integrity in government;
- Focus on *prevention*, not punishment;
- Are not intended to (and will not) catch crooks, which is the province of penal laws, law enforcement agencies (including inspectors general), and prosecutors;
- Recognize the inherent honesty of public officials, whom these laws seek to guide;
- Do not regulate morality (most are really conflicts of interest laws not ethics laws); and
- Require that the public have a stake in the ethics system.

In the United States, government ethics laws seek to implement this purpose and these underlying principles through one of two approaches. Values-based ethics laws promote positive conduct but lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action). These laws are correctly viewed as ethics laws and may provide, for example, that "public officials shall place the interest of the public before themselves." By contrast, compliance-based ethics laws provide bright-line, civilly and criminally enforceable rules but focus on negative conduct and interests. These laws are more properly called conflicts

[1] For a more extensive discussion of the issues raised in this statement, see the articles on the Conflicts of Interest Board's website at http://nyc.gov/ethics in the Municipal and International Ethics Resources link.

of interest laws and may provide, for example, that "a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official."

To instill values while enabling clear guidance and the imposition of civil fines and other penalties, best practice dictates that an ethics law first set forth ethical precepts (a largely precatory code of ethics) and then from those ethical precepts draw forth compliance-based rules (an enforceable conflicts of interest code). This approach emphasizes both values and compliance. One should note that "conflict of interest" refers to divided loyalty, that is, a conflict, usually (though not always) a financial conflict, between one's private interests and public duty.

Structure of an Effective Government Ethics Law: The Three Pillars

An effective government ethics law must rest upon three pillars, removal of *any* of which causes the entire structure to collapse:

(1) A simple, comprehensive, and comprehensible code of ethics (conflicts of interest code);
(2) Sensible disclosure; and
(3) Administration by an independent ethics board.

Each of these pillars is discussed below.

Code of Ethics

An effective code of ethics (technically, a conflicts of interest code) must be simple, comprehensive, and sensible. To that end, its provisions should not be cluttered by definitions and exceptions, which should instead be set forth in separate sections; and the definitions should always limit but never expand the restrictions in the code of ethics. Thus, an official complying with the ethics code but ignoring the definitions and exceptions sections may forego permissible conduct but will never engage in impermissible conduct. So, too, the code of ethics provisions must be found in a single section, not scattered among a number of sections, accreted over the years.

The most common prohibitions of a bare bones ethics code include:

- Using one's government office for private gain for oneself or an associated person or business;
- Using government resources for private purposes;
- Soliciting gifts or accepting gifts from persons doing business with the government;
- Seeking or accepting private compensation for doing one's government job (tips; gratuities);
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job, such as vendors or developers (except as expressly permitted by law);

- Disclosing confidential government information or using that information for a private purpose;
- Appearing before government agencies on behalf of private interests or representing private interests in government matters;
- Seeking a job from a private person or firm with which one is dealing in one's government job;
- After leaving government service,
    - Appearing on behalf of a private employer before one's former government agency for a specified period (e.g., one year);
    - Working on a matter on behalf of a private employer that one worked on personally and substantially while in government service;
    - Revealing or using confidential government information; and
- Inducing other government officials to violate the code of ethics.

The history and issues in the particular governmental entity may mandate additional provisions, which might prohibit, for example:

- Holding certain outside positions (e.g., with a firm doing business with one's government or, more narrowly, with one's own government agency);
- Holding certain ownership interests;
- Acting as a lawyer or expert against the government's interests;
- Purchasing a government office or promotion;
- Engaging in coercive political solicitation;
- Holding certain political party positions ("two-hats");
- For high-level appointed officials, engaging in certain political activity (a "little Hatch Act");
- Having a business or financial relationship with a superior or subordinate;
- Soliciting subordinates to contribute money to non-government causes or engage in non-government activities;
- For former high-level officials, appearing on behalf of a private employer before their entire branch of government for a specified period;
- Failing to avoid conflicts of interest; or
- Engaging in improper conduct (appearance of impropriety), that is, taking an action or holding a position or interest that, as defined by rule of the ethics board, conflicts with the official's government duties.

In addition, to ensure that the public, vendors, developers, and the like have a stake in officials' compliance with the ethics code, inducement *by anyone* of an ethics violation by an official should itself be a violation. Moreover, the private employer or business of a government official should be prohibited from appearing before that official's government agency in a representative capacity.

Sensible Disclosure

Ethics laws contain three types of disclosure:

- Transactional disclosure and recusal;
- Applicant disclosure; and
- Annual financial disclosure.

A government officer or employee transactionally discloses and recuses when a potential conflict of interest actually arises. For example, "My brother's company is bidding on this contract, so I recuse myself from this matter." Transactional disclosure is the most important type of disclosure.

Private citizens or firms seeking government business or a government license or benefit submit an applicant disclosure form, disclosing the interests of officials in the applicant or application, to the extent the applicant knows or should know. Applicant disclosure provides a check on transactional disclosure.

Annual financial disclosure should be made only by those most at risk of conflicts of interest, such as elected officials, department heads and those who can act on their behalf, policymakers, and those involved in purchasing, contracting, and inspecting. Annual disclosure also provides a check on transactional disclosure and helps prevent ethics violations by alerting everyone, including the public, the media, and the filers themselves, to where the filer's potential conflicts of interest lie. Thus, *only* those questions that may reveal a potential violation of the ethics code should appear on an annual disclosure form. For example, if the ethics code permits an official to take an action that benefits a publicly-traded company in which the official owns less than $10,000 in debt and equity, then the annual disclosure form should not require disclosure of ownership interests below that threshold. Thus tying the annual disclosure form to the code of ethics obviates the need to disclose any amounts on the form, for whether a conflict is a $10,000 conflict or a $10 million conflict, it is still a conflict and still prohibited; the amount merely goes to the extent of the penalty in a subsequent enforcement action.

Administration by an Independent Ethics Board

An ethics board lacking independence cannot possibly promote either the reality or the perception of integrity in government and, indeed, may engender distrust and undermine the public's confidence in the government's integrity. The touchstones of an independent ethics board are:

- Highly qualified, volunteer board members of high integrity,
    - With fixed, overlapping terms,
    - Holding no other government positions,
    - Having no government contracts,
    - Engaging in no lobbying of, or appearances before, the government,
    - Who are appointed by the government's chief executive officer with the

advice and consent of the legislative body (appointment by multiple officials creates factions and leaks), and
    - Who are removable only for cause after a public due process hearing;
- A protected budget;
- Staff accountable solely to ethics board; and
- Vesting in the ethics board of the sole authority to authoritatively interpret the ethics law (subject only to court review).

The ethics board exercises four responsibilities:

- Legal advice;
- Training and education;
- Administration of disclosure; and
- Enforcement.

The ethics board must provide timely and confidential advice on the legality of *future* conduct and interests under the ethics code and, where authorized by law and at the discretion of the board, grant waivers of prohibitions of the code. Second, the ethics board must train all officials in the requirements of the ethics code. Officials cannot obey a law of which they have no knowledge. Third, the ethics board must administer the disclosure system, that is collect disclosure forms, review them for completeness and possible violations of ethics code, and make them available to the public.

Fourth, the ethics board must enforce the ethics code when violations occur - to educate other officials, the public, and those who deal with the government; to deter unethical conduct; and to emphasize how seriously the government takes the ethics mandate. Absence of enforcement power over *all* officials subject to code makes the ethics board a toothless tiger. Enforcement power must include complete control of investigations and prosecution; the ability to commence investigations on the board's own initiative; subpoena power; and broad range of penalties. The penalties imposable by the ethics board must include civil fines (with a maximum of no less than $10,000); public censure; private censure; disgorgement of ill-gotten gains; voiding of contracts, licenses, permits, or other action taken in violation of the ethics law; and debarment of violators from future government business. The official's agency may take disciplinary action, but agency action or inaction should never restrict the power of the ethics board to act. The government's legal department should be authorized to seek damages resulting from unethical conduct and injunctive relief against future violations.

To the greatest extent permitted by law, the records and meetings of the ethics board should be confidential. Officials will often not seek advice or file a complaint if they fear its disclosure to supervisors or the public. As the mere hint of an ethics investigation may undermine an official's career, enforcement actions should be confidential until a formal accusatory instrument, such as a petition, has been filed. But all decisions and settlements

finding a violation must be public if the public is to keep faith in the integrity of the ethics process.

Conclusion

Virtually alone among laws enacted by government, an ethics law regulates the very persons who enact it. Not surprisingly, therefore, the road to ethics reform more often than not proves long, rocky, and arduous, fraught with obstacles along the way. Yet success requires only good faith and hard work – and a clear understanding of the purpose, principles, and structure of an effective ethics law. Without that understanding, legal drafters and lawmakers will invariably stumble from argument to counter-argument with little sense of direction toward an elusive goal. But with that understanding, every argument, counter-argument, provision, clause, and word can be weighed against a clear standard, significantly improving the odds of effective ethics reform.

[Legal: Chicago Ethics Reform Statement]