



## **Recommendation 89-6**

### **Public Financial Disclosure by Executive Branch Officials**

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(Adopted June 16, 1989)

Public financial disclosure by federal officials is intended to make it possible to monitor actual or potential conflicts of interest of such officials. This, in turn, may deter public officials from even considering conduct that would present the appearance of a conflict of interest. However, these benefits of public financial disclosure must be balanced against the burdens imposed on the federal officials who are subject to them.

Determining appropriate public financial disclosure requirements requires an assessment and accommodation of three concerns: the relevance of the information to conflicts of interest which might be faced by the individual in his or her official capacity; the practical burden faced by an individual who must assemble and report information accurately (including whether a nominee or employee would reasonably be expected to have at hand the information which he or she is required to report); and the psychological burden imposed on an individual who must make his or her financial status publicly available to others (i.e., whether public disclosure constitutes an excessive invasion of privacy).

The Administrative Conference has studied the Ethics in Government Act's executive branch financial disclosure requirements (codified at 5 U.S.C. 201-209) and in this recommendation urges Congress to make specific changes to those requirements, consistent with an appropriate balance of the benefits and costs of such disclosure.

This recommendation is not made with the intention of generally requiring either more or less disclosure of public officials. Rather, the Conference's goal is to rationalize the Ethics in Government Act's requirements and eliminate those that appear to bear no reasonable relationship to the Act's purposes. On the one hand, the recommendation increases disclosure by reducing the current threshold level for the reporting of a covered individual's liabilities from \$10,000 to \$1,000, to be consistent with the current threshold level of \$1,000 for the reporting of assets (§ 2 b (1)). On the other hand, the recommendation would lessen disclosure by reducing the number of categories of value for the reporting of assets from the current six to two, which the Conference believes is sufficient for conflict-of-interest analysis and the maintenance of public confidence in the integrity of executive branch officials (§ 2 b (2)).



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Because the Act's executive branch financial disclosure provisions are so detailed, this recommendation has been organized to clearly distinguish between current provisions that the Conference believes generally further the Act's purposes and, therefore, should be retained, and those provisions that appear unnecessary to achieve the Act's purposes and, therefore, should be eliminated or changed. However, in recommending the retention of particular provisions, the Conference does not mean to imply that such provisions cannot be improved. To the contrary, the Conference urges the Congress to systematically review the coverage and language of all of the Act's public financial disclosure provisions, and to rewrite those that can be made clearer and simpler.

To illustrate, the Conference recommends continuation of the current requirement that nominees for positions covered by the Act report the source of all earned income in excess of \$5,000 received by a reporting individual from one source in the two years preceding the year of filing (¶12 a (2)). However, the current statutory provision (5 U.S.C. 202(a)(6)(B)) requires reporting of such compensation paid "in any of the two calendar years prior to the calendar year during which the individual files his first report \* \* \*." If strictly applied, a nominee who filed a report in October of 1989 would be required to disclose such compensation for calendar years 1987 and 1988, but not for the period in 1989 prior to his or her entering government service. This theoretical gap in coverage should be closed whether or not in practice it has proven to be a problem.

The same statutory provision exempts from the "over-\$5,000 from one source" disclosure requirement the reporting of "any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was *directly involved* in the provision of such services." 5 U.S.C. 202 (a)(6)(B)(emphasis added). In redrafting this provision, Congress should consider either defining the term "directly involved" or delegating to the Office of Government Ethics the responsibility to clarify its meaning by regulation, especially as applied to individuals who provide services to others, such as lawyers. Therefore, although the Conference supports the retention of the substance of this and other of the Act's financial reporting provisions, it is clear that improvements to the language and coverage can be made.

Because of its limited mandate,<sup>1</sup> the Conference takes no position on the public financial disclosure requirements applicable to legislative and judicial branch officials. However, the

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<sup>1</sup> The Conference is authorized by statute to study and make recommendations relating to administrative procedure used by administrative agencies in carrying out administrative programs, 5 U.S.C. §574.



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similarity of those requirements to executive branch requirements suggests the desirability of reviewing and possibly amending legislative and judicial branch requirements as well.

### **Recommendation**

#### **1. Persons Required To File.**

a. *Positions For Which Coverage Should Be Retained.* Congress should continue to require the following categories of executive branch personnel to make public financial disclosure:

(1) The President, Vice President, and nominees for and incumbents in positions which require Senate confirmation;

(2) Full-time officers and employees of the executive branch (including independent agencies) whose positions are classified as GS-16 or above or who are paid at or above the minimum rate of pay fixed for GS-16;

(3) Each member of a uniformed service whose pay grade is at or in excess of O-7;

(4) The Postmaster General, Deputy Postmaster General, each Governor of the United States Postal Service, and each Postal Service and Postal Rate Commission officer or employee whose rate of pay equals or exceeds the minimum rate of basic pay for GS-16;

(5) Each administrative law judge appointed pursuant to 5 U.S.C. 3105; and

(6) All other employees determined by the Director of the Office of Government Ethics to be in positions equal in responsibility to those normally classified at GS-16 or above.

b. *Positions For Which Coverage Should Be Removed.* Congress should amend the Ethics in Government Act to remove the reporting requirement, except as may be required under subsection c below, from the following persons:



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(1) Candidates for the offices of President and Vice President who are not receiving federal funds under the federal election laws and who are not government officials otherwise required to report;<sup>2</sup>

(2) Special government employees;<sup>3</sup> and

(3) Designated agency ethics officers whose rate of pay or other responsibilities would not otherwise subject them to the reporting requirement.

*c. Administrative Extensions of Coverage.* Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics to extend the reporting requirement, on a position or categorical basis, to any officer, employee or special government employee of the executive branch not covered by the Act, whose position is determined by the Director to present an unusual opportunity for conflicts of interest.

*d. Administrative Exemption From Coverage.* Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics to exempt from the reporting requirement those positions included in subsection a above whose responsibilities are identified by their agencies and determined by the Director to be unlikely to place their incumbents in situations of conflict of interest.

*e. Review of Coverage Extensions and Exemptions.* Congress should require the Office of Government Ethics annually to review, based on the recommendation of the designated agency ethics officials, all determinations currently in effect under c and d above.

### **2. Information Required To Be Filed:**

*a. Reporting Requirements That Should Be Retained.* Congress should leave the Ethics in Government Act unchanged in the following respects:

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<sup>2</sup> The Conference recognizes that candidates for these offices are not executive branch officials; nonetheless, this recommendation addresses coverage of candidates because they are included in the current statute setting forth executive personnel financial disclosure requirements.

<sup>3</sup> It is noted that the Administrative Conference has recommended minimal financial disclosure for all members of federal advisory committees, including those members who are special government employees. See ACUS Recommendation 89-3, Conflict-of-Interest Requirements for Federal Advisory Committees, 1 CFR 305.89-3.



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(1) *Reporting by Both Incumbent and Nominated Officials.* Congress should continue to require both *incumbent* executive branch officers and employees whose positions are covered by the Ethics in Government Act, and *nominees* for those positions, to disclose publicly the following categories of information:

(a) the identity of any interest in a trade or business or asset held for investment or production of income, if the value of the interest exceeds \$1,000;

(b) the identity of all positions held by the reporting individual as an officer, director, trustee, partner, proprietor, representative, employee or consultant of any corporation, company, firm, partnership, or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution other than the United States, but not including positions held in religious, social, fraternal, or political entities, or positions solely of an honorary nature; and

(c) the date, parties to, and terms of any future employment arrangements negotiated by the reporting individual, leaves of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan.

(2) *Reporting Only by Nominated Officials.* In addition to the information required to be reported by incumbent and nominated executive branch officers and employees under subsection (1) above, Congress should continue to require that nominees for positions covered by the Ethics in Government Act report the source of all earned income in excess of \$5,000 received by the reporting individual from one source in the two years preceding the one in which the nominee files, and a brief description of the services for which the compensation was paid. As current law provides, this requirement should not apply to information about any person for whom services were provided by the firm or association of which the nominee was a member, partner, or employee, unless the nominee was directly involved in the provision of such services.

(3) *Reporting Only by Incumbent Officials.* In addition to the information required to be reported by incumbent and nominated executive branch officers and employees under



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subsection (1) above, Congress *should* continue to require covered incumbent executive branch officers and employees to disclose the following categories of information:<sup>4</sup>

(a) the source, type and amount of nongovernmental earned income received by the reporting individual, including honoraria, which in the aggregate exceeded \$100; and

(b) the date and a brief description of each purchase, sale or exchange of real property, stocks, bonds, commodities futures or other property with a value over \$1,000, *except* (i) transactions between the reporting individual and a spouse or dependent children, (ii) transactions involving a personal residence of the reporting individual or the individual's spouse, and (iii) transactions involving an investment in the nature of a cash equivalent (*e.g.*, a money market fund, certificate of deposit, or personal bank account).

(4) *Interests of Spouses and Dependent Children.* The present statutory provisions on reporting of the interests of spouses and dependent children of the reporting official should be retained.

b. *Reporting Requirements That Should be Changed.* Congress should amend the Ethics in Government Act to change the reporting requirements in the following ways:

(1) *Liabilities.* The present requirement of reporting the identity of liabilities in excess of \$10,000 owed by the reporting individual should be changed to a requirement of reporting liabilities in excess of \$1,000, the same value which the statute now uses for reporting of assets. As present law provides, the reporting requirement should not extend to the individual's home mortgage, loans for the purchase of personal property which are secured by the property purchased and which do not exceed the value of the security, sums owed to a relative, and revolving charge accounts with a balance less than a specified amount at the end of the reporting period (currently \$10,000).

(2) *Categories of Value.* The present requirement that assets, liabilities, and transactions in assets above the \$1,000 threshold be reported in numerous categories of value should be eliminated. However, in order to distinguish large interests from those of lesser significance,

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<sup>4</sup> Under current practice individuals who joined the government in the preceding calendar year are only required to report this information for their period of government service and not before.



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the reporting individual should be required to state whether each particular asset, liability or transaction was in excess of a specified higher amount (*e.g.*, \$50,000 or \$100,000 each).

(3) *Sources of Earned Income Prior to Government Service.* The requirement that all nominees for covered positions report the source, type and amount of non-government earned income which they received in the year prior to entering government service should be eliminated, except for amounts in excess of \$5,000 received from one source (*see* 2 a (2) above).

(4) *Income from Assets Otherwise Reported.* The requirement that both incumbents and nominated officials report income in excess of \$100 from each of their investments should be eliminated because the assets themselves are already reported.

(5) *Reimbursements and Gifts.*

(a) *Reporting Period.* The date after which all covered reimbursements and gifts should be required to be reported should be the date on which the official is nominated for or appointed to the position covered by the Ethics in Government Act, not the date the official takes office.

(b) *Reimbursement and Gifts of Travel or Entertainment.* The threshold amount for reporting reimbursements and gifts of transportation, lodging, food or entertainment, other than personal hospitality from an individual, received by the reporting individual from any source other than a relative during the reporting period should be changed from \$250 per year to a per event amount (*e.g.*, \$100 or \$150) to avoid reporting de minimis information. The statute should be amended further to require, in addition to the source and a brief description, the reporting of the value or amount of such reimbursements or gifts in broad categories (*e.g.*, under \$1,000; \$1,000 to \$10,000; over \$10,000) in accordance with regulations issued by the Office of Government Ethics.

(c) *All Other Covered Gifts.* The requirement of reporting all gifts to the reporting individual, other than gifts of transportation, lodging, food or entertainment, which aggregated more than \$100 in value over the reporting period, excluding gifts from relatives of the reporting individual, and not aggregating gifts of \$35 or less in calculating the \$100, should be retained. However, the statute should be amended to require, in addition to the source and a brief description, the reporting of the value or



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amount of such gifts in broad categories (*e.g.*, under \$1,000; \$1,000 to \$10,000; over \$10,000) in accordance with regulations issued by the Office of Government Ethics.

### **Citations:**

54 FR 28973 (July 10, 1989)

\_\_ FR \_\_\_\_ (2011)

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### **Note:**

This recommendation has become moot as a result of the Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716.