



Memorandum

December 4, 2002

TO: Senate Committee on Governmental Affairs

FROM: Jack Maskell
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SUBJECT: Financial Disclosure Requirements of Persons Appointed to a Federal Commission

This memorandum is submitted in response to your rush request of this date concerning financial disclosure requirements for commissioners of a federal study or advisory commission which has been established pursuant to federal law. Due to the time-frame in which this information was requested, a brief examination of the issues is provided.

The Commission in question is the National Commission on Terrorist Attacks Upon the United States, established in title VI of the Intelligence Authorization Act for Fiscal Year 2003. That legislation provides for the establishment "in the legislative branch" of the Commission (Section 601), the chairman of which is to be appointed by the President, with the other nine Commission members, including the vice chairman, appointed by various Members of Congress in leadership positions in the House and Senate. The position of commissioner "may be compensated at not to exceed the daily equivalent of the annual rate of pay in effect for a position at level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day during which that member is engaged in the actual performance of the duties of the Commission" (Section 608).

There are two categories of financial disclosure requirements under federal law and regulation which may apply generally to persons appointed to an entity of the Federal Government: (1) the *public* (and detailed) financial disclosures which must be made under the provisions of the Ethics in Government Act of 1978, as amended,¹ and (2) the *confidential* (and potentially less detailed) disclosures which may be required from certain officers and employees who are *not* required to file public disclosure statements.² Both the public and confidential disclosure requirements apply only to persons who are

¹ P.L. 95-521, as amended; *see now* 5 U.S.C. appendix, §§ 101 *et seq.*

² 5 U.S.C. appendix, § 107(a). In the executive branch, *see* Executive Order 12674, as modified by Executive Order 12731, Section 201(d), and 5 C.F.R. §§ 2634.901 - 2634.909.

(or who have been nominated to be) officers or employees of the Federal Government — either regular Government employees, or “special Government employees,” that is, those employees who are compensated to perform duties for the Government for less than 130 days in any year.³

Whether a person appointed to a position in the Federal Government must file a *public* disclosure report under the Ethics in Government Act provisions is dependent, in the first instance, on whether or not that person is an “officer or employee” of the Federal Government. If a person is, by virtue of his or her appointment to a position in the Federal Government, an “employee” or officer of the Government, then whether such “employee” (either a regular, or part-time or intermittent special Government employee) is required to file public financial disclosure statements is determined by the rate of compensation of the position to which the employee has been appointed, and then whether that person is to work on Government matters for more than 60 days in a calendar year.

Officer or Employee of the Government. The financial disclosure provisions apply only to persons who are officers or employees of the Federal Government, and thus do not apply to so-called “representatives” of outside entities who are appointed to such governmental bodies as advisory committees to represent that outside entity, nor do they apply to “independent contractors” of the Federal Government.⁴ Most persons who are appointed to positions in or on a federal entity where that person is expected to provide his or her expertise, advice, or other such services to the Government for the benefit of the Government, would be considered to be the Government’s officer or employee.⁵ Statutory guidance on classifying persons, such as on advisory committees as either “employees” of the Government or private “representatives,” or as “independent contractors” as opposed to “employees” may be gleaned from statutory definitions in other contexts, such as 5 U.S.C. §§ 2104 and 2105, which include the considerations of “employment” to include: (1) appointment in the civil service, (2) performance of a federal function, and (3) some level of supervision or operational control by a Federal official.⁶ A person appointed to such a position whereby he or she would otherwise be an “employee” of the Government, would include those who serve even without compensation.⁷ The commissioner positions established by the legislation creating the National Commission on Terrorist Attacks Upon the United States appear to clearly fall within the meaning, intent and definition of a federal office or employment for purposes of financial disclosure and ethics regulation.

³ 18 U.S.C. § 202(a), and as referenced in 5 U.S.C. §101(f)(3) for executive branch and defined in 5 U.S.C. appendix, § 101(f)(10), and § 109(13)(B)(i), for legislative branch employees.

⁴ See discussion, for example, in Office of Government Ethics, Memorandum, DO-00-003, February 15, 2000, at 1- 4. As to advisory committees and “representatives,” as opposed to special “employees,” the Office of Government Ethics regulations note: “The term special Government employees does not include an advisory committee member who serves only as a representative of an industry or other outside entity or who is already a federal employee.” 5 C.F.R. § 2634.904(b).

⁵ Office of Government Ethics, Memorandum, *supra* at 1-5.

⁶ *Id.* at 2.

⁷ *Id.* at 5.

Compensation Level. As to compensation, the public financial disclosure provisions of law apply to a legislative branch employee as “an officer or employee of Congress,”⁸ if the officer or employee “occupies a position for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule.”⁹ The Commission positions in question *may* be compensated at a rate of pay up to a level IV of the Executive Schedule (Section 608), which at such level would make it a “covered position.” An incumbent in or entrant into such a covered position might arguably be able to waive compensation, or agree to a lesser amount of compensation, but it is not clear whether such action would then exempt such incumbent from the disclosure requirements, since the *position* itself is one which is statutorily entitled to receive a rate of pay above the threshold amount.¹⁰ It may be noted that in the executive branch, the Office of Government Ethics [OGE] has ruled that a detailee to a “covered position,” even if the detailee himself or herself does not receive compensation above the threshold amount, is still required to file a public disclosure form because: “*The position, not the individual in the position, controls the SF 278 [public disclosure form] filing requirements.*”¹¹

Employment for 60 Days. As an additional qualification, those employees compensated at the rate of pay described above will be required to file public disclosure statements if the individual works for the Government for more than 60 days in the calendar year.¹² It is generally understood that activity for the Government on any part of a day would be counted as one day.¹³

Information to Be Disclosed by Persons Entering A Federal Position. Persons entering the Federal Government in a covered position must file within 30 days of taking the position¹⁴ a financial disclosure statement setting out detailed information about

⁸ 5 U.S.C. appendix, § 101(f)(10).

⁹ 5 U.S.C. appendix, § 109(13)(B)(i).

¹⁰ There is a reasonable argument that an incumbent in such a “position,” even one who waives compensation or agrees to a lesser amount, would be intended by the ethics law to be covered by the public financial disclosure provisions, since the portion of the law in question covers certain “positions” rather than individuals. *See, for example, Office of Government Ethics, Public Financial Disclosure: A Reviewer’s Reference*, at page 2-2 (1994). This is so because potential conflicts of interest often relate directly to the duties and responsibilities of a position, and thus the conflict of interest laws themselves generally apply to WOC’s (without compensation employees) who occupy covered positions. *Note*, 6 Op. O.L.C. 644, 675 - 677 (1982). Office of Government Ethics Memorandum, DO-00-003, February 15, 2000, at 5. Under such an interpretation, an officer could thus not avoid the conflict of interest regulation by merely taking one dollar under the statutory limit. Although the top rate of pay for the Commission position does not appear to be mandatory under the statute, the coverage of such position under financial disclosure provisions would appear to be particularly relevant if other commissioners are receiving the statutory entitled rate of pay.

¹¹ OGE, *Public Financial Disclosure: A Reviewer’s Reference*, *supra* at 2-7.

¹² 5 U.S.C. appendix, § 101(d). Certain exemptions and waivers may be permitted upon particular findings and determinations regarding special Government employees. *See* 5 U.S.C. appendix, § 101(i).

¹³ *See, for example, Public Financial Disclosure: A Reviewer’s Reference*, at p. 2-3.

¹⁴ 5 U.S.C. appendix, § 101(a).

income, assets, certain liabilities, positions held in private entities and organizations, agreements or understandings for future employment or re-employment, and about clients from whom the officer had generated payments in the amount of \$5,000 or more over the preceding two years.¹⁵ Persons in a legislative entity which was created after 1989, when the organic statute does not otherwise direct, will disclose to the Senate if the entity, commission or other body was created in an even-numbered year (and to the House of Representatives if created in an odd-numbered year).¹⁶ The Senate, in a similar vein as the executive branch, has noted that an incoming employee must disclose those clients who made the payments to a firm or company in which the covered official was an employee, even if the payment was not made directly to the covered official, when that person had personally provided the client those services for which compensation was generated.¹⁷

Review and Public Availability of Reports. Disclosure reports filed under the Ethics in Government Act are filed with the appropriate supervisory ethics office to review the reports to ensure that the filing individual is in compliance with applicable conflict of interest and ethics laws and regulations.¹⁸ After filing with the Secretary of the Senate (for those in covered positions in legislative branch entities recently created in even-numbered years), the reports are forwarded to the Senate Select Committee on Ethics for review and release to the public.¹⁹ Such reports are to be made available for public inspection within 30 days after the report is received.²⁰

The scope of this memorandum is not intended to cover all ethics or conflict of interest matters which may or may not apply to officers and employees, including “special Government employees” in the legislative branch of Government, which could be the subjects of review for compliance by the Senate Select Committee on Ethics. However, questions have been specifically raised concerning the application of the so-called “emoluments” clause of the Constitution. It should be noted that the emoluments clause of the Constitution, at Article I, Section 9, clause 8, prohibits any person “holding any Office of Profit or Trust” under the United States (thus including offices for which compensation is not provided or not accepted), from receiving any “emolument”²¹ from a foreign “King, Prince or foreign State,” unless consented to by Congress. As requested, a detailed discussion of this provision will be provided to the Committee, but it may be said generally that while Congress has consented to the acceptance of certain *de minimis* gifts and decorations from foreign governments under the so-called “Foreign Gifts and Decorations Act” (5 U.S.C. § 7342), there is no general permission for officers or employees of the Federal Government to accept compensation for services rendered (“emoluments”) from a foreign government or from a foreign king or prince.

¹⁵ 5 U.S.C. appendix, §§ 102(b)(1), and 102(a)(1),(3),(4),(6), and (7).

¹⁶ 5 U.S.C. appendix, § 103(h)(1)(a)(ii)(II).

¹⁷ Senate Ethics Manual, S. Pub. 106-40, 106th Cong., 2d Sess. at 136-137.

¹⁸ 5 U.S.C. appendix, § 106(a)(2), (b)(1).

¹⁹ 5 U.S.C. appendix, § 103(j)(2).

²⁰ 5 U.S.C. appendix, § 105(b)(1).

²¹ *Note*, generally, 49 Comp. Gen. 819 (1970); B-180472, March 4, 1974, as to “emoluments.”