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MEMORANDUM TO ALL HOUSE MEMBERS, OFFICERS AND EMPLOYEES

FROM: Committee on Standards of Official Conduct
Stephanie Tubbs Jones, Chairwoman
Doc Hastings, Ranking Republican Member

SUBJECT: Negotiating for Future Employment

This memorandum consolidates the Committee's previous guidance concerning the rules governing negotiations for future employment by House Members,¹ officers, and staff and the requirement for Members and "very senior staff"² to disclose such negotiations to the Standards Committee, and, in certain circumstances, to recuse themselves from matters involving the private entity with which they are negotiating. It includes guidance on the additional restrictions imposed by the Honest Leadership and Open Government Act of 2007 (S.1),³ which was enacted during the 110th Congress.

NEGOTIATING FOR FUTURE EMPLOYMENT

In the past, the Committee's general guidance on job negotiations has been that House Members and employees are free to pursue future employment while still employed by the House, subject to certain ethical constraints. This general statement remains true for both House Members and employees, and this memorandum provides more detailed guidance on the issues presented by such negotiations. However, House Rule 27 (which was created by S.1) established an additional restriction for House

¹ This Memorandum uses the term "Member" to refer to House Members, Delegates, and the Resident Commissioner.

² "Very senior staff" are those employees who were paid at least 75% of the Member pay rate for any 60 days during the previous twelve months. In 2008, Members will be paid \$169,300 annually, resulting in a very senior staff rate of \$126,975. For employees of "other legislative offices," the triggering salary is \$149,000, which is Level IV of the Executive Schedule. "Other legislative offices" include the Architect of the Capitol, Botanic Garden, Library of Congress, Government Accountability Office, Congressional Budget Office, Government Printing Office, and the Capitol Police.

³ Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (Sept. 14, 2007) (hereinafter S.1).

Members. Pursuant to House Rule 27, clause 1, a Member may not “directly negotiate or have any agreement of future employment until after his or her successor has been elected” *unless* the Member discloses those negotiations in the manner addressed in the second part of this memorandum.

The general guidance applicable to any Member or House employee who wishes to engage in negotiations for future employment is as follows. First and foremost, it would be improper for a Member or House employee to permit the prospect of future employment to influence the official actions of the Member or employee, or the employing office of the employee. Some Members and employees may determine to use an agent (a “headhunter”) to solicit job offers on their behalf in order to avoid any appearance of improper activity. Regardless of whether job negotiations are undertaken personally or through an agent, the following generally applicable principles must be observed.

The term “negotiation” is not defined in the legislation or House rule. In its past guidance, the Committee has given deference to court decisions interpreting a related federal criminal statute. That statute (18 U.S.C. § 208) bars Executive Branch employees from participating in matters affecting the financial interests of an entity with which the employee is “negotiating or has any arrangement” concerning future employment. Those decisions found that the term “negotiation” should be construed broadly.⁴ However, the Committee makes a distinction between “negotiations,” which trigger the rule, and “[p]reliminary or exploratory talks,” which do not. “Negotiations” connotes “a communication between two parties with a view toward reaching an agreement” and in which there is “active interest on both sides.”⁵ Thus, merely sending a copy of one’s résumé to a private entity is not considered “negotiating” for future employment.

Other, more general, ethical rules also bear on the subject of employment negotiations. The House Code of Official Conduct prohibits House Members, officers, and employees from receiving compensation “by virtue of influence improperly exerted” from a congressional position.⁶ The Code of Ethics for Government Service (§ 5) forbids anyone in government service from accepting “favours or benefits under circumstances which might be construed by reasonable persons as influencing the performance” of governmental duties. Federal criminal law prohibits a federal official from soliciting or accepting a “bribe” – *i.e.*, anything of value given in exchange for being influenced in an official act.⁷ Although bribery necessarily entails a *quid pro quo* arrangement, the same statute also bans seeking or accepting “illegal gratuities” – *i.e.*, anything given because

⁴ See, e.g., *United States v. Schaltenbrand*, 930 F.2d 1554, 1559 (11th Cir. 1991), *cert. denied*, 502 U.S. 1005 (1991) and *United States v. Conlon*, 628 F.2d 150, 155 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1149 (1982).

⁵ *United States v. Hedges*, 912 F.2d 1397, 1403 n.2 (11th Cir. 1990) (quoting jury instruction); see also *Schaltenbrand*, 930 F.2d at 1558, 1559 n.2.

⁶ House Rule 23, cl. 3.

⁷ 18 U.S.C. § 201(b)(2)(A).

of, or in reward for, a future or past official act, whether or not the official action would be, or would have been, taken absent the reward.⁸

In light of these restrictions, Members and employees should be particularly careful in negotiating for future employment, especially when negotiating with anyone who could be substantially affected by the performance of official duties. It may be prudent for the Member or employee to have an exchange of correspondence with any serious negotiating partner, stipulating that the prospective employer will receive no official favors in connection with the job negotiations. Members and those employees who will be subject to the post-employment restrictions⁹ may also wish to establish in correspondence with any prospective employer that the future employer understands that (1) it will receive no official favors as a result of the job negotiations, and (2) the Member or employee is subject to post-employment restrictions, which should be briefly outlined.¹⁰ Former Members and employees who are lawyers should consult their local bar association concerning the application of rules governing their involvement in matters in which they participated personally and substantially during their time with the House.¹¹ In addition, as addressed in the next section of this memorandum, Members, officers, and very senior staff must disclose the employment negotiations to the Standards Committee.

Provided that Members and employees conduct themselves in accordance with the considerations discussed above, they may engage in negotiations for employment in the same manner as any other job applicant. Discussions may specifically address salary, duties, benefits, and other terms.

DISCLOSURE OF EMPLOYMENT NEGOTIATIONS AND RECUSAL REQUIREMENTS

Pursuant to new House Rule 27, which took effect on September 14, 2007, Members, officers, and very senior staff must notify the Committee on Standards of Official Conduct within three (3) business days after the commencement of any

⁸ *Id.* § 201(c)(1)(B).

⁹ The post-employment restrictions are discussed in detail in a pair of advisory memoranda – one for Members and officers and another for employees – issued annually by the Committee. Copies of the memoranda are available on the Standards Committee website, www.house.gov/ethics.

¹⁰ Briefly, House Members may not contact any Member, officer, or employee of the House or Senate on official business for one year after leaving office, nor may they assist any foreign government in securing official action from any federal official during that year. House officers and employees may neither contact the individual's former congressional office or committee members on official business for one year after leaving House employment, nor assist any foreign government in securing official action from any federal official during that year. Detailed guidance on the restrictions is contained in the memoranda referenced in note 9.

¹¹ A former employee who joins a law firm should also be aware that a separate statutory provision, 18 U.S.C. § 203, has been interpreted to prohibit a former federal official who joins a firm from sharing in fees attributable to representational services in federally related matters where those services were provided by the firm while the individual was still employed by the government. U.S. Office of Gov't Ethics Advisory Opinion 99 x 24 (Dec. 14, 1999) (available on the OGE website, www.usoge.gov).

negotiation or agreement for future employment or compensation with a private entity. The notification requirement applies to all job negotiations commenced, and employment or compensation agreements entered into, on or after the effective date of the rule. "Very senior staff" are those employees who are paid at an annual rate of \$126,975 for at least 60 days during the calendar year.¹²

The term "negotiation" is not defined in the legislation. Thus, the Committee views negotiations using the standard discussed earlier in this memorandum, namely that there has been "a communication between two parties with a view toward reaching an agreement" and in which there is "active interest on both sides."

In addition, officers, very senior staff, and those Members subject to the requirement must recuse themselves from "any matter in which there is a conflict of interest or an appearance of a conflict" with the private entity with which they are negotiating or have an agreement for future employment or compensation, and they must notify the Standards Committee in writing of such recusal.¹³ Members who make such a recusal also must file their negotiation notification with the Clerk for public disclosure.

The Committee has issued forms to be used for these notification requirements. When notifying the Committee of negotiations or agreements for future employment or compensation, Members, officers, and very senior staff should complete and sign an employment negotiation form, formally titled the "Notification of Negotiations or Agreement for Future Employment." The original, completed form must be submitted to the Committee, but filers should keep a copy of their submission. There is a separate form for notifying the Committee of recusal, entitled the "Statement of Recusal." All Members, officers, and very senior staff who recuse themselves from official matters pursuant to Rule 27 must complete and submit the recusal form to the Committee. At that time, Members must *also* submit to the Clerk a copy of the completed employment negotiation form regarding that private entity, which they had previously submitted to the Committee. The Clerk will make that form available for public disclosure. Copies of both forms are available on the Standards Committee website (www.house.gov/ethics).

Members must additionally determine whether it is necessary to abstain from voting or taking other official actions on matters that would affect an outside party with whom the Member is negotiating, or from whom the Member has accepted employment. This inquiry has traditionally been governed solely by House Rule 3, which states that abstention from voting on the House floor is not warranted unless the Member has "a direct personal or pecuniary interest in" the matter.¹⁴ Longstanding House precedent has interpreted this rule to mean that Members may vote on any matter that affects them merely as part of a large class of individuals or entities rather than with particularity.

¹² A Member, Delegate, or Resident Commissioner is not subject to this requirement if his or her successor has been elected.

¹³ House Rule 27, cl. 4.

¹⁴ House Rule 3, cl. 1.

Thus, Members who were bar owners were permitted to vote on Prohibition, which affected them only as a member of a large class of business owners.¹⁵

However, as described above, House Rule 27, clause 4 imposes a new, additional requirement that Members who are negotiating for future employment “shall recuse” themselves “from any matter in which there is a conflict of interest or an appearance of a conflict for that Member.” Historical practice has established that, with regard to House Rule 3, there is no authority to force a House Member to abstain from voting, and the decision on whether abstention from voting was necessary has been left for individual Members to determine for themselves under the circumstances.¹⁶ At a minimum, Members faced with a vote on a matter that directly impacts a private entity with which they are negotiating would have difficulty balancing the duty they owe to their constituents with the recusal provisions of Rule 27. Members who wish to avoid such conflicts are encouraged to delay any negotiations for future employment until after their successor has been elected.

BENEFITS OFFERED BY PROSPECTIVE EMPLOYERS WHILE ENGAGING IN JOB NEGOTIATIONS

The House gift rule provides that a Member, officer, or employee may accept “[f]ood, refreshments, lodging, transportation, and other benefits . . . customarily provided by a prospective employer in connection with bona fide employment discussions.”¹⁷ Thus, subject to the limitations set out in the rule, a Member or employee may accept travel expenses from a negotiating partner to interview for a position and to meet prospective colleagues. Such travel is *not* subject to the requirement for prior, written approval from the Committee that applies to privately-funded travel undertaken as part of one’s House duties. However, travel expenses that exceed \$335 from any one source must be disclosed on Schedule VII of the termination financial disclosure statement required of departing House Members and senior employees.

Please contact the Committee at (202) 225-7103 with any questions.

¹⁵ See *House Ethics Manual*, 102d Cong., 2d Sess. 120-23 (1992).

¹⁶ See 5 Asher C. Hinds, *Hinds’ Precedents of the House of Representatives* §§ 5950, 5952 at 502, 503-04 (1907).

¹⁷ House Rule 25, cl. 5(a)(3)(G)(ii).

