



August 20, 2020

Larry Novins  
Executive Director  
Vermont State Ethics Commission  
6 Baldwin St.  
Montpelier, VT 05633

Dear Mr. Novins:

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Vermont State Ethics Commission (“Commission”) regarding the Commission’s proposed statutory code of ethics.

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening American democracy across all levels of government. We work toward a more transparent, accountable and inclusive democracy that is responsive to the people. In furtherance of that goal, we work to ensure ethics laws across the country adequately protect the public’s confidence in the integrity of democratic institutions.

We support the Commission’s decision to initiate this new statutory ethics code, and we applaud the Commission for including the fundamental pillars of ethical government service in its draft. As public confidence in the federal government hits historic lows,<sup>1</sup> it has never been more important for states to reaffirm their commitment to public service.

Our comments are intended to support the Commission’s initiative to promulgate a statute with meaningful safeguards to maintain Vermonters’ trust in their state government. We recognize that some of these suggestions may be incorporated into Vermont’s ethics code through other means, so we encourage the Commission to incorporate these suggestions in whatever

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<sup>1</sup> Pew Research Center, *Public Trust in Government: 1958-2019* (Apr. 11, 2019), <https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/>.

manner it sees fit. Below is a summary of our comments. Our in-text suggestions for the statutory language are also attached.

### **Use of Position for Personal Gain**

CLC recommends clarifying the scope of what constitutes misusing official positions for personal gain. The additional language is taken from the federal regulation covering misuse of position.<sup>2</sup> Our recommendation clarifies that use of position for *any* personal gain is a violation of the public's trust, even if a friend or a business affiliated with the public servant is the beneficiary of that gain. We also recommend including language surrounding the use of confidential or non-public information for private financial gain to clarify that the prohibition covers the use of non-public information acquired during the course of official duties for trading in securities or other business transactions.

### **Gifts**

CLC recommends striking the term “political contribution” from the definition of a prohibited gift, and instead including “a lawfully reported political contribution” under the list of items not considered gifts. As written, the statute suggests that if a political contribution given after a public servant makes a policy choice the contributor likes (*i.e.*, “as a reward for any official action”), the acceptance of that contribution violates the ethics code. Removing the otherwise lawful political contributions from the definition of prohibited gifts will prevent a constitutional challenge of a ban on political contributions from non-lobbyists.

The Commission should include an exception for nominal gifts as well. Our suggestion is to allow unsolicited gifts valued at \$20 or less, provided that the total value of gifts from the same source is not more than \$50 in a calendar year. This exception will encourage compliance with the other gift restrictions by not prohibiting generally acceptable conduct.

### **Outside Employment and Post-Government Employment**

CLC believes the post-employment restrictions included in the draft code are important to prevent the conflicts of interest that occur when public servants depart government for the private sector. The draft code currently includes three post-employment restrictions for Vermont public servants: a prohibition on seeking conflicting employment while in office; a “cooling off” period of one year, during which the public servant is barred from representational activities in front of the department, agency, board,

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<sup>2</sup> 5 C.F.R. § 2635.702.

commission, or office in which they served; and a permanent restriction on “switching sides,” or representational activities to influence the State of Vermont on the same matter the public servant personally worked on while in office.

We have two suggestions regarding these post-employment restrictions. First, we recommend mirroring federal law by limiting the permanent ban to particular matters involving specific parties. When limited to particular matters involving specific parties, the Congressional Research Service describes the lifetime ban in federal law as follows:

“This lifetime ban is a fairly narrow and case-specific restriction which in practice would apply to one who worked substantially on a particular governmental matter such as a specific contract, a particular investigation or a certain legal action, involving specifically identified private parties, and who then leaves the government and attempts to represent those private parties before the government on that same, specific matter.”<sup>3</sup>

We agree. The permanent restriction on switching sides is an important safeguard; and when limited to particular matters involving specific parties, it is narrow enough to ensure compliance while leaving former public servants free to pursue nongovernment work in their areas of expertise.

Second, CLC recommends not only prohibiting public servants from seeking conflicting post-government employment, but also prohibiting conflicting outside employment while working as a Vermont public servant. This restriction is especially important for full-time public servants.

### **Financial Disclosure**

Finally, CLC recommends that Vermont require by statute an accessible public financial disclosure database. We suggest that the Commission publish all financial disclosure statements in one place—on its website—in a searchable, sortable, and downloadable format. Although public servants should maintain constant awareness of conflicts of interest that arise during their official duties, making reports available for public scrutiny provides extra impetus for public servants to resolve conflicts of interest and take extra care to avoid even the appearance of a conflict. The transparency that comes with a user-friendly, centralized source for accessing financial disclosures will boost public confidence in Vermont public servants’ decision making.

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<sup>3</sup> JACK MASKELL, CONG. RESEARCH SERV., POST-EMPLOYMENT, “REVOLVING DOOR,” LAWS FOR FEDERAL PERSONNEL 3 (May 12, 2010), <https://fas.org/sgp/crs/misc/97-875.pdf>.

## Conclusion

CLC respectfully urges the Commission to adopt these recommendations for the new statutory ethics code. We appreciate having the opportunity to participate in this important process, and CLC welcomes any questions that the Executive Director has regarding our comments.

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
Kedric L. Payne  
General Counsel and Senior Director,  
Ethics

\_\_\_\_\_/s/\_\_\_\_\_  
Delaney N. Marsco  
Legal Counsel, Ethics

# Vermont State Ethics Commission

## 2020 Statutory Proposal: Draft Code of Ethics

July 10, 2020 for public input

Subject to further revision

### Introduction:

More than 40 states have adopted ethics codes by statute. Vermont has no ethics code in law. The Vermont State Ethics Commission intends this document to prompt discussion of a Vermont Ethics Code which can be adopted by statute. The provisions of this draft code below are taken or modified from:

- Provisions of other states' ethics codes,
- The Code of Federal Regulations,
- The current State Code of Ethics (COE) adopted by the State Ethics Commission,
- Vermont statutes, and
- Governor Scott's Executive Order 19-17.

The suggestions herein are made with full knowledge that not all parts of this draft code of ethics will be deemed necessary at this time.

This draft code of ethics builds on the sources listed above. An ethics code should help public servants avoid conflicts of interest and promote faith in government. This draft code of ethics sets a baseline for acceptable and unacceptable conduct. Many states and the federal government have more comprehensive and detailed ethics provisions. They often represent responses to specific instances of unethical conduct. The Ethics Commission has not yet seen conduct that would justify such detailed, complex provisions for Vermont. This draft addresses core concerns of government ethics.

This draft code of ethics contemplates that Executive Orders, internal rules of the General Assembly, or administrative agency rules or policies may be adopted imposing more specific or stringent ethics requirements.

The substantive provisions address the following topics:

- 1) Conflict of Interest
- 2) Unethical Conduct May Not Be Delegated
- 3) Appearance of Conflicts of Interest or Other Ethical or Law Violations
- 4) Preferential Treatment
- 5) Use of Position for Personal Gain
- 6) Use of Confidential or Non-Public Information

- 7) Use of Government Resources
- 8) Gifts
- 9) Statements Obligating the State of Vermont
- 10) Post-Government Employment
- 11) Compliance with Law
- 12) Other Ethics Rules or Policies
- 13) Whistleblower Protections for Ethics Complaints
- 14) Ethics Education and Training
- 15) Financial Disclosure

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## **Vermont State Ethics Commission Draft Vermont Code of Ethics**

### **Findings and Legislative Intent**

It is declared that high moral and ethical standards among state public servants are essential to the conduct of government affairs; that the General Assembly believes a code of ethics: will help public servants avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service, and will promote and strengthen the faith and confidence the people of this state are entitled to have in the judgment, integrity, and impartiality of their public servants.

Public servants hold their positions as a public trust. Any effort to realize personal gain through official conduct is a violation of that trust. This code of ethics does not prevent public servants from accepting other employment or following pursuits which in no way interfere with the full and faithful discharge of their duties to the state.

The Legislature recognizes that: public servants are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; citizens who serve as state public servants retain their rights as citizens to interests of a personal or economic nature; standards of ethical conduct for state public servants need to distinguish between minor and inconsequential conflicts that are unavoidable in a free society and conflicts which are substantial and material. The legislature further recognizes that state public servants may need to engage in employment, professional, or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity. They may need to maintain activities or investments, which do not conflict with the specific provisions of this

code. The legislature recognizes that the activities of public servants should not be unduly circumscribed.

[Source: Wisconsin-modified]

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## **Vermont State Code of Ethics Substantive Provisions**

### **Applicability:**

Unless excluded below, this Code of Ethics applies to all persons elected or appointed to serve as officers of the State of Vermont, all persons elected or appointed to serve as members of the general assembly, all state employees, all persons appointed to serve on state boards and commissions, and persons who in any other way are authorized to act or speak on behalf of the State of Vermont. This code refers to them all as “public servants.”

### **Exclusions:**

- I. This code of ethics does not apply to the functions of State Legislators that are protected by the Constitution of the State of Vermont. Vermont Constitution, Chapter I, Article 14.

#### **Chapter I Article 14. [Immunity for words spoken in legislative debate]**

The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

- II. This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 “Departments to be Distinct.”

**Chapter II Article 4. [Judiciary]** The judicial power of the State shall be vested in a unified judicial system which shall be composed of a Supreme Court, a Superior Court, and such other subordinate courts as the General Assembly may from time to time ordain and establish.

**Chapter II Article 5 [Departments to be distinct]** The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.

## **Definitions**

### **1) Conflict of Interest:**

(a) A “conflict of interest” for a public servant means an interest, direct or indirect, financial or otherwise, of the public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or which is in

conflict with the proper discharge of the public servant's duties. "Conflict of Interest" does not include any interest that:

(1) is no greater than that of other persons generally affected by the outcome of a matter (such as a policyholder in an insurance company or a depositor in a bank), or

(2) has been disclosed as required by law or applicable written policy and found not to be significant. [Modified from COE and Exec. Order #79]

**2) Confidential information:** means information that is exempt from public inspection and copying or is otherwise designated by law as "confidential."

**3) Gift:** means anything of value, tangible or intangible, that is bestowed for less than adequate consideration. [Sources: 3 V.S.A. § 1201(4)(a) and 2 V.S.A. § 261(6)(A)(ii)] Included within this definition are travel expenses such as travel fare, room and board, and other expenses associated with travel.

(a) Examples of gifts may also include;

~~(1) a political contribution; [Source: 2 V.S.A. § 261(6)(A)(i)] [Deleted, and added to exceptions below, to prevent constitutional challenge of ban on political contributions from non-lobbyists.]~~

(2) a meal or alcoholic beverage; [Source: 2 V.S.A. § 261(6)(A)(iii)]

(3) a ticket, fee, or expenses for or to any sporting, recreational, or entertainment event; [Source: 2 V.S.A. § 261(6)(A)(iv)]

(4) a speaking fee or honorarium, except actual and reasonable travel expenses; [Source: 2 V.S.A. § 261(6)(A)(v)]

(5) a loan made on terms more favorable than those made generally available to the public in the normal course of business. [Source: 2 V.S.A. § 261(6)(A)(vi), 3 V.S.A. § 1201(4)(a), 2 V.S.A. § 261(6)(A)(ii)]

(b) Not Considered "Gifts:"

(1) An item which would qualify as a gift, but which is not used, and which within 30 days after receipt, is returned to the donor, or for which the donor is reimbursed for its fair market value will not be considered a "gift;" [2 V.S.A. § 261]

(2) anything given between immediate family members;

(3) printed educational material such as books, reports, pamphlets, or periodicals;

~~(4) an unsolicited gift valued at \$20 or less, provided that the total value of gifts from the same person is not more than \$50 in a calendar year; [5 C.F.R. § 2635.204(a)] [Inserting exception for nominal gifts, which encourages compliance by not prohibiting generally acceptable conduct.]~~

(5) a devise or inheritance; [currently in 3 V.S.A. § 1201(4)(B) and 2 V.S.A. § 261]

~~(6) a lawfully reported campaign contribution.~~

**4) "Person"** as used in this chapter means: any individual, group, business entity, association or organization.

## Rules



### **1) Conflicts of Interest:**

Public servants who are confronted with a conflict of interest shall take no action on the matter and, upon identifying the conflict of interest or potential conflict of interest, shall in writing disclose to their immediate supervisor or to the public in detail sufficient to be understood by the public, the nature of the interest, financial or otherwise, that gives rise to the conflict of interest, and sign a statement of recusal from future participation in the matter.

[Taken roughly from CT. Ethics Code, 1-86.]

### **2) Unethical Conduct May Not Be Delegated:**

Public servants may not direct others to act in a manner which they themselves cannot. Public servants who have a conflict of interest shall not direct others to act to their benefit. Public servants, who because of a conflict of interest, recuse themselves from a matter may not in any way participate in or act to influence a decision regarding that matter.

### **3) Appearance of Violation:**

Public servants shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.

Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

[5 CFR § 2635.101 - Basic obligation of public service]

### **4) Preferential Treatment:**

Public servants in the course of state business shall act impartially showing no favor toward or prejudice against any person. Public servants shall not give or represent an ability to give preference or special treatment to anyone because of their wealth, position, or status, or because of any personal relationship with a public servant. When required by law, public servants may give preference to designated individuals or groups.

[Comment: e.g. Affirmative action plans, or a statute giving a preference to a group like veterans. A public servant executing the statute may give preference to the target group, but otherwise act impartially and consistent with the statute. Modified from Current Code, and NIH Ethics Order, 5 CFR § 2635.101(b)(8).]

### **5) Use of Position for Personal Gain:**

Public servants shall not use their official positions for personal or financial gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the

employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. [taken from 5 C.F.R. § 2635.702]. [Inserted to clarify the scope of personal gain.]

#### 6) Use of Confidential or Non-Public Information:

Public servants shall not use or disclose non-public government information or confidential information acquired during the course of state service for their own or anyone else's personal or financial gain, including trading in stock or other securities or otherwise transacting private business based upon such information. [Exec Order #79] [inserted clarifying language]

[Modified from current Vermont COE]

#### 7) Use of Government Resources:

Public servants shall not make use of state materials, funds, property, personnel, facilities, or equipment or permit others to do so for any purpose other than for official state business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule.

Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule.

[Modified from Iowa Statutes and E.O. 19-17.]

#### 8) Gifts:

Public servants shall not solicit, accept, or receive, directly or indirectly, from any person a gift under circumstances in which it can reasonably be inferred that the gift is intended to influence them in the performance of their official duties or is intended as a reward for any official action or inaction on their part.

[Modified from current COE. Note: E.O. 19-17 is more specific.]

#### 9) Statements Obligating the State of Vermont:

Public servants shall not make unauthorized commitments or promises of any kind purporting to bind State government.

[VCOE, modified per 5 CFR § 2635.101(b)(12)]

#### 10) Outside Employment and Post-Government Employment:

While in State service, public servants shall not have [prohibiting conflicting outside employment], seek or negotiate in any manner employment that potentially or actually conflicts with their official government duties and responsibilities.

[VCOE]

One-year restriction. Public servants shall not, for one year after leaving state service, represent anyone, other than the State of Vermont, for compensation before the department, agency, board,

commission, or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a substantial interest.

Permanent restrictions on representation on particular matters. Public servants shall not, after termination of their service or employment with the State, knowingly make with the intent to influence, any communication or appearance before any entity of the State of Vermont on behalf of any person other than the State of Vermont in connection with a particular matter **involving specific parties** *[narrowing scope of permanent restriction]*:

- (a) in which the State of Vermont is a party or has a direct and substantial interest, and
- (b) in which the former public servant participated personally and substantially while in public service.

[Source: 18 USC § 207, a criminal statute].

### **11) Compliance with Law:**

Public servants shall meet personal legal obligations and comply with applicable state and federal laws and regulations and comply with applicable governmental codes of conduct.

[VCOE, modified]

### **12) Other Ethics Rules or Policies:**

Public servants shall comply with any other applicable rules or policies established by executive order, agency rule, or policy. Nothing herein shall prohibit branches of state government, agencies, or departments from adopting more stringent ethics provisions.

### **13) Whistleblower Protections for Ethics Complaints:**

Consistent with 3 V.S.A. § 971 et seq., public servants shall be free to disclose waste, fraud, abuse of authority, violations of law, or violations of this or other applicable ethics codes to the Ethics Commission without fear of reprisal, intimidation, or retaliation.

### **14) Ethics Education and Training:**

Mandatory ethics training. Within the first 6 months of public service or beginning a new state position, public servants shall engage in ethics training which may be in person or on-line. Public servants shall participate in continuing ethics education which may be in person or on-line at least once every three years thereafter. Acceptable continuing ethics education providers are: The State Ethics Commission, the Department of Human Resources - Center for Achievement in Public Service (CAPS), the Vermont House of Representatives Ethics Panel for the House of Representatives, and the Vermont Senate Ethics Panel for the Senate. Copies of CAPS, House, and Senate Ethics training materials shall be provided to the Ethics Commission. On request, the State Ethics Commission may collaborate with or assist other providers.

### **15) Financial Disclosure**

**Financial disclosure forms required by 17 V.S.A. § 2414(a), 3 V.S.A §§ 1211(a) and 1212(a), and all ethics disclosures filed by the following individuals shall be accessible to the public on the website of the State Ethics Commission in a format that is searchable, sortable, and downloadable: Each elected Statewide**

officeholder, State Senator, and State Representative; each Executive Officer; each member of the State Ethics Commission; and the Executive Director of the State Ethics Commission. *[Inserted to accomplish intent of the VT financial disclosure requirements – public transparency. Public needs a centralized source of the records.]*

July 8, 2020