ATTACHMENT II

TEXAS ETHICS COMMISSION

A GUIDE TO ETHICS LAWS FOR STATE OFFICERS AND EMPLOYEES

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A GUIDE TO ETHICS LAWS
FOR STATE OFFICERS AND EMPLOYEES

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INTRODUCTION

As a public servant, you owe a responsibility to the people of Texas in the performance of your official duties. This pamphlet sets out laws that govern your conduct as a public servant. As you read this pamphlet, you should bear in mind that ethical conduct involves more than merely following these laws. As a public servant, you should act fairly and honestly and should avoid creating even the appearance of impropriety.

Laws Interpreted by the Ethics Commission

The Ethics Commission interprets various laws governing the conduct of state officers and employees: the provisions in chapter 572 of the Government Code; the restrictions on benefits, gifts, and honoraria in chapter 36 of the Penal Code and in the lobby law, chapter 305 of the Government Code; and the restrictions on the use of government resources in chapter 39 of the Penal Code.

Some laws governing public servants, such as the nepotism law, are not under the jurisdiction of the Ethics Commission. Also, officers and employees of particular state agencies may be subject to statutes, rules, or personnel guidelines specifically applicable to that agency. Your general counsel or the Office of the Attorney General are the appropriate sources for advice about such laws.

Advisory Opinions

If you are concerned about how any of the laws subject to interpretation by the Ethics Commission apply to you, you may request an advisory opinion. The request must be about the application of one or more of those laws to a specific factual situation, either existing or hypothetical. Gov't Code § 571.091. Unless you waive confidentiality in writing, the Ethics Commission must keep your name confidential.

The legal effect of an Ethics Commission advisory opinion is described in section 571.097 of the Government Code as follows:

> It is a defense to prosecution or to imposition of a civil penalty that the person reasonably relied on a written advisory opinion of the commission relating to the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved.

Copies of Ethics Advisory Opinions are available from the Ethics Commission at (512) 463-5800 or (800) 325-8506 or at *http://www.ethics.state.tx.us* on the Internet.

PART I. STANDARDS OF CONDUCT AND CONFLICT OF INTEREST

The "Should Nots"

The legislature has adopted the following standards of conduct for state employees:

A state officer or employee should not:

(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;

(2) accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;

(3) accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;

(4) make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

A state agency may not use appropriated funds to compensate a state employee who violates those standards. Gov't Code § 2113.014. Also, in some cases failure to follow the standards of conduct will violate one of the criminal statutes discussed in this pamphlet.

Private Interest in Measure or Decision

If a board member has a private or personal interest in a measure, proposal, or decision pending before the board, the board member must disclose that fact to the rest of the board in an open meeting and must refrain from voting or otherwise participating in the matter. Gov't Code § 572.058. The law specifies that a person does not have a "private or personal interest" in a matter if the person is engaged in a profession, trade, or occupation, and the person's interest in the matter is the same as others similarly engaged.

Note: This guide addresses only the laws that the Ethics Commission interprets. Other laws may contain additional "conflict of interest" provisions. In particular, state agency counsels should be aware of the common-law rule restricting a contract between agencies and agency board members. *See* Attorney General Opinion JM-671 (1987).

PART II. ACCEPTANCE OF BENEFITS

Chapter 36 of the Penal Code prohibits public servants from accepting certain gifts or benefits. Violations of the laws in this chapter carry criminal penalties, and complaints alleging such violations are handled by local prosecutors, not by the Texas Ethics Commission.

Bribery

As a public servant, you commit the offense of bribery if you solicit, offer, or accept a "benefit" in exchange for your decision, opinion, recommendation, vote, or other exercise of official discretion. Penal Code § 36.02. Common sense should tell you if something is a bribe. If it is, don't take it.

Honoraria

You may not solicit, agree to accept, or accept an honorarium in consideration for services you would not have been asked to provide but for your official position. Penal Code § 36.07. Thus, for example, you may not take a speaker's fee for speaking if your position with the state is one of the reasons you were asked to speak. The honorarium law does not, however, prohibit acceptance of food, transportation, and lodging in connection with a speech that is more than merely perfunctory. If a state officer or the executive head of an agency accepts food, transportation, or lodging under these circumstances, the officer must report it on Part XIII of the annual personal financial statement. (A travel regulation provides that a state employee may not accept money for a travel expense reimbursement from a person that the employee's employing state agency intends to audit, examine, or investigate or is auditing, examining, or investigating. Gov't Code § 660.016.)

Prohibitions on Gifts

Most public servants are subject to one or more prohibitions on the acceptance of "benefits" from persons subject to their jurisdiction. Penal Code § 36.08. For example, a public servant in an agency performing regulatory functions or conducting inspections or investigations may not accept a benefit from a person the public servant "knows to be subject to regulation, inspection, or investigation by the public servant or his agency." *Id.* § 36.08(a). Similarly, a public servant who "exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions" of the agency may not accept a benefit from a person the public servant knows is interested in or likely to become interested in such a transaction. *Id.* § 36.08(d). (The Appendix contains the full text of section 36.08.) *These prohibitions apply regardless of whether the donor is asking for something in return.*

The statutory definition of "benefit" is "anything reasonably regarded as pecuniary gain or pecuniary advantage." Penal Code § 36.01(3). In advisory opinions, the Ethics Commission has stated that the following gifts are benefits: a $50 clock, a hotel room, a hunting trip, football tickets, a $160 rifle, and a $60 restaurant meal. Ethics Advisory Opinion Nos. 97, 94, 90, 69, 60 (1992).

Exceptions to Gift Prohibitions

There are exceptions to the prohibitions set out in Penal Code section 36.08. These exceptions are exceptions to criminal liability under that section. You should also make sure that the laws and rules specifically applicable to your agency permit you to accept a benefit permitted under the Penal Code. Even if the acceptance of a gift is legally permissible, you should consider whether the gift raises the appearance of impropriety.

The following exceptions are most likely to be relevant to state officers or employees. (The Appendix contains the full text of section 36.10, which sets out the exceptions to section 36.08.)

- You may accept non-cash items of less than $50 in value. Penal Code § 36.10(a)(6). If a *lobbyist* provides you with food, beverages, entertainment, lodging, or transportation, however, the lobbyist must be present at the event.

- You may accept benefits in the form of food, lodging, transportation, or entertainment in any amount if you accept them as a "guest" and report them if there is an applicable reporting requirement. Penal Code § 36.10(b). In order for you to accept something as a "guest," the donor must be present.

  Lobbyists may provide you with transportation and lodging only in connection with a fact-finding trip related to your official duties or in connection with an event, such as a conference, at which you will be providing "more than perfunctory" services in your official capacity.

  State officers and agency heads: You will be required to report on your personal financial statement the acceptance of gifts worth more than $250, except for gifts from a member of your immediate family or from a lobbyist required to report the gift. You must also report on your personal financial statement your acceptance of meals, transportation, or lodging provided in connection with a speech or other services you provided in your official capacity. (*See* above discussion on "Honoraria.")

- You may accept a benefit from a person such as a friend, relative, or business associate with whom you have a relationship independent of your official status *if the benefit is given on account of that relationship rather than your official status*. Penal Code § 36.10(a)(2).

- You may accept a payment for which you give legitimate consideration *in a capacity other than as a public servant*. Penal Code § 36.10(a)(1). The use of the term "legitimate consideration" means that the payment you receive must reflect the actual value of the services or goods you provide in exchange for the payment. Ethics Advisory Opinion No. 41 n.1 (1992).

- You may accept certain gifts, awards, and mementos from persons required to register as lobbyists. "Gift" in this context does not include food, entertainment, transportation, or lodging, which are discussed above. Penal Code § 36.10(a)(5). (*See* discussion of "Gifts Prohibited by the Lobby Statute" below.)

Gifts Prohibited by the Lobby Statute

The lobby law, chapter 305 of the Government Code, contains restrictions on gifts from a person required to register under that statute. For the most part, the lobby statute is stricter than the Penal Code. For instance you may not accept transportation and lodging in connection with a pleasure trip from a lobbyist. There is, however, one exception to the general rule that the lobby law is stricter than the Penal Code: Under section 36.10(a)(5) of the Penal Code, there is an exception from the Penal Code prohibition on the acceptance of benefits for a gift, award, or memento that is required to be reported by a lobbyist. Because of this exception there are circumstances in which it is permissible for you to accept a gift from a lobbyist that you could not accept from a non-lobbyist. If you are thinking about relying on this exception, you should ask the Ethics Commission for advice before you do so.

Gifts to State Agencies

The Ethics Commission has issued several opinions in response to questions about the acceptance of gifts by a state agency. Ethics Advisory Opinion Nos. 118 (1993), 63, 62, 51, 31 (1992). Chapter 305 of the Government Code, which regulates lobbying, and chapter 36 of the Penal Code, which regulates gifts to public officers and employees, do not apply to gifts given to a state agency. Ethics Advisory Opinion Nos. 62, 31 (1992). The statutes applicable to a specific state agency determine whether the agency has authority to accept gifts. *Id*. Also, even if an agency has authority to accept gifts, it may do so only in accordance with the provisions of Government Code chapter 575.

Although questions about the specific authority of a state agency to accept gifts are outside the Ethics Commission's advisory opinion authority, previous ethics advisory opinions have set out some general guidelines about the acceptance of gifts by a state agency. First, the commission has noted that even if a state agency has authority to accept gifts generally, the agency may accept gifts on behalf of the agency only if the gifts can be used in carrying out the agency's powers and duties. A gift to a state agency becomes state property, and an officer or employee of the agency cannot be permitted to use it for private purposes. Consequently, acceptance of gifts by a state agency is not a permissible way of acquiring gifts for the personal enjoyment of individual state officers and employees.

Gifts to state agencies, even if legally permissible, may raise questions about impropriety. If the donor is subject to agency regulation or oversight, or engages in a business that can be affected by agency action, then it may be that the donor hopes or expects to gain favor with the agency. Even if that is not the case, it may appear to be so, especially to someone whose interests are different from those of the donor and who may feel at a disadvantage because of the donor's generosity.

Donation of Gifts to Charity

What should you do if someone sends you an unsolicited gift that you may not accept? Often public servants would prefer to donate such gifts to charity or to a governmental body, rather than returning them to the donor. A provision of the Penal Code allows such donations in specified circumstances:

> A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under [section 36.08] may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

Penal Code § 36.08(i).

PART III. ABUSE OF OFFICE

Chapter 39 of the Penal Code contains several provisions prohibiting a public servant from using his or her official position in various ways for non-governmental purposes.

Misuse of Government Property

As a public servant, you commit an offense if, with intent to obtain a benefit or harm another, you *misapply any thing of value belonging to the government* that has come into your custody or possession by virtue of your public office or employment. Penal Code § 39.02(a)(2). Simply stated, this means that you are to use government property for governmental purposes, not for personal or private purposes.

Frequent Flyer Miles: Penal Code section 39.02(d) specifically provides that travel discount awards such as "frequent flyer" miles, hotel or rental car discounts, or food coupons are not things of value belonging to the government for purposes of the criminal law prohibiting misapplication of a thing of value belonging to the government. This means that personal or private use of travel awards accrued on state business is not a crime. The law does not, however, prevent a particular agency from adopting a policy requiring that such travel awards be used for agency purposes.

Political Campaigns: Do not use state time or state equipment to work on an individual's political campaign. *See* Ethics Advisory Opinion No. 172 (1993). Also, chapter 556 of the Government Code prohibits a state agency from using appropriated funds in connection with a political campaign. Further, it prohibits a state officer or employee from using official authority to interfere with or attempt to influence the result of an election. Gov't Code § 556.004. The Ethics Commission does not have authority to interpret chapter 556 of the Government Code.

Misuse of Official Information

As a public servant, you may have access to information that has not been made public. Chapter 39 of the Penal Code restricts your use of such information in the following ways:

- You may not use the information to acquire or help another person to acquire a pecuniary interest in any property, transaction, or enterprise affected by the information. Penal Code § 39.06(a)(1).

- You may not speculate or aid another to speculate on the basis of the information. Penal Code § 39.06(a)(2).

- You may not disclose or use the information with the intent to obtain a benefit or to harm another. Penal Code § 39.06(b).

PART IV. OTHER EMPLOYMENT

Concurrent Employment

Some of the laws under the jurisdiction of the Ethics Commission are relevant to questions about other employment by a state officer or employee. For example, under the bribery law, you may not solicit or accept a "benefit" in exchange for your decision, opinion, recommendation, vote, or other exercise of discretion as a public servant. Penal Code § 36.02. A salary is a benefit. *See generally* Ethics Advisory Opinion No. 155 (1993). Therefore, the crime of bribery occurs if a state officer accepts other employment in exchange for official action or inaction. In addition, under the honorarium law a state officer may not accept an honorarium for performing services that he or she would not have been asked to provide but for his or her official status. Other laws outside the Ethics Commission's jurisdiction may also restrict your employment. For information about such laws, consult your general counsel or the Office of the Attorney General.

Future Employment

If you are about to leave your position with the state, you should be aware of laws that might restrict your future employment. Chapter 572 of the Government Code contains two "revolving door" provisions. These provisions apply to former officers and certain former employees of regulatory agencies.

Note: If other law restricts you from representing a person before an agency after you leave your position, that law prevails over the Government Code provisions discussed below.

Revolving Door #1

The first revolving door provision will apply to you if you are a former board member or executive director of a regulatory agency. For two years after you cease to be a member of the board, you may not make any communication to or appearance before an officer or employee of the board on behalf of any person with the intent to influence agency action in connection with any matter on which that person seeks official action. The restriction applies even if the agency initiates the contact and even if you are communicating on your own behalf (subject to your due process rights). It does not, however, prevent you from merely providing information to the agency, as long as you are not doing so with the intent to influence agency action on behalf of a person.

Revolving Door #2

The second revolving door provision applies to all former board members and executive directors of regulatory agencies. It also applies to former employees who, at the time of leaving the agency, were compensated at or above a certain salary level. (The law states that the law applies to a former employee whose compensation at the time of leaving state employment was at or above the level prescribed by the general appropriations act for step 1, salary group A17, of the position classification salary schedule. (The 2007 General Appropriations Act prescribed the minimum annual salary for salary group A17 to be $36,043 for fiscal year 2008 and $36,764 for fiscal year 2009.)

A former board member or employee covered by the provision may *never* represent a person or receive compensation for services rendered on behalf of any person regarding a "particular matter" in which he or she "participated" while serving with the agency. A "particular matter" is a *specific* matter before the agency, such as an investigation, application, contract, rulemaking proceeding, administrative proceeding, request for a ruling, etc. This revolving door provision prohibits you from representing a person, or getting paid to help a person, regarding a *specific* matter in which you were either personally involved or that was a matter within your official responsibility while a state officer or employee. It does not prohibit you from working on the *type of matters* you worked on at the agency. *This restriction lasts forever*.

Note: For purposes of the Government Code revolving door statute, a "person" is an individual or business entity. Gov't Code § 572.002(7). The statute does not restrict former state officers or employees from representing or providing services on behalf of nonprofit or governmental entities. Ethics Advisory Opinion No. 232 (1994).

Violation of either of the revolving door provisions is a Class A misdemeanor.

PART V. PERSONAL FINANCIAL STATEMENTS

Board members and executive directors of most state agencies are required to file a personal financial statement with the commission on or before April 30 each year if they served at any time beginning on January 1 and continuing through April 30 of that year. Gov't Code § 572.026(a). If your term as a board member is ending or if you plan to resign from a board, you should be aware of the "holdover" provision of the Texas Constitution. Under this provision, a state officer "holds over" in office until replaced. A person who no longer attends meetings may nonetheless "holdover" as a board member. Thus, if you resign or your term expires before January 1 of a given year, you will still be required to file a financial statement for that year if your successor was not appointed before January 1.

However, if you are an appointed officer, as defined by section 572.002 of the Government Code, you are not required to file a personal financial statement if the following criteria are met before January 1 of the year the statement is due: (1) your term expired, you resigned, your agency was abolished, or your agency functions were transferred to another agency; and (2) you ceased to participate in the state agency's functions. If your term expired or if you resigned, you are required to provide written notice of your intent to not participate in the agency's functions to the Office of the Governor and to the Texas Ethics Commission.

Anyone who asks for extra time to file by April 30 is entitled to a one-time, 60-day extension. Call the Ethics Commission legal staff at (512) 463-5800 if you have questions when completing the form.

Note: The commission imposes a civil penalty of $500 for late filings. The commission has the authority to raise this penalty. There are criminal penalties for failing to file at all.

PART VI. LOBBYING BY STATE OFFICERS AND EMPLOYEES

The provisions of Government Code chapter 556 prohibit the use of appropriated funds to influence legislation. Those provisions are not under the Ethics Commission's jurisdiction. The lobby law, chapter 305 of the Government Code, is not applicable in this context. Note, however, that a *gift* from a state agency to a legislator may be prohibited under the Penal Code.

SUMMARY

This guide is intended to make you familiar with the laws interpreted by the Texas Ethics Commission that govern your conduct as a state officer. For further guidance, you should consult your agency ethics advisor or general counsel. Also, feel free to call the Ethics Commission at (512) 463-5800 for advice or visit our Internet site at *http://www.ethics.state.tx.us.*

APPENDIX

Penal Code Provisions Regarding Gifts to a Public Servant

§ 36.08. Gift to Public Servant by Person Subject to His Jurisdiction

(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) A member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.

(g) A public servant who is a hearing examiner employed by an agency performing regulatory functions and who conducts hearings in contested cases commits an offense if the public servant solicits, accepts, or agrees to accept any benefit from any person who is appearing before the agency in a contested case, who is doing business with the agency, or who the public servant knows is interested in any matter before the public servant. The exception provided by Section 36.10(b) does not apply to a benefit under this subsection.

(h) An offense under this section is a Class A misdemeanor.

(i) A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under this section may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

§ 36.09. Offering Gift to Public Servant

(a) A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting.

(b) An offense under this section is a Class A misdemeanor.

§ 36.10. Non-Applicable

(a) Sections 36.08 (Gift to Public Servant) and 36.09 (Offering Gift to Public Servant) do not apply to:

(1) a fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a public servant;

(2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient; or

(3) a benefit to a public servant required to file a statement under Chapter 572, Government Code, or a report under Title 15, Election Code, that is derived from a function in honor or appreciation of the recipient if:

(A) the benefit and the source of any benefit in excess of $50 is reported in the statement; and

(B) the benefit is used solely to defray the expenses that accrue in the performance of duties or activities in connection with the office which are nonreimbursable by the state or political subdivision;

(4) a political contribution as defined by Title 15, Election Code;

(5) a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code;

(6) an item with a value less than $50, excluding cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code; or

(7) an item issued by a governmental entity that allows the use of property or facilities owned, leased, or operated by the governmental entity.

(b) Section 36.08 (Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law.

(c) Section 36.09 (Offering Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donor is required by law to report those items, reported by the donor in accordance with that law.