Report and Recommendations of the Task Force on Integrity in State and Local Government

June 14, 2017

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Chapter 4 of the Resolves of 2016[1]

RESOLVE ESTABLISHING A TASK FORCE ON INTEGRITY IN STATE AND LOCAL GOVERNMENT

Resolved, That there shall be established, pursuant to section 2A of chapter 4 of the General Laws, a special legislative commission known as the Task Force on Integrity in State and Local Government. The task force shall be comprised of the following 13 members: the chair of the house committee on ethics or a designee; the chair of the senate committee on ethics or a designee; the chairs of the joint committee on state administration and regulatory oversight or their designees; the attorney general or her designee; a member of the house of representatives appointed by the minority leader of the house of representatives; a member of the senate appointed by the minority leader of the senate; the chief legal counsel to the governor; the chief legal counsel to the senate; the chief legal counsel to the house of representatives; and 3 members with expertise on issues relating to ethics or public integrity to be appointed as follows: 1 member to be appointed by the governor, 1 member to be appointed by the president of the senate and 1 member to be appointed by the speaker of the house of representatives. The chairs of the joint committee on state administration and regulatory oversight and chairs of the house and senate committees on ethics shall serve as co-chairs of the task force.

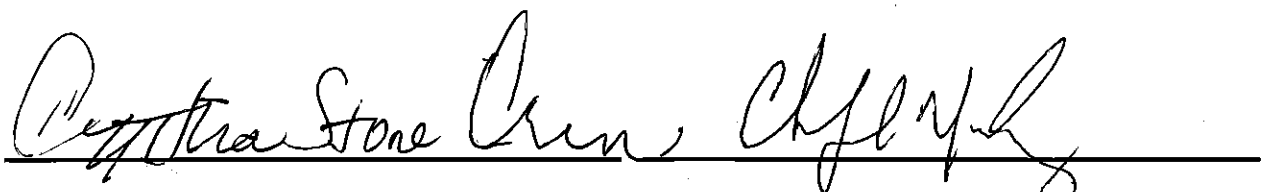
The task force shall conduct an investigation and study of the existing legal and regulatory framework governing the conduct of state, county and municipal elected officials and appointed public employees, including a review of: (i) the Conflict of Interest Law, chapter 268A of the General Laws; (ii) the Financial Disclosure Law, chapter 268B of the General Laws; and (iii) the regulations of the state ethics commission, 930 CMR 1.00 et seq., and associated processes.

The task force shall confer with representatives of the various state offices responsible for overseeing the state ethics laws, as well as with academics, practitioners and others with expertise in these areas.

The task force shall file a report with the governor, the president of the senate and the speaker of the house of representatives regarding the results of its investigation and study on or before June 1, 2017. The report shall include: (i) an assessment of the current legal and regulatory structures, education and training, and advisories and processes of the State Ethics Commission; (ii) recommendations for amendments to any current law, rule or regulation; and (iii) recommendations for legislation, if any, which shall be filed with the clerk of the house of representatives.

[1] As amended by St. 2017, c. 5 §§ 20 to 24A, inclusive.

Task Force Membership

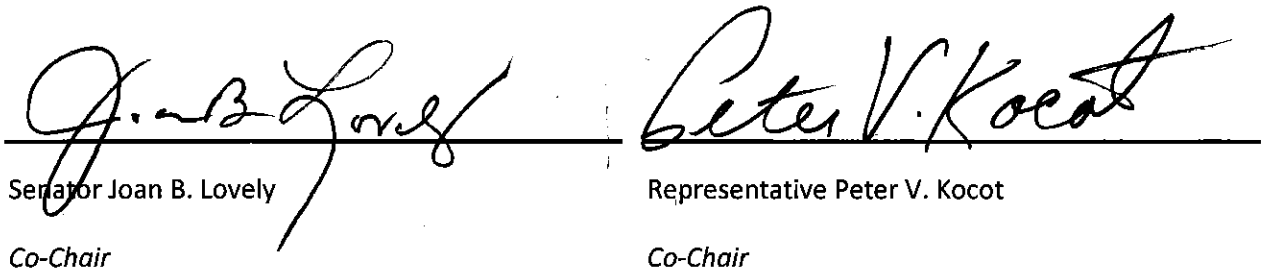


Senator Cynthia S. Creem

Co-Chair

Representative Christopher M. Markey

Co-Chair

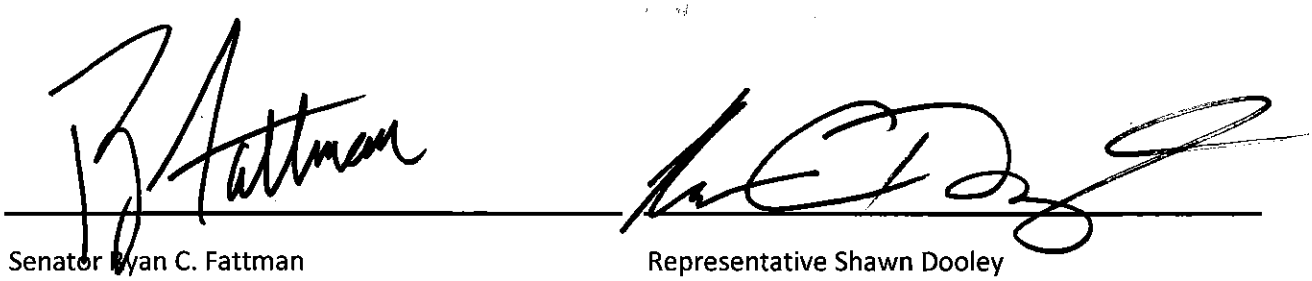


Senator Joan B. Lovely

Co-Chair

Representative Peter V. Kocot

Co-Chair

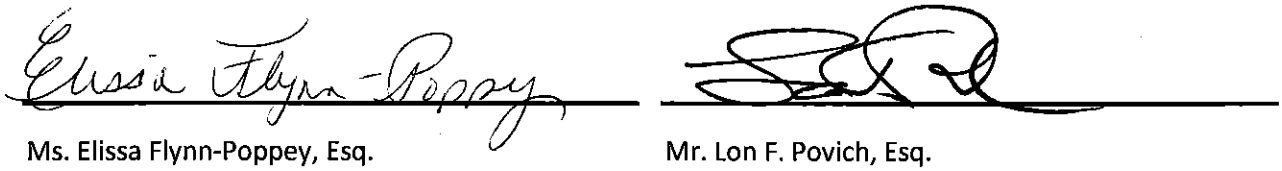


Senator Ryan C. Fattman

Senate Minority Leader's Appointee

Representative Shawn Dooley

House Minority Leader's Appointee



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Governor's Appointee

Mr. Lon F. Povich, Esq.

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Attorney General's Designee

A. Introduction & Executive Summary

The Task Force on Integrity in State and Local Government ("Task Force") was assigned to conduct an investigation and study of the existing legal and regulatory framework governing the conduct of state, county and municipal elected officials and appointed public employees, including a review of the Conflict of Interest Law (G.L. c. 268A), the Financial Disclosure Law (G.L. c. 268B) and the regulations of the State Ethics Commission.

The Task Force held seven public hearings between January 17, 2017 and May 31, 2017 and received oral and written testimony from the Executive Director and General Counsel of the State Ethics Commission; two members of the State Ethics Commission, the Honorable Barbara A. Dortch-Okara and the Honorable Regina L. Quinlan; members of the legislature; government entities; nonprofit organizations; and members of the public.[2] The Commission reported on the number of inquiries its staff receives about the application of the law, as well as its enforcement actions where violations are found. The Commission noted that, since the implementation of new education and training requirements in 2009, the number of inquiries to the Commission has increased dramatically. Commission staff observed that there are a number of circumstances in which the questions posed to it do not fit neatly into the current statutory and regulatory framework.

We explored the provisions of the ethics laws and their underlying rationales and reviewed certain exceptions to those laws that the State Ethics Commission has established through its existing regulatory power, and the motivations behind those exceptions. We also received specific recommendations for statutory and policy changes from Task Force members, and benefited from the Commission's review of and feedback on those recommendations.

We heard from the State Ethics Commission that, in its opinion, the single most important result that could come from this Task Force would be the granting of full regulatory authority to the Commission. There is consensus among the members of the Task Force that expanded regulatory authority is advisable and that such change must be accomplished by a statutory amendment. There is, however, a lack of agreement regarding the precise scope of that expanded regulatory authority and how the Commission should be authorized to implement it.

We also heard, from multiple parties, concerns and requests for clarification of certain provisions in the statutes. In addition, we extended to our own members and interested stakeholders the opportunity to submit their proposals for changes to both the Conflict of Interest Law and the Financial Disclosure Law, and asked that the State Ethics Commission create a comprehensive list of those proposals, indicating, as to each, whether the Commission believes that each suggested change could be accomplished by a regulation, if the Commission had or were granted adequate regulatory authority, or whether it could only be accomplished by a statutory amendment. The Commission submitted its response to that request on May 25, 2017.

[2] The Task Force is also scheduled to meet on June 14, 2017 to vote on our Report and Recommendations.

At its May 31, 2017 meeting, the Task Force did not discuss or vote on the merit of each proposed change. Nor did it determine whether each proposed change would best be accomplished by statutory amendment or regulation. Instead, the Task Force voted to recommend that the House and Senate Committees on Ethics and the Joint Committee on State Administration and Regulatory Oversight conduct further study of the individually proposed changes presented to the Task Force to date.

RECOMMENDATIONS

Therefore, the Task Force on Integrity in State and Local Government recommends the following:

(i) Amendment of the General Laws to expand regulatory authority for the State Ethics Commission; the extent of such expansion, in form and scope, shall be determined by the General Court and the Governor; and

(ii) Continued study by the House and Senate Committees on Ethics and by the Joint Committee on State Administration and Regulatory Oversight of the proposals presented to the Task Force to date.

B. Task Force Proceedings[3]

DATE	TOPICS DISCUSSED
January 17, 2017	• Procedural and organizational issues of the Task Force • Overview of the State Ethics Commission, the Conflict of Interest Law and the Financial Disclosure Law
February 1, 2017	• Corrupt gifts (G.L. c. 268A, § 2) • Gifts of substantial value for official acts (G.L. c. 268A, § 3) • Gifts for or because of official position (G.L. c. 268A, § 23(b)(2)(i)) • Gifts from lobbyists (G.L. c. 268B, § 6) • Related regulatory exemptions (930 CMR 5.00 et seq.)
February 15, 2017	• Public employees acting as agents in government matters and receiving private compensation (G.L. c. 268A, §§ 4, 11, 17) • Former public employers and their business partners (G.L. c. 268A, §§ 5, 12, 18) • Public employees who have financial interests in government contracts (G.L. c. 268A, §§ 7, 14, 20)
February 28, 2017	• Financial interests of public employees and their relatives or associates (G.L. c. 268A, §§ 6, 6A, 13, 19) • Standards of conduct (G.L. c. 268A, § 23)
March 21, 2017	• State Ethics Commission Memorandum dated March 20, 2017[4]
April 25, 2017	• State Ethics Commission Memorandum dated April 25, 2017[5]
May 31, 2017	• Proposed changes to the Conflict of Interest and Financial Disclosure Laws submitted by individual members of the Task Force on May 12, 2017; and the State Ethics Commission's compilation of and comment on those proposals, as requested by the Task Force[6] • Content of Task Force report to be submitted.
June 14, 2017	• Task Force review and vote on report

[3] Recordings of all Task Force hearings may be found on the General Court's website, https://malegislature.gov/Events, under the Hearing & Events tab.

[4] Hereinafter referred to as the "SEC Memo dated March 20, 2017." This memorandum was requested by the Task Force on February 28, 2017, and includes a list of proposed changes to the Conflict of Interest Law and Financial Disclosure Law and a list of proposed regulations the Commission would adopt if granted full regulatory authority.

[5] Hereinafter referred to as the "SEC Memo dated April 25, 2017." This memorandum was requested by the Task Force on March 21, 2017, and includes additional recommendations for statutory changes, an overview of areas of the Conflict of Interest Law that the Commission believes could be addressed by statutory revision and materials that were before the Commission for consideration at its meeting on January 25, 2017.

[6] The proposals include inquiries made by Senator Creem to the State Ethics Commission dated May 12, 2017; recommendations submitted to the Task Force by Representative Kocot, Representative Markey and House Counsel, James Kennedy on May 12, 2017, hereinafter referred to as "Recommendations of Rep. Kocot, Rep. Markey and House Counsel"; and recommendations submitted to the Task Force by Pam Wilmot on April 26, 2017. The recommendations submitted by Pam Wilmot were also included in the testimony of Peter Sturges, submitted to the Task Force on April 25, 2017, and are hereinafter referred to as "Recommendations of CCMA."

C. The State Ethics Commission

State Ethics Commission Established

The State Ethics Commission was established in 1978 as part of a package of amendments to the Conflict of Interest Law, which was previously a criminal statute enforced by the Attorney General and District Attorneys, and the new Financial Disclosure Law (G.L. c. 268B).[7]

Since its inception, the Commission has been the primary civil enforcement agency for violations of the Conflict of Interest Law and has been exclusively responsible for administering the Financial Disclosure Law.

Commission Structure

The Commission is a non-partisan body composed of five members: three appointees of the Governor, one appointee of the Secretary of the Commonwealth and one appointee of the Attorney General. The Commission also employs staff to aid in its mission, and currently has twenty employees.[8] Staff is generally assigned to one of three practice areas: the Legal Division, the Enforcement Division, or the Public Education and Communications Division.

The Legal Division addresses inquiries from public employees subject to the state's ethics laws and provides advice to individual employees, as well as to state, municipal and corporation counsel. In Fiscal Year 2016, the Legal Division received more than 6,000 inquiries – the highest in division history.[9] The Enforcement Division is responsible for investigating and resolving alleged violations of the state's ethics laws. The Commission estimates that it receives between 800 and 1,200 complaints each year, the majority of which allege violations at the municipal level.[10] Approximately 30% of the complaints that the Enforcement Division investigates are found to have sufficient merit to warrant further action. The Public Education and Communication Division develops and implements all statutorily required training for public employees, and generally furthers the Commission's focus on education and the principle that education about the law is the best form of enforcement.

Commission Authority

The State Ethics Commission has the authority to investigate alleged violations of the Conflict of Interest Law and the Financial Disclosure Law. While the structure of the Commission has remained unchanged since 1978, the Commission's specific duties have evolved as the result of various amendments to the Conflict of Interest Law and Financial Disclosure Law enacted from 1978 to the present. Most notably, upon statutory amendment in 2009, the Commission was given (i) responsibility for implementing

[7] See St. 1978, c. 210.
[8] Executive Director David Wilson stated at the January 17, 2017 Task Force meeting that one position was vacant at that time and the Commission was hoping to add another position.
[9] See Written Testimony of David A. Wilson dated January 17, 2017.
[10] See Written Testimony of David A. Wilson dated January 17, 2017, and oral testimony of David A. Wilson at the January 17, 2017 Task Force meeting.

expanded education and training requirements, (ii) power to issue a mandatory summons, and (iii) authority to levy higher civil penalties against those who violate the ethics laws.[11]

The Commission's enabling legislation, Chapter 210 of the Acts of 1978, also gave the Commission the power to "*prescribe and publish, pursuant to the provisions of chapter 30A, rules and regulations to carry out the purposes of [G.L. c. 268B], including rules governing the conduct of proceedings hereunder."*[12] This limited grant of regulatory authority allowed the Commission to interpret and implement the Financial Disclosure Law and to structure its proceedings. The Commission did not receive authority to issue regulations relating to the Conflict of Interest Law (G.L. c. 268A) until 2004, and such authority was limited in scope.

In 2004 the legislature directed the Commission to:

> *prescribe and publish, pursuant to chapter 30A, rules and regulations…to carry out chapter 268A; provided, however, that the rules and regulations shall be limited to providing exemptions from the provisions of sections 3 to 7, inclusive, sections 11 to 14, inclusive, sections 17 to 20, inclusive, and section 23 of said chapter 268A….*[13]

The act further stated:

> *It is the intent of this act to authorize the state ethics commission to establish reasonable exemptions from chapter 268A of the General Laws. The establishment of such exemptions shall not be the basis for inferring that any conduct, items or other matters not so exempted are prohibited, permitted, restricted or otherwise regulated by said chapter 268A.*[14]

Soon thereafter, the Commission issued regulations establishing a number of individualized exemptions related to public employees receiving gifts, including travel expenses and incidental hospitality pertaining to their official positions and legitimate public purposes, and certain government and educational benefits.

In 2009, the Commission was again tasked with adopting new regulations.[15] The 2009 act required the Commission to define "substantial value," provided that substantial value shall not be less than $50, and to establish certain specific exemptions from the Conflict of Interest Law regarding ceremonial or familial gifts or other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest.[16]

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[11] See St. 2009, c. 28, §§ 61 to 63, inclusive, 66 to 80, inclusive, 84, 88, 89, 97.
[12] See G.L. c. 268B, § 3(a), as appearing in St. 1978, c. 210, § 20.
[13] See G.L. c. 268B, § 3(a), as appearing in St. 2004, c. 399, § 1.
[14] See St. 2004, c. 399, § 2.
[15] See St. 2009, c. 28.
[16] See G.L. c. 268A, § 3(f), regarding gifts, and G.L. c. 268A, § 23(f), regarding privileges and exemptions, as most recently amended by St. 2009, c. 28.

D. The Ethics Laws

Overview of the Conflict of Interest Law (G.L. c. 268A)

The structure of the Conflict of Interest Law includes enumerated sections that generally relate to one of three classes of public employees: municipal employees, county employees or state employees. Those sections—while not identical—serve as counterparts to the others.

Many of the law's key terms are defined in the statute.[17] Others, over time, have been interpreted by the courts of the Commonwealth or the State Ethics Commission.[18] The terms, prohibitions and requirements of the law affect public employees both in their official capacities and in their private lives. The Conflict of Interest Law makes clear that public employees should:

(1) not use their official positions for their own financial benefit, or to benefit their families, businesses or other organizations with which they are closely affiliated;[19]
(2) not advocate for others before their same level of government, because of the state, county, or municipality's interests in that issue;[20]
(3) not accept gifts or gratuities given to them because of their official actions or positions;[21]
(4) not have contracts with their level of government, *i.e.*, an inside track to additional government monies by virtue of their public position;[22]
(5) not abuse the power of their public positions to benefit or punish others unfairly;[23]
(6) publicly disclose any circumstances that would cause others to believe they may be biased in their official roles;[24] and
(7) be restricted from taking certain actions after they leave public service (*e.g.*, actions directed toward their previous public employer and implicating their prior work as a public employee).[25]

Overview of the Financial Disclosure Law (G.L. c. 268B)

The Financial Disclosure Law requires candidates for public office (*i.e.*, an office chosen at the state election), public officials, and state and county employees holding "major policymaking positions" to file annual statements of financial interest (SFIs) with the State Ethics Commission.[26] The Commission noted that the Financial Disclosure Law tries to strike a balance between public employees' and officials' privacy interests and transparency in government. SFIs allow the public to scrutinize the finances of certain public officials to learn whether other parties or interests may potentially hold sway over an

[17] G.L. c. 268A, § 1.
[18] See, e.g., Graham v. McGrail, 370 Mass. 133 (1976); EC-COI-12-1; EC-COI-07-2.
[19] See G.L. c. 268A, §§ 6, 13, 19.
[20] See G.L. c. 268A, §§ 4, 11, 17.
[21] See G.L. c. 268A, §§ 2, 3, 23(b)(2)(i); G.L. c. 268B, § 6.
[22] See G.L. c. 268A, §§ 7, 14, 20.
[23] See G.L. c. 268A, § 23(b)(2)(ii).
[24] See G.L. c. 268A, § 23(b)(3).
[25] See G.L. c. 268A, §§ 5, 12, 18.
[26] See G.L. c. 268B, § 5.

individual who has been elected or appointed to serve the public or may otherwise be in a position to exert authority.

Certain positions are defined by statute as major policy-making positions, including judges and agency or department heads. Other positions may be designated as major-policy making by the head of their respective agency, board, etc. Approximately 4,000 individuals filed SFIs in 2016.[27]

Individuals required to file an SFI must disclose a wide array of information regarding their income and assets, including outside business interests, property ownership, gifts received and debts owed. SFIs are filed annually in May, reflecting the filers' interests over the course and at the close of the previous calendar year. Once filed, the statements are available to the public for inspection.

Overview of the State Ethics Commission's Regulations (930 CMR 1.00, et seq)

The Commission's regulations can be broadly categorized into four areas:[28]

(1) Practice and procedure;[29]
(2) Statements of financial interest;[30]
(3) Exemptions related to gifts;[31]
(4) Exemptions unrelated to gifts.[32]

As discussed above, the Commission has had regulatory authority to interpret and implement the Financial Disclosure Law and to structure its proceedings since its inception in 1978. As the scope of regulatory authority expanded over time to include, in limited fashion, the Conflict of Interest Law, the Commission added regulations accordingly. In 2010, the Commission promulgated new regulations differentiating between "exemptions related to gifts" and "exemptions unrelated to gifts." The exemption categories have been augmented and clarified since 2010, but remain in essentially the same format.

The Commission's exemptions that are not related to gifts predominantly address the following topics: (1) financial interests in government contracts; (2) public employees acting as agents or attorneys for others in matters in which their level of government (*i.e.,* state, county or municipal) has a direct and substantial interest; and (3) financial interests in particular matters in which a public employee is involved *as* a public employee.

[27] See Written Testimony of David A. Wilson dated January 17, 2017.
[28] There are two regulations that do not fit into these categories: 930 CMR 3.02 (disclosures containing confidential information); and 930 CMR 7.00 (defining governmental body for purposes of G.L. c. 268A, § 5(e)).
[29] See 930 CMR 1.00 to 1.03, inclusive; 930 CMR 3.01.
[30] See 930 CMR 2.00 to 2.06, inclusive; 930 CMR 4.00 and 4.01.
[31] See 930 CMR 5.00 to 5.12, inclusive.
[32] See 930 CMR 6.00 to 6.27, inclusive.

E. Recommendations

1: Expanded Regulatory Authority

The State Ethics Commission testified to the Task Force that "[i]n the Commission's view, the most important single improvement that this Task Force could recommend to promote public understanding of the law would be to give the Commission full regulatory authority; that is, the authority to issue regulations interpreting the conflict of interest law."[33] There is consensus among the members of the Task Force that some form of expanded regulatory authority is advisable, and that such change must be accomplished by statutory amendment. There is, however, no agreement regarding the precise scope of that expanded regulatory authority and how the Commission should be authorized to implement it. As a result, we recommend that the General Court and the Governor determine the form and scope of expanded regulatory authority that would be best suited to strengthen, update and clarify the Conflict of Interest Law to protect the interests and the people of the Commonwealth, while allowing the Commission appropriate flexibility to carry out its statutory mandate.

2A: Further Study of the Proposals for Statutory Changes Received by the Task Force

The Task Force received testimony and proposals from a number of stakeholders, including, but not limited to, the Commissioners and staff of the State Ethics Commission, individual Task Force members, legislators and public employees, and members of the public. While the Task Force is appreciative of these individuals' submissions, the Task Force has not debated the merit of or voted on any of the individual proposals it received, other than the Commission's request for expanded regulatory authority discussed above. It also did not determine whether these proposals should be implemented by statutory amendment or regulation.

Therefore, the Task Force recommends the continued study of these submissions by the House and Senate Committees on Ethics and by the Joint Committee on State Administration and Regulatory Oversight.

The submissions summarized below, and contained fully in the appendix to this report, represent only the positions of their respective authors. The Task Force takes no position on the content of any submission. We summarize them as a practical inventory only. Submissions are listed in conjunction with the chapter and section of law to which they refer.

[33] See Written Testimony of David A. Wilson dated January 17, 2017, p. 5.

G.L. c. 268A	
§1	• Amend the definition of "municipal employee" to delete "elected" before "members of town meeting."[34] • Amend the definition of "county employee" to exclude members of a charter commission.[35] • Add a definition of "regional municipal agency."[36] • Amend definition of "special municipal employee."[37] • Amend definitions of "special county employee" and "special municipal employee."[38] • Add definitions for the following terms used in Chapter 268A:[39] ○ "Acting as agent" ○ "Adjudicatory" ○ "Business organization" ○ "Constituent" ○ "Financial interest" ○ "General legislation" ○ "General policy" ○ "In relation to a particular matter" ○ "Inherently incompatible" ○ "Ministerial" ○ "Partner" ○ "Public notice" ○ "Official authority" ○ "Official dealings" ○ "Otherwise than as provided by law" ○ "Party" ○ "Person" ○ "Public office" ○ "Public Official" ○ "Quasi-judicial" ○ "Regional municipal agency" ○ "Substantial value" ○ "Similarly situated individuals" ○ "Substantial segment" ○ "Unwarranted exemption" ○ "Unwarranted privilege"

[34] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[35] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[36] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[37] See SEC Memo dated April 25, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[38] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[39] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.

§4[40]	• Amend statute to allow appointed state employees to appear for others before a state agency other than the one in which they serve, for only ministerial matters, and without compensation.[41] • Allow appointed state employees to appear for others before a state agency other than the one in which they serve, without compensation, with certain approvals and disclosures.[42] • Clarify when members of the General Court may appear before state agencies for outside compensation; by, for example, establishing uniform parameters for "quasi-judicial" proceedings, and eliminating a loophole that could allow someone to appear for a paying client so long as they do not receive compensation for a particular appearance.[43] • Clarify the scope of the exemption that allows state employees to also serve in municipal roles.[44]
§6[45]	Amend to allow elected state officials to participate in certain matters in which they or a member of their immediate family, but not any outside business interests, may have a financial interest; with disclosure.[46]
§6A	Amend to reflect current interpretation of section and add definitions.[47]
§6B	Amend section to apply only to "immediate family."[48]
§7	• Revise to more clearly identify prohibited conduct."[49] • Amend to delete an out-of-date reference to the "general salary schedule" contained in G.L. 30, § 46.[50] • Amend to delete out-of-date reference to "mentally retarded persons."[51]
§8B	Amend to update reference by striking "telecommunications and cable" and replacing it with "the department of public utilities."[52]
§17	Revise to address issues specific to employees of regional municipal entities.[53]
§20	Revise to address issues specific to employees of regional municipal entities.[54]
§21	Amend to allow private right of action regarding violations on the municipal level.[55]

[40] Changes proposed to § 4 in Recommendations of Rep. Kocot, Rep. Markey and House Counsel may also apply to § 11 (for county employees) and § 17 (for municipal employees).
[41] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[42] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[43] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[44] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[45] Changes to § 6 in Recommendations of Rep. Kocot, Rep. Markey and House Counsel may also apply to § 13 (for county employees) and § 19 (for municipal employees).
[46] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[47] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[48] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[49] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[50] See SEC Memo dated April 25, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[51] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[52] See SEC Memo dated March 20, 2017.
[53] See SEC Memo dated April 25, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[54] See SEC Memo dated April 25, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[55] See Recommendations of CCMA; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.

§23	• Amend subsection (b)(2) to clarify the scope.[56] • Amend subsection (b)(3).[57] • Amend regarding appearance of conflict and private circumstances.[58]
§27	Amend to require distribution of summaries of the law every two years.[59]
§28	Amend to require online training in years in which summary is not required to be distributed.[60]
§30	Add new section to require the Commission to develop an electronic reporting system for public disclosures.[61]

G.L. c. 268B	
§1	• Amend the definition of "amount."[62] • Amend the definition of "major policymaking position" to delete reference to out of date statute.[63] • Amend the definition of "business."[64] • Amend the definition of "gift."[65]
§3	• Amend to provide the Commission with full regulatory authority over the Conflict of Interest Law. • Amend subsection (d).[66] • Amend subsection (f).[67] • Amend subsection (j).[68]
§4	Amend subsection (a).[69]
§5	• Amend to: (i) require electronic filing; (2) eliminate confusing references to "third degree of consanguinity"; and (3) require reporting of out of state real estate.[70] • Amend to require electronic filing and to require the Commission to create an electronic system for filing such statements.[71]

[56] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[57] See SEC Memo dated March 20, 2017; Recommendations of CCMA; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[58] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[59] See SEC Memo dated March 20, 2017.
[60] See SEC Memo dated March 20, 2017.
[61] See Recommendations of CCMA.
[62] See SEC Memo dated March 20, 2017; Recommendations of CCMA; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[63] See SEC Memo dated March 20, 2017; Recommendations of CCMA; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[64] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[65] See Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[66] See Recommendations of CCMA.
[67] See SEC Memo March 20, 2017.
[68] See SEC Memo dated March 20, 2017.
[69] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.
[70] See SEC Memo dated March 20, 2017.
[71] See Recommendations of CCMA.

G.L. c. 23K	
§68	• Add the following paragraph: A municipal employee serving as a member of an advisory committee or subcommittee created by this section shall not violate section four of chapter two hundred sixty-eight A by expressing the views of his employing municipality or regional planning agency during committee or subcommittee meetings or by receiving his usual compensation as a municipal employee or by performing the usual duties of his municipal employment, including acting as agent or attorney for the municipality or regional planning agency, in relation to particular matters in which he participated or which are, or in the prior year have been, a subject of his official responsibility as a member of the advisory committee or subcommittee or which are pending before the advisory committee or subcommittee.[72]

2B: Further Study of the Proposals for Policy Changes Received by the Task Force

Over the course of its proceedings, the Task Force received a number of submissions that were not accompanied by any draft statutory language. We are characterizing those recommendations as "proposals for policy changes" simply for ease of reference.

Therefore, consistent with the recommendation made above in Section E.2A, the Task Force recommends the continued study of these submissions by the House and Senate Committees on Ethics and by the Joint Committee on State Administration and Regulatory Oversight.

The submissions summarized below, and contained fully in the appendix to this report,[73] represent only the positions of their respective authors. The Task Force takes no position on the content of any submission. We summarize them as a practical inventory only. If a submission appears to implicate a particular statute, it is cited for organizational purposes only.

G.L. Implicated	Policy Proposal
G.L. c. 268B, § 3	• Provide a regulatory definition for currently undefined statutory terms in the Conflict of Interest Law.[74]
G.L. c. 268A, § 1	• Simplify and explain existing statutory definitions of some terms in Conflict of Interest Law.[75]
G.L. c. 268A, §§ 4, 11, 17	• Provide a "plain English" explanation of the prohibition against acting as an agent or attorney.[76]
G.L. c. 268A, §§ 4	• Amend G.L. c. 268A, § 4 to clarify the legislators' exemption and ensure it allows legislators who are also attorneys to practice before the Massachusetts Commission Against Discrimination.[77]

[72] See Testimony of the Massachusetts Gaming Commission submitted January 17, 2017.
[73] The oral testimony of Representative Kenneth Gordon presented at the February 15, 2017 Task Force meeting was not accompanied by written testimony.
[74] See SEC Memo dated March 20, 2017.
[75] See SEC Memo dated March 20, 2017.
[76] See SEC Memo dated March 20, 2017; Recommendations of Rep. Kocot, Rep. Markey and House Counsel.

G.L. c. 268A, §§ 7, 14, 20	• Provide a "plain English" explanation of the prohibition against having a financial interest in a public contract.[78]
G.L. c. 268A, § 23(b)(2)	• Provide a "plain English" explanation of situations in which public officials may not use their official positions because it is inherently coercive or abusive.[79]
G.L. c. 268A, §§ 3, 23(b)(2)	• Prohibit organizations that retain lobbyists from paying for legislators' travel.[80]

F. Conclusion

Upon filing with the Governor, the President of the Senate and the Speaker of the House of Representatives, this Report and Recommendations shall be forwarded to the House and Senate Committees on Ethics and the Joint Committee on State Administration and Regulatory Oversight, for their consideration, consistent with the recommendations made above.

[77] See oral testimony of Rep. Gordon at the February 15, 2017 Task Force Meeting; Written testimony of Rep. Livingstone dated February 28, 2017.
[78] See SEC Memo dated March 20, 2017.
[79] See SEC Memo dated March 20, 2017.
[80] See Written Testimony of Massachusetts Peace Action dated February 1, 2017.

Appendix

A. Written Testimony of David A. Wilson dated January 17, 2017

B. Recommendations of the Massachusetts Gaming Commission dated January 17, 2017

C. Written Testimony of David A. Wilson dated February 1, 2017

D. Written Testimony of Eva Moseley, Massachusetts Peace Action, dated February 1, 2017

E. Email from Susan McLucas dated February 1, 2017

F. Written Testimony of David A. Wilson dated February 15, 2017

G. Letter from Representative Jay D. Livingstone dated February 23, 2017

H. Written Testimony of David A. Wilson dated February 28, 2017

I. Memorandum of the State Ethics Commission dated March 20, 2017

J. Memorandum of the State Ethics Commission dated April 25, 2017

K. Written Testimony of Peter Sturges, Common Cause Massachusetts, including recommendations of Common Cause Massachusetts dated April 25, 2017; also submitted by Pam Wilmot

L. Inquiries from Senator Cynthia S. Creem to the State Ethics Commission dated May 12, 2017

M. Recommendations to the Task Force submitted by Representative Christopher M. Markey, Representative Peter V. Kocot and House Counsel, James C. Kennedy, dated May 12, 2017

N. Memorandum of the State Ethics Commission dated May 25, 2017

Ms. Stephanie Lovell, Esq.

Senate President's Appointee

Ms. Jennifer Grace Miller, Esq.

Senate Counsel

Ms. Pamela Wilmot, Esq.

Speaker's Appointee

Mr. James C. Kennedy, Esq.

Chief Legal Counsel to the House of Representatives

Ms. Mariya Treisman, Esq.

Attorney General's Designee

APPENDIX A

Testimony for Task Force on Integrity in State and Local Government

David A. Wilson, Acting Executive Director

Initial Task Force Meeting January 17, 2017

On behalf of the members of the State Ethics Commission, thank you for the opportunity to participate in this first meeting of the Task Force on Integrity in State and Local Government. The Commission is honored to assist in the important work to be done by this Task Force. I would like to take this opportunity to first give you an overview of the Commission's work, and then to describe our plan to provide you with the Commission's ideas concerning possible improvements to the laws.

Overview of Commission's Work

The Commission was created in 1978 as an independent state agency responsible for administering the conflict of interest and financial disclosure laws, G.L. c. 268A and 268B, and for investigating alleged violations of, and serving as the primary civil enforcement agency for, those laws. The Commission consists of five members, each of whom may serve one five-year term. The Governor appoints our Chair and two of our Commissioners, and the other two are appointed by the Secretary of State and the Attorney General. The Commission is non-partisan – no more than three members overall and no more than two of the governor's appointees may be of the same political party. Currently, our Chair is Judge Barbara Dortch-Okara, formerly the Chief Justice for Administration and Management of the Trial Court. Our other Commissioners are Judge Regina L. Quinlan, formerly of the Superior Court; Judge David A. Mills, formerly of the Appeals Court; Thomas J. Sartory of the law firm of Goulston & Storrs, P.C.; and Maria J. Krokidas of the law firm Krokidas & Bluestein. The Commission meets once per month in a

public meeting; the next meeting will be this Thursday, January 19, 2017. As Acting Executive Director I am responsible to the Commissioners for administration of the agency, and am one of 20 current Commission employees.

The Commission has three divisions: Legal, Enforcement, and Public Education and Communications. Most Commission employees are assigned to one of the three divisions.

The Legal Division is staffed with six attorneys (several of whom have additional duties outside the Division at the moment), one staff member who is the Statements of Financial Interests administrator, and one administrative assistant. The Division is led by the Commission's General Counsel Deirdre Roney. The Legal Division responds to requests for advice concerning the conflict of interest and financial disclosure laws. Anyone with a question about how to comply with these laws can obtain free, confidential advice from the Legal Division. During Fiscal Year 2016, the Division responded to 6,257 requests for advice, the highest number in the Division's history. The number of requests for advice has increased substantially since passage of the 2009 Ethics Reform Act; for comparison, in FY 2008, prior to that act, the Division received 4,101 requests for advice. The Act included requirements for training and education concerning the conflict of interest law that have significantly increased public awareness of the conflict of interest law, and of the availability of free advice from us. The Legal Division's time standards require that telephone calls requesting advice be returned the same day, email requests be answered within a few days, and requests for written opinions be answered within 30 days, and we work hard to meet those goals.

The Legal Division also administers the financial disclosure law, which requires state and county elected officials and candidates, and persons who hold major policymaking positions at

the state and county level, to file annual Statements of Financial Interests ("SFIs") with the Commission. Approximately 4,000 SFIs were filed with the Commission during the most recent filing season in May (like tax returns, SFIs are filed in spring for the previous calendar year). We are currently in the final stages of a project to replace our former electronic filing application with a new, improved electronic filing application, using capital bond funding. The new system was used by the majority of filers to file during the filing season this past May, and is significantly easier to use than the old system. The new system, when complete, will also allow members of the press and the public to request SFIs electronically using the system, and will automatically redact information required to be redacted before we can produce SFIs. This aspect of the new system is expected to greatly reduce the amount of staff time needed to comply with public records requests, and enable us to respond to such requests faster.

The Commission's Enforcement Division is currently staffed with three attorneys (one of whom will start work next week), five investigators (one position is currently vacant), and an administrative assistant. The Enforcement is led by its new chief, Monica Brookman. The Enforcement Division investigates alleged violations of the conflict of interest and financial disclosure laws; it receives between 800 and 1,200 complaints annually alleging such violations. Complaints alleging matters within the Commission's jurisdiction are investigated informally by the Division's investigators; those found to have merit, approximately 30% of those received, are referred to a Division attorney for further action. Enforcement Division attorneys may resolve matters by sending a private education letter to the subject of the complaint if the violation is minor in nature, the subject genuinely misunderstood the law, and pursuing the matter would be an inefficient use of Commission resources.

If the Enforcement Division determines that a violation is of a more serious nature, it will

seek authorization from the Commission to conduct a formal investigation in which Division attorneys may issue summonses for documents and testimony under oath. After the investigation is complete, if the Commission finds reasonable cause to believe that a violation of the law occurred, the subject has a right to an adjudicatory proceeding. Commission adjudicatory hearings are held before a single Commissioner, who acts as the hearing officer. In these hearings, both the subject and the Enforcement Division present evidence to the Commission. The full Commission receives the transcript of the hearing and determines whether a violation has occurred. If the Commission rules the subject violated the law, it may impose a civil penalty up to $10,000 per violation, or up to $25,000 per violation for bribery. The Division prosecutes around 3 to 8 cases per year that go to adjudicatory hearings. The Division may also resolve matters that reach the formal investigation stage by settlement, through a disposition agreement, or by a Public Education Letter. Public Education Letters are typically issued when the circumstances are novel or believed to be fairly widespread. In these cases, the subject does not admit to the wrongdoing or pay a civil penalty, but must consent to the publication of the letter.

The Public Education and Communications Division is currently staffed by two employees (one of whom is the Commission's fulltime IT person). The Division's Chief, David Giannotti, conducts educational seminars for state and county agencies and municipalities. (We are currently working on adding an additional employee to the Pub. Ed. Division.) During FY 2016 69 seminars were conducted. The Division handles over 500 press calls and calls from the public each year seeking information about the Commission and the conflict of interest law. The Division manages the statewide conflict of interest law education requirements and handles an average of 1,700 phone calls and emails from public employees concerning these requirements. The Division collects the summary acknowledgments and online training program

completion certificates for over 340 elected state and county officials.

Possible Improvements to the Law

The Commission welcomes the creation of this Task Force to examine the conflict of interest and financial disclosure laws and to determine whether they need to be updated, strengthened or clarified to ensure that their prohibitions and restrictions are clear to the tens of thousands of state, municipal and county employees who are subject to those laws. Educating public employees about how the conflict of interest and financial disclosure laws apply to them has been a critical part of the Commission's mission since the agency's creation, and we welcome the opportunity to suggest improvements that will assist us in carrying out that mission.

Much of the Commission's work is required by statute to be confidential. Requests for advice are required to be kept confidential, understandably, since public employees are more likely to seek advice about how to comply with the law if they know that their inquiry will remain confidential. Enforcement investigations are also required to be kept confidential unless and until an adjudicatory proceeding is commenced, and this again makes sense, given the potential impact that allegations of violation of the law can have upon a public employee. However, the result of these requirements of confidentiality is that much of the Commission's advice, and the educational letters it sends, are not accessible to the public.

In the Commission's view, the most important single improvement that this Task Force could recommend to promote public understanding of the law would be to give the Commission full regulatory authority: that is, the authority to issue regulations interpreting the conflict of interest law. At present, the Commission's regulatory authority is limited to creating exemptions from the conflict of interest law. Full regulatory authority would enable the Commission to

engage in a public rule-making process to codify existing precedent. Not only would the public be able to participate in that process, the end result would be a set of regulations that would be far more accessible to the public than the current body of Commission precedent – much of which is subject to confidentiality requirements, as noted above. The 2009 ethics reform act directed the Commission to create exemptions in the area of gifts, and the Commission responded with the regulations set forth in 930 CMR 5.00, which explain the governing principles in the area of gifts to public employees, and create a variety of exemptions from those requirements. Full regulatory authority would enable the Commission to propose rules codifying its numerous confidential precedents through a public process, during which the Commission would solicit broad public comment, and incorporate those comments in the final product. The end result would be a significant improvement in the accessibility of the law in this area.

Commission staff have been working to prepare a list of possible improvements to the conflict of interest and financial disclosures laws in addition to full regulatory authority. Some potential amendments have been discussed and adopted by the Commission's Legal Committee, and are anticipated to be presented to the full Commission for discussion at its January meeting later this week. Once approved by the full Commission, and assuming that the Commission authorizes me to do so, I will be happy to share those suggestions with this Task Force, and to provide any additional analysis or explanation that the Task Force would find helpful. In addition, we will be happy to work with the Task Force in discussing the current laws and the purposes they serve, and providing assistance with research and drafting.

APPENDIX B

January 17, 2017

Task Force On Integrity In State and Local Government
Attn: Justin Downey, Staff Director, House Committee on Ethics
Room 527A, State House
Boston, Massachusetts 02133

Re: Recommended Language Regarding Gaming Policy Advisory Committee Appointees

Dear Task Force Members:

On behalf of the Massachusetts Gaming Commission ("MGC"), we respectfully request that the Task Force consider recommending legislation to clarify the responsibilities of municipal and regional planning agency employees that may be appointed to various gaming advisory committees pursuant to M.G.L. c. 23K, §68.

M.G.L. c. 23K, §68 creates a comprehensive advisory committee structure to help the MGC receive advice on gaming policy matters and specifies important roles for host and surrounding communities and regional planning agencies. We believe that the intent of including these and other representatives was to ensure that the committees would benefit from the advice of those with firsthand experience on the potential effects of gaming policies.

The attached letter by the State Ethics Commission proposes language that is tailored to provide an exemption to relevant provisions of the Conflict of Interest Law to enable the municipal employees and regional planning agency employees to provide extremely valuable advice to the MGC. The proposed legislation resulted from a cooperative effort between the MGC and the State Ethics Commission over the past year to understand difficulties such representatives may have under the Conflict of Interest Law in serving both the state and locally/regionally. The legislation would allow such employees to continue to perform gaming related responsibilities at the local and regional level while also serving as "special state employees" through their service on gaming advisory committees. We anticipate that the attached proposed language by the State Ethics Commission would enable the MGC to fulfill its responsibility to get the best advice it can on gaming related matters. This legislation filed by Senator Jennifer L. Flanagan was adopted in the Senate during its deliberations of the FY 2018 General Appropriations Act and has been filed by the MGC for consideration during the 2017-2018 legislative session.

We thank the State Ethics Commission for their assistance on this matter and look forward to working together on future matters that likely will require our cooperative efforts. Please do not hesitate to contact me with any questions or if you would like further background information on this matter. We thank the Task Force, in advance, for its consideration of this request.

Sincerely,

Catherine Blue

Catherine Blue, General Counsel

Enclosure

cc: Senator Jennifer E. Flanagan
Massachusetts Gaming Commissioners
Edward R. Bedrosian, Jr., Executive Director
John S. Ziemba, Ombudsman

M.G.L. Chapter 23K, Section 68

Section 68. (a) There shall be a gaming policy advisory committee to consist of the governor or the governor's designee, who shall serve as chair, the commission chair, 2 members of the senate of whom 1 shall be appointed by minority leader, 2 members of the house of representatives of whom 1 shall be appointed by the minority leader, the commissioner of public health or the commissioner's designee and 8 persons to be appointed by the governor, of whom 3 shall be representatives of gaming licensees, 1 shall be a representative of a federally recognized Indian tribe in the commonwealth, 1 shall be a representative of organized labor and 3 shall be appointed from the vicinity of each gaming establishment, as defined by the host community and surrounding communities, upon determination of the licensee and site location by the commission. The committee shall designate subcommittees to examine community mitigation, compulsive gambling and gaming impacts on cultural facilities and tourism. Members of the committee shall serve for 2-year terms. The committee shall meet at least once annually for the purpose of discussing matters of gaming policy. The recommendations of the committee concerning gaming policy made under this section shall be advisory and shall not be binding on the commission.

(b) There shall be a subcommittee on community mitigation under the gaming policy advisory committee consisting of 12 members, 1 of whom shall be appointed from the host community in region A, 1 of whom shall be appointed from the host community in region B; 1 of whom shall be appointed from the host community in region C, 1 of whom shall be a representative from the department of revenue's division of local services, 1 of whom shall be a representative of the commission, 3 of whom shall be appointed by the governor, of whom 1 shall have professional experience in community mitigation related to gaming, 1 shall be a small business owner in a host community and 1 shall be a representative from a chamber of commerce serving a host community who shall be chosen from a list of 3 candidates selected by the chambers of commerce in the surrounding communities, 1 of whom shall represent the local community mitigation advisory committee in region A, 1 of whom shall represent the local mitigation advisory committee in region B, 1 of whom shall represent the local mitigation advisory committee in region C and 1 of whom shall be a representative from the Massachusetts Municipal Association. The subcommittee shall develop recommendations to be considered by the commission to address issues of community mitigation as a result of the development of gaming establishments in the commonwealth including, but not limited to, how funds may be expended from the Community Mitigation Fund, the impact of gaming establishments on the host community and surrounding communities including, but not limited to, the impact on local resources as a result of new housing construction and potential necessary changes to affordable housing laws, increased education costs and curriculum changes due to population changes in the region, development and maintenance of infrastructure related to increased population and utilization in the region and public safety impacts resulting from the facility and ways to address that impact. The subcommittee shall receive input from local community mitigation advisory committees. The subcommittee shall review annually the expenditure of funds from the Community Mitigation Fund and make recommendations to the commission relative to appropriate and necessary use of community mitigation funds. The commission may promulgate such

regulations as advised by the subcommittee; provided, however, that the commission shall submit proposed final regulations to the subcommittee for comment 30 days before promulgation.

(c) There shall be a subcommittee on addiction services under the gaming policy advisory committee consisting of 5 members, 1 of whom shall be a representative from the department of public health's bureau of substance abuse services; 1 of whom shall be a representative from the Massachusetts Council on Compulsive Gambling, Inc., 1 of whom shall be a representative of the commission and 2 of whom shall be appointed by the governor with professional experience in the area of gambling addictions. The subcommittee shall develop recommendations for regulations to be considered by the commission in addressing issues related to addiction services as a result of the development of gaming establishments in the commonwealth including, by not limited to, prevention and intervention strategies.

(d) There shall be a subcommittee on public safety under the gaming policy advisory committee consisting of 7 members, 1 of whom shall be a member of the commission, 1 of whom shall be the secretary of public safety or the secretary's designee, 1 of whom shall be the attorney general or the attorney general's designee, 1 of whom shall be a representative from the Massachusetts District Attorneys Association, 1 of whom shall be the colonel of state police or the colonel's designee, 1 of whom shall be a representative from the Massachusetts Chiefs of Police Association and 1 of whom shall be a representative of a public safety labor union. The subcommittee shall develop recommendations for regulations to be considered by the commission to address public safety issues as a result of the development of gaming establishments in the commonwealth including, but not limited to, ways to mitigate the impact of gaming establishments on crimes committed in the commonwealth. The subcommittee shall also study the impact of gaming establishments on all aspects of public safety in the commonwealth.

(e) Each region, as defined in section 19, may establish a local community mitigation advisory committee, which shall include not fewer than 6 members, 1 of whom shall be appointed by each of the host and surrounding communities, 1 of whom shall be appointed by each regional planning agency to which at least 1 of the host or surrounding communities belongs and 4 of whom shall be appointed by the commission, of whom at least 1 shall represent a chamber of commerce in the region, 1 shall represent a regional economic development organization in the region and 2 shall represent human service providers in the region. Each local committee shall annually elect a chair and such other officers as it deems necessary to carry out its duties. Each local committee shall annually elect 1 committee member from those members appointed by surrounding communities to represent the local committee in the subcommittee on community mitigation under subsection (b).

Each local community mitigation advisory committee may provide information and develop recommendations for the subcommittee on community mitigation on any issues related to the gaming establishment located in its region including, but not limited to: (i) issues of community mitigation; (ii) ways in which funds may be expended from the Community Mitigation Fund; and (iii) the impact of the gaming establishments on the host and surrounding communities. Additionally, each local community mitigation advisory committee may present information to the commission consistent with the rules of the commission on any issues related to the gaming establishment located in its region.

Commonwealth of Massachusetts
STATE ETHICS COMMISSION
One Ashburton Place - Room 619
Boston, Massachusetts 02108

Hon. Barbara A. Dortch-Okara (ret.)
Chair

Karen L. Nober
Executive Director

May 2, 2016

Stephen P. Crosby, Chairman
Massachusetts Gaming Commission
101 Federal Street, 12th floor
Boston, MA 02110

Dear Chairman Crosby:

I am writing to follow up on the meeting between our offices on March 16, 2016, in which we discussed the restrictions of the conflict of interest law on certain types of appointees to the various advisory committees created by G.L. c. 23K, § 68, and your concerns as to whether those restrictions would, as a practical matter, create impediments to the full participation of those appointees as committee members.

Specifically, you raised concerns regarding the application of the conflict of interest law to municipal employees who may be appointed to serve on the Gaming Policy Advisory Committee (GPAC) or its subcommittees, including, in particular, the Local Community Mitigation Advisory Committees (LCMAC), the Subcommittee on Community Mitigation or the Subcommittee on Public Safety.

As you know, the State Ethics Commission considers the various advisory committees created pursuant to G.L. c. 23K, § 68 to be "state agencies" and their members "state employees" for purposes of the conflict of interest law. Any municipal employees or gaming licensee representatives appointed to serve on these committees would not be compensated for such service, and, therefore, would be "special state employees" as a result of their committee membership, i.e., the conflict law would apply less restrictively to them than it would to "state employees" in certain respects.

It is our understanding that with respect to municipal employees serving as committee members, your main concern is that such municipal employees would be at risk of violating Section 4 of the conflict law if their municipal employee duties included participating in gaming-related matters. Section 4 prohibits a special state employee from receiving compensation from, or acting as agent or attorney for, someone other than the state (including a municipality), in connection with a particular matter, if he participated as a special state employee in the matter or if he has, or in the past year has had, official responsibility for the matter as a special state

employee. You note that any municipal employee who potentially would be appointed to a gaming advisory committee most likely would have gaming-related duties in their municipal roles due to the fact that municipalities have a very limited number of employees with this expertise, and those individuals would be the obvious choice of the municipalities to serve on the gaming advisory committees. Although the gaming statute does not explicitly require the appointment of municipal employees to any of these committees, you expressed your belief that the Legislature intended or expected that municipal employees would be appointed to serve on these committees because those individuals are uniquely qualified to advise the Gaming Commission on the potential effects of gaming policies on the municipalities that employ them and would provide the most valuable input.

With that in mind, we discussed whether a legislative solution would be appropriate to address this issue. Assuming the Legislature agrees that it was (or is) their intent that municipal employees be able to serve and fully participate as members of the various gaming advisory committees, the Ethics Commission would not oppose legislation that would allow municipal employees to be paid by their municipalities for work relating to gaming and gaming mitigation matters while those employees also served as members of any of the gaming advisory committees. To the extent that this is consistent with the legislative intent, we think this is a viable solution because even though the municipal employees would be able to work on gaming issues in their municipal positions and represent the interests of entities other than the state, they would still be representing public interests, i.e., the interests of their municipalities.

As we discussed, we think the best way to accomplish the above would be to amend the Gaming Commission's enabling act by adding the following language to section 68 of G.L. c. 23K:

> A municipal employee serving as a member of an advisory committee or subcommittee created by this section shall not violate section four of chapter two hundred sixty-eight A by expressing the views of his employing municipality or regional planning agency during committee or subcommittee meetings or by receiving his usual compensation as a municipal employee or by performing the usual duties of his municipal employment, including acting as agent or attorney for the municipality or regional planning agency, in relation to particular matters in which he participated or which are, or in the prior year have been, a subject of his official responsibility as a member of the advisory committee or subcommittee or which are pending before the advisory committee or subcommittee.

Thank you for bringing these issues to our attention. If we can provide additional assistance, or if you would like to discuss this further, please let me know.

Sincerely,

Karen L. Nober

Karen L. Nober
Executive Director

2017 Community Mitigation Fund Frequently Asked Questions

Question: Can communities submit a joint application for a transportation planning grant?

Response: There is no provision in the 2017 Community Mitigation Fund Guidelines ("Guidelines") for joint applications by municipalities for transportation planning grants. However, each community should feel free to include in its narrative how its application could work with one or more applications from a neighboring community. The Commission has encouraged communities to work regionally. Indeed, we required Regional Planning Agency notification of planning proposals to encourage communities to work together.

The Guidelines state:

"[T]he Commission will make available funding for certain transportation planning activities for all communities eligible to receive funding from the Community Mitigation Fund in Regions A & B and for the Category 2 facility, including each Category 1 and Category 2 host community and each designated surrounding community, each community which entered into a nearby community agreement with a licensee, and any community that petitioned to be a surrounding community to a gaming licensee, each community that is geographically adjacent to a host community." *Underlining added.*

"No application for a transportation planning grant shall exceed $150,000...."

"[T]he Commission will evaluate requests for planning funds (including both the use of Reserve Planning Funds and Transportation Planning Grant Funds) after taking into consideration input the applicant has received from the local Regional Planning Agency ("RPA") or any such interested parties. Although there is no prerequisite for using RPA's for planning projects, consultation with RPA's is required to enable the Commission to better understand how planning funds are being used efficiently across the region of the facility. Please provide details about the applicant's consultation with the RPA or any such interested parties...."

"...Factors used by the commission to evaluate transportation planning grant applications may include but not be limited to:

...

Any demonstration of regional benefits from a mitigation award;"

Please note that all final decisions regarding Community Mitigation Fund grants and interpretations of its Guidelines are made by the Commission.

APPENDIX C

TASK FORCE ON INTEGRITY IN STATE AND LOCAL GOVERNMENT

Meeting 2 - February 1, 2017 – Outline of Testimony of David A. Wilson, Acting Executive Director, State Ethics Commission

Subject

Gifts – anything of value given without equivalent market value being given in return. 930 CMR 5.04: Definitions. (e.g., free or reduced conference expenses and event attendance).

Governing Law

General Laws c. 268A, sections 2, 3, 23(b)(2)(i), and G.L. c. 268B, section 6, and Commission Regulations 930 CMR 5.00.

Introduction

I have been invited to provide you with a brief overview of the laws and regulations under the Commission's jurisdiction dealing with gifts to public employees.

Overview of Gift Laws – the Statutes

Gifts to public employees are subject to restrictions under both the conflict of interest law (G.L. c. 268A) and the financial disclosure law (c. 268B).

The conflict of interest law gift prohibitions of c. 268A, sections 2 and 3, although enacted in 1962, are modern versions of fairly ancient prohibitions. The prohibitions of c. 268A, section 23(b)(2)(i) and of c. 268B, section 6 are much more recent in origin.

G.L. c. 268A, Section 2. Corrupt Gifts

Section 2 prohibits "corrupt gifts." A public employee violates section 2 when he or she "directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility, or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the commonwealth or on a state, county or municipal agency, or

(3) being induced to do or omit to do any acts in violation of his official duty." (The provider of the "corrupt gift" also violates section 2.)

In short, section 2 prohibits bribes. Bribes involve a corrupt bargain or *quid pro quo* relating to official acts. Any amount of value received is a bribe if corruptly received. Public employees cannot receive them and no one may give them. This has been the case in Massachusetts since early colonial times.
Section 2 has not changed since it was enacted in 1962, except that its penalties have increased. Criminal violations of section 2 are punishable by fines of up to $100,000 and 10 years imprisonment. The Commission may impose a civil penalty of up to $25,000 for section 2 violations. The Commission is not empowered to adopt regulatory exemptions to section 2.

Example: You are seeking the Board of Selectmen's approval for a beer and wine license for your new restaurant. A selectman asks for $10,000 to vote in favor. You agree to pay. This is a corrupt gift or bribe. You and the selectmen have violated section 2.

G.L. c. 268A, Section 3. Gifts of Substantial Value Connected to Official Acts

Section 3 prohibits gifts of substantial value connected to official acts. A public employee violates section 3 when he or she "knowingly" "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of substantial value: (i) for himself for or because of any official act or act within his official responsibility performed or to be performed by him; or (ii) to influence, or attempt to influence, him in an official act taken." (The provider of the gift also violates section 3.)

In short, section 3 prohibits gifts (e.g., gratuities and tips) of substantial value to public employees that are connected to the public employees' official acts (whether for or because of or to influence those official acts). Substantial value is $50 or more. The giving and receipt of gifts and gratuities in connection with official acts by public employees has been prohibited in Massachusetts since colonial times.

Example: You are seeking the Board of Selectmen's approval for a beer and wine license for your restaurant. By a narrow vote the selectmen approve your license. In gratitude, you treat the selectmen who voted in favor of your application to dinner at your pricey new restaurant (value in excess of $50 per diner). The dinners are each gifts of substantial given because of official acts performed (i.e., approval of your license). You and the selectmen have violated section 3. (Section 3 would also be violated if, the night before the vote, you treated the selectmen to dinner with the intention of influencing their vote in your favor by ingratiating yourself with them – but without any corrupt agreement or *quid pro quo*.)

From its enactment in 1962 until 2009, section 3 was unchanged. In 2009, Ethics Reform added: "knowingly" and "to influence, or attempt to influence him in an official act taken," and increased the penalty for a criminal violation to "a fine of not more than $50,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both." The Commission may impose a civil penalty of up to $10,000 for civil violations of section 3.

In addition, 2009 Ethics Reform added to section 3, "(f) The state ethics commission shall adopt regulations: (i) defining "substantial value,"; provided, however, that "substantial value" shall not be less than $50; (ii) establishing exclusions for ceremonial gifts; (iii) establishing exclusions for gifts given solely because of family or friendship; and (iv) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest." (The regulations which the Commission has adopted pursuant to this section will be discussed below.)

G.L. c. 268A, Section 23(b)(2)(i). Gifts For or Because of Official Position

Section 23(b)(2)(i) provides "No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know: ... solicit or receive anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position".

In short, section 23(b)(2)(i) prohibits a public employee's solicitation or receipt of anything of substantial value given because of the employee's official position unless it is authorized by statute or regulation. The Commission may impose a civil penalty of up to $10,000 for civil violations of section 23(b)(2)(i).

Example: A well-known, high-ranking city official regularly lunches at a high-end restaurant in the city which does not charge him for his meals because of his city position. The meals exceed $50 in value. The official has violated section 23(b)(2)(i).

Section 23(b)(2)(i) was added to the conflict of interest law in 2009, together with "(f) The state ethics commission shall adopt regulations: (i) defining substantial value; provided, however, that substantial value shall not be less than $50; (ii) establishing exclusions for ceremonial privileges and exemptions; (iii) establishing exclusions for privileges and exemptions given solely because of family or friendship; and (iv) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest. (The regulations which the Commission has adopted pursuant to this section will be discussed below.)

G.L. c. 268B, Section 6. Gifts from Lobbyists (Note: section does not apply to all public employees, but only to "public employees" and "public officials" as defined in c. 268B, i.e., elected state officials and those in major policymaking positions)

Section 6, of the financial disclosure law, G. L. c. 268B, which was enacted in 1978, provides, after amendment in 2009, "No executive or legislative agent shall knowingly and willfully offer or give to any public official or public employee or a member of such person's immediate family, and no public official or public employee or member of such person's immediate family shall knowingly and willfully solicit or accept from any executive or legislative agent, any gift of any kind or nature".

In short, section 6 prohibits public officials[1] or public employees[2] (as defined in G. L. c. 268B) and their immediate family[3] (as defined in c. 268B) from seeking or receiving any gift from a legislative[4] or executive agent[5] (i.e., lobbyist) (as defined in G.L. c. 3, section 39). The Commission may impose a civil penalty of up to $10,000 for civil violations of section 6 of G.L. c. 268B.

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[1] "Public official", a person who holds a public office. "Public office", a position for which one is nominated at a state primary or chosen at a state election, excluding the positions of senator and representative in congress and the office of regional district school committee member elected district-wide.

[2] "Public employee", a person who holds a major policymaking position in a governmental body; provided, however, that a person who receives no compensation other than reimbursements for expenses, or any person serving on a governmental body that has no authority to expend public funds other than to approve reimbursements for expenses shall not be considered a public employee for the purposes of this chapter; provided, further, that the members of the board of bar examiners shall not be considered public employees for the purposes of this chapter.

[3] "Immediate family", a spouse and any dependent children residing in the reporting person's household.

[4] "Legislative agent", a person who for compensation or reward engages in legislative lobbying, which includes at least1 lobbying communication with a government employee made by said person. The term "legislative agent" shall include a person who, as part of his regular and usual business or professional activities and not simply incidental thereto, engages in legislative lobbying, whether or not any compensation in addition to the salary for such activities is received for such services. For purposes of this definition a person shall be presumed to be engaged legislative lobbying that is simply incidental to his regular and usual business or professional activities if he: (i) engages in legislative lobbying for not more than 25 hours during any reporting period; and (ii) receives less than $2,500 during any reporting period for legislative lobbying.

[5] "Executive agent", a person who for compensation or reward engages in executive lobbying, which includes at least1 lobbying communication with a government employee made by said person. The term "executive agent" shall include a person who, as part of his regular and usual business or professional activities and not simply incidental thereto, engages in executive lobbying, whether or not any compensation in addition to the salary for such activities is received for such services. For the purposes of this definition a person shall be presumed to be engaged in executive lobbying that is simply incidental to his regular and usual business or professional activities if he: (i) engages in executive lobbying for not more than 25 hours during any reporting period; and (ii) receives less than $2,500 during any reporting period for executive lobbying.

Example: A legislator and a legislative agent discuss over lunch the merits a pending bill which the agent's client wishes to pass and the legislative agent picks up the check, which is less than $50. Both violate section 6.

Section 6 further provides "provided, however, that the state ethics commission shall promulgate regulations: (i) establishing exclusions for ceremonial gifts; (ii) establishing exclusions for gifts given solely because of family or friendship; and (iii) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest." (The regulations which the Commission has adopted pursuant to this section will be discussed below.)

Overview of Gift Laws - Regulations

Gift Regulations - 930 CMR 5.00 et sq.

Pursuant to the authority and direction of G. L. c. 268A, sections 3(f) and 23(f), and c. 268B, section 6, the Commission has since 2009 adopted regulations in 930 CMR 5.01et seq.:
(i) defining "substantial value,"
(ii) establishing exclusions for ceremonial gifts;
(iii) establishing exclusions for gifts given solely because of family or friendship; and
(iv) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest."

NOTE: None of these exclusions allow conduct prohibited by section 2, the "corrupt gift" or bribery section of the conflict of interest law.

1. "Substantial value" is defined in section 5.05 as "$50 or more" based on the gift's "fair market value at the time of the gift, cost or face value, whichever is greater." This section also explains how "substantial value" is determined. See also, section 5.07: Gifts Worth Less Than $50 (*except those from a lobbyist*) Are Not Prohibited But a Disclosure May be Required.

2. "Ceremonial gifts," see 930 CMR 5.08(9): Ceremonial Gifts and Privileges.

3. "Solely Family or Friendship gifts," see 930 CMR 5.06: No violation and No Exemption Needed: Gifts Unrelated to Official Action, Position or Performance of Duties. But see special rule for lobbyist gifts at 930 CMR 5.09.

4. "Situations that do not present a genuine risk of conflict or an appearance of conflict," see 930 CMR 5.08: Gifts Worth $50 or More and Related to Official Action or Position: Exemptions. This section creates fifteen (15) exemptions to the prohibitions against gifts of substantial value related to official actions or positions:

   (i) Travel Expenses (930 CMR 5.08(2)

   This regulation permits public employees to accept travel expenses of substantial value where their doing so serves a legitimate public purpose outweighing any special non-work related benefit to the public employee or to the provider of the travel expenses. The regulation broadly defines "legitimate public purpose" as, "intended to promote the interests of the Commonwealth, a county, or a municipality."

   (a) Paid by Domestic Public Agency

   A public employee may accept payment, waiver or reimbursement of travel expenses of substantial value provided by a domestic public agency on the state, county municipal or federal level for any purpose in furtherance of the employing agency's mission and in accordance with its procedures. No disclosure is required.

   (b) Paid by Non-Public or Foreign Entity or Federally Recognized Tribe

   A public employee may accept payment, waiver or reimbursement of travel expenses from a non-public or foreign entity or federally recognized tribe if a prior written determination/disclosure is made that acceptance will serve a legitimate public purpose outweighing any special non-work-related benefit to the employee or to the person providing the reimbursement, waive or payment. Non-elected public employees must obtain the determination of their appointing authority. Elected officials make their own determination.

   (c) In-state Travel for Educational Purposes

   Unless the giver is a lobbyist, a public employee may accept reimbursement, waiver or payment of travel expenses of substantial value at an in-state educational program provided that the employee has a good faith belief that his or her attendance will serve a legitimate public purpose outweighing any special non-work related benefit to the employee or the person providing the

reimbursement, waiver or payment. Disclosure is not required unless a matter involving the giver is before the public employee within six months before or after the gift.

(ii) Incidental Hospitality That Serves a Public Purpose (930 CMR 5.08(3))
Elected public employees and their staff may accept waiver, payment or reimbursement of their expenses to attend weekday informational programs during regular business hours at which incidental hospitality is provided and where their attendance serves a legitimate public purpose. No disclosure is required for daytime events.
For all other events: a written determination/disclosure is required (by the elected official or appointing authority) that the public employee's attendance at the event serves a legitimate public purpose that outweighs any non-work-related benefit to the employee or to the person providing the waiver payment of expenses.

(iii) Legitimate Speaking Engagements (930 CMR 5.08(4))
A public employee invited to participate in a legitimate speaking engagement in whole or in part because of his official position may accept waiver or reimbursement of his travel expenses required for his participation. Honoraria may be accepted only under certain conditions. No disclosure required.

(iv) Honorary Degrees (930 CMR 5.08(5))
A public employee may accept an honorary degree from a public or private institution given in whole or in part for his official duties or position, provided no monetary award of substantial value is included. May accept travel expenses reimbursement for self and guests to attend ceremony. Disclosure is not required unless a matter involving the giver is before the public employee within six months before or after the gift.

(v) Awards for Meritorious Public Service or Lifetime Achievement (930 CMR 5.08(6))
A public employee may accept a lifetime achievement or meritorious public service award from a program that makes the award on a regular basis and may accept reimbursement of travel expenses for himself and his guests in order to attend the award ceremony. The employee may accept a monetary award if the employee has not had and does not expect to have official dealings with the awarding entity or any sponsor of the award. Disclosure is not required unless a

matter involving the giver comes before the public employee within six months after the gift.

(vi) Public Employee Discounts and Waived Membership Fees (930 CMR 5.08(7))
Public employees may accept discounts of substantial value available to all public employees generally or all public employees from a city, town, county or state or geographic area and may accept reduced or waived membership fees in a professional organization offered to all similarly situated public employees in that profession. Teacher discounts for school supplies okay. No disclosure required.

(vii) Gifts Among Public Employees (930 CMR 5.08(8))
Public employees may generally give and accept personal gifts from their colleagues. They may also give gifts to their subordinates. Gifts from subordinates to their superiors are strictly limited. No disclosure required.

(viii) Ceremonial Gifts and Privileges (930 CMR 5.08(9))
A public employee performing a ceremonial function at an event may accept free admission to the event (e.g., making opening remarks, throwing out the first pitch, cutting a ribbon, or turning over the first shovel of dirt). The employee may also accept an unsolicited gift customary to the occasion (e.g. a baseball hat, ball or an engraved shovel). No disclosure required.

(ix) Retirement Gifts (930 CMR 5.08(10))
A retired or retiring public employee may accept gifts of substantial value "appropriate to the occasion" from members of the public (not lobbyists) reflecting general good will and not as a reward for any specific past action. No disclosure required.

(x) Unsolicited Perishable Items (930 CMR 5.08(11))
If a public employee receives unsolicited perishable or impractical to return items such as flowers, fruit baskets or candy, the item may be put out for the general public or given to charity. No disclosure required.

(xi) Admission to Political Campaign Events for Elected Officials and their Staff Members (930 CMR 5.08(12))
Elected public officials and their staff may accept free admission to political campaign events. No disclosure required.

(xii) Gifts Received and Held Temporarily as Part of Charitable Activity (930 CMR 5.08(13))
A public employee participating in her agency's charitable activity may receive (except from a lobbyist) and temporarily hold donations of substantial value pending their distribution. No disclosure required.

(xiii) Class Gifts to Teachers (930 CMR 5.08(14))
Public school teachers may accept a class gift or gifts totaling $150 per year. No disclosure required for class gifts. Disclosure required for individual gifts.

(xiv) Passes to School Events (930 CMR 5.08(15))
Public school employees and officials may accept from the district passes of substantial value for the district's sports or entertainment events. No disclosure required.

(xv) Drawings (930 CMR 5.08(16))
A public employee may accept a prize from a random drawing, including a drawing at an event to which the employee's agency paid her admission. No disclosure required.

5.09: Gifts from Lobbyists Not Related to Official Action or Position

(2) Exemption.

Lobbyists, as defined in 930 CMR 5.04, are not prohibited from giving, and Public officials and public employees, as defined in M.G.L. c. 268B, § 1, are not prohibited from accepting, the following from a lobbyist or the lobbyist's spouse, if the gift is purchased with the giver's personal funds and not with funds belonging to the giver's employer, client, or institution, the public employee reasonably believes that only the giver's personal funds were used, and the gift is given and received solely because of family or established personal friendship:

(a) meals in the donor's home; and

(b) gifts on occasions of religious significance including, for example, confirmations and bar mitzvahs; and occasions of personal significance including weddings, engagements, the birth or adoption of a child, and the illness or death of a relative. A birthday is not an "occasion of personal significance" for purposes of this exemption.

Example: A childhood friend of a State Representative is a lobbyist. Over the years, the two have exchanged gifts on the occasion of significant life events such as weddings and the births of their children. The lobbyist uses her personal funds to purchase two place settings, worth $300, as a wedding present for the Representative's daughter. The gift is not prohibited.

(c) A public employee may accept any gift or inheritance from a lobbyist who is a member of the public employee's immediate family, other relative, intended spouse, or member of the public employee's household, if the gift is purchased with the giver's personal funds and not with funds belonging to the giver's employer, client, or institution, and is given and received solely because of the family or comparable relationship.

5.10: Political Campaign Contributions: Exemption from Disclosure

A contribution made and reported in accordance with M.G.L. c. 55 is not required to be the subject of a separate, additional disclosure pursuant to M.G.L. c. 268A, § 23(b)(3). A person acting within this exemption remains subject to the other prohibitions of M.G.L. c. 268A, including, but not limited to, §§ 3 and 23(b)(2).

APPENDIX D

MASSACHUSETTS Peace Action

TESTIMONY BEFORE THE TASK FORCE ON INTEGRITY IN STATE AND LOCAL GOVERNMENT

STATE HOUSE, FEBRUARY 1, 2017

Good morning. My name is Eva Moseley, and I'm testifying on behalf of Massachusetts Peace Action.

My testimony concerns a loophole in the Conflict of Interest Law and Ethics Commission regulations that allows legislators to receive very substantial gifts from lobbying organizations. The problem came to our attention in the context of a particular situation involving gifts given by the Jewish Community Relations Council of Greater Boston (JCRC).

As you may know, JCRC is a lobbying organization, called a "client" under the Massachusetts Lobbying Law. JCRC retains individuals to lobby on its behalf before the state legislature, and as such, is required to register with the Secretary of the Commonwealth.

One of JCRC's announced objectives during 2016 was to secure passage of binding legislation "to reject the BDS campaign." ("BDS" stands for boycott, divestment and sanctions, aimed at pressuring Israel to change its policies towards the Palestinians).

In July 2016, an anti-BDS amendment, reported in the *Jewish Advocate* as "written by the JCRC," was introduced and withdrawn the same day. The following day, JCRC issued a statement vowing to bring up similar legislation in the next legislative session, expressing confidence that it would pass.

So in July 2016 every Massachusetts legislator was on notice that he or she would soon be required to consider legislation of great interest to JCRC.

The month before the next legislative session – the current one -- began, JCRC took 12 Massachusetts representatives on a free nine-day study trip to Israel.

The travelers returned on December 12, 2016. On December 20, the *Jewish Advocate* reported that JCRC was "finalizing the language" of a new bill to combat BDS. It was indeed filed on January 20, 2017, as SD.922 and HD.779, and JCRC launched an intense

lobbying campaign for it.

This is a classic conflict of interest. No lobbying organization, including JCRC, should be allowed to give a gift of substantial value to the same legislators who have been, are, or will soon be acting on specific legislation of great interest to that organization. Similarly, legislators should not be allowed to accept gifts in such circumstances. Several factors make the conflict especially serious in this case: the value of the gift (over $4,000 per legislator), the closeness in timing between the gift and future legislative action, and that JCRC is not only lobbyist but also drafter of the bill.

A similar conflict of interest had occurred in 2015. Just three weeks after the Massachusetts Senate adopted an anti-BDS resolution written by JCRC, JCRC announced that it was taking one-quarter of the Senate on a free ten-day study trip to Israel.

The Massachusetts Conflict of Interest Law and Ethics Commission regulations prohibit gifts to legislators of $50 or more. The regulations contain an exception for travel, provided a legislator files a public disclosure stating that the travel serves a "legitimate public purpose," and that this purpose outweighs any conflict of interest. [930 CMR 5.08(2)(d)2].

We recognize that travel can serve a public purpose. But when that travel is paid for by a registered lobbying organization with specific business before the legislature, the conflict of interest outweighs any public purpose that might be served. Such conflicts should not be allowed to continue.

Moreover, the disclosure form does not ask whether the organization paying for travel is a registered lobbying organization with specific business before the legislature. In the absence of such relevant information, it is hard to see how the legislator has any basis for weighing ethical implications.

In summary, we urge the Task Force to investigate changes in law or regulation to end the practice of registered lobbying organizations paying for legislators' travel. Since most legislative travel is not paid for by lobbying organizations, this change would not affect most such travel. We would gladly work with the Task Force to suggest concrete changes for this purpose.

Thank you.

Eva Moseley, Board Member of Massachusetts Peace Action
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Susan T. Nicholson, Esq., susantnicholson@comcast.net

APPENDIX E

Downey, Justin (HOU)

From: Susan McLucas <susanbmcl@gmail.com>
Sent: Wednesday, February 01, 2017 2:18 PM
To: Downey, Justin (HOU)
Subject: junkets to Israel

I was at the hearing this morning about the ethics of gifts to legislators and heard about the exemption for travel expenses and how legislators are the ones to decide if a trip has a legitimate public interest. I am at all not in agreement with this system.

All these legislators, who get all-expense-paid trips to Israel and then vote on legislation designed to shield Israel from the reasonable anger of people trying to help the Palestinians have some rights, should not be allowed to enjoy those trips and become influenced by the Israeli point of view.

I heard a lot of hand wringing about whether legislators had to declare every last cup of coffee (It was agreed that they didn't) but no one seemed too concerned about all-expenses-paid trips to Israel. It's so clearly unethical. I hope you all can see this.

Susan McLucas
Somerville, MA
(617) 776-6524

APPENDIX F

TASK FORCE ON INTEGRITY IN STATE AND LOCAL GOVERNMENT

Meeting 3 – February 15, 2017 – Testimony of David A. Wilson, Acting Executive Director, State Ethics Commission

Good morning. On behalf of the State Ethics Commission, thank you for once again affording us the opportunity to speak with you about the conflict of interest law.

I understand that you plan to focus today on three areas in which the conflict of interest law imposes restrictions on current and former public employees:

(1) public employees acting as agents in government matters and receiving private compensation;

(2) former public employees and their business partners; and

(3) public employees who have financial interests in government contracts. These three topics, and especially the first and third, are among the least intuitive and most confusing parts of the conflict of interest law. They generate many requests for advice from our office.

I would like to address each of today's three topics in two ways. First, I would like to give a very brief explanation of the restrictions in each of the three areas. Second, since the focus of this Task Force is on identifying areas where the law can be improved, I would like to give you an example of uncertainty or confusion in each area, and some thoughts on how the uncertainty or confusion might be addressed.

1. Public Employees Acting as Agents in Government Matters and Receiving Private Compensation – G.L. c. 268A, Sections 4, 11 and 17

A. Explanation

The basic principle behind the sections of the conflict of interest law dealing with public employees acting as private agents in government matters and receiving private compensation is to prevent divided loyalties. In other words, a public employee is supposed to be entirely loyal to his or her public employer, and is not supposed to act on behalf of someone else in a matter where the public employer has an interest. In short, generally when the government is involved in a matter, a government employee must be on the government's side. The sections of the

conflict of interest law that impose this restriction are Section 4, which applies to state employees; Section 11, which applies to county employees; and Section 17, which applies to municipal employees. (These sections apply less restrictively to "special" state, county and municipal employees, however, in the interest of brevity those lesser restrictions will not be discussed here.)

Sections 4, 11 and 17 of the conflict of interest law prohibit divided loyalties in two ways. First, a public employee may not be paid by someone other than his or her public employer to work on any particular matter in which the public employer is a party, or has a direct and substantial interest (otherwise than as provided by law for the proper discharge of his or her official duties). For example:

- A government attorney who defends a public agency in litigation cannot receive a bonus for a successful result from a private party that was a codefendant with the public agency in the litigation.
- A municipal inspector cannot be paid by a restaurant for having found code violations at a competing restaurant.

In addition to the restrictions on receiving private compensation, sections 4, 11 and 17 also prevent divided loyalties in a second way: by prohibiting public employees from acting as agent or attorney for anyone other than their public employer in any particular matter in which the public employer is a party, or has a direct and substantial interest (otherwise than in the proper discharge of his or her official duties). "Acting as agent or attorney" means acting on behalf of someone. This means that, for example, a state employee generally may not represent a private party in dealings with the state, whether or not the employee is paid by the private party to do so. A municipal employee generally cannot speak on behalf of a private party with an agency or employee of his employing municipality about a particular matter involving the municipality, even if he is willing to do so without private payment. For example:

- A Selectman cannot act as the spokesman for his neighborhood association in making a presentation to the town Conservation Commission.

- An employee of the state Department of Revenue cannot submit an application for grant funding to the state Department of Elementary and Secondary Education on behalf of a nonprofit on whose board she serves.

B. Area of Uncertainty

The restrictions I have just described are not obvious in every situation. Also, they capture some conduct that most people do not think involves an actual conflict of interest. For these reasons, over the years, these three sections of the law have been amended many times to add exemptions (Section 4 – 6; Section 11 – 5; Section 17 – 5). The Commission has also created a number of exemptions from these sections of the law (930 CMR 6.00 et seq. – 12). Still, areas of uncertainty and confusion remain. One such area is Section 4's treatment of state legislators.

In general, Section 4 prohibits state employees from communicating with state agencies on behalf of other persons or entities. The section, however, applies differently to state legislators (and to governor's councilors). For state legislators, communicating with state agencies on behalf of constituents is an important part of their job. For example, a state legislator may need to communicate with a state agency about a constituent who has been unable to obtain a hearing on a request for benefits. Or, a state legislator may wish to advocate in favor of a state agency's making a decision that will benefit his or her district. The law recognizes that these actions by state legislators are appropriate by exempting them from the general Section 4 restrictions that apply to other state employees. Instead, state legislators are prohibited by Section 4 from appearing for compensation (other than their legislative salaries) before state agencies, with certain exceptions. One of the exceptions, and an area of uncertainty, is in "quasi-judicial" proceedings.

A state legislator is permitted under Section 4 to appear for non-legislative compensation before a state agency in a "quasi-judicial" proceeding. Section 4 gives a definition of what proceedings are "quasi-judicial," but it does not specify which agencies' proceedings are "quasi-judicial." Therefore, a state legislator who wants to know how that part of Section 4 applies has to ask the Ethics Commission, and we in turn have to look at the procedures of the particular agency and apply the statutory definition. The Commission has a body of internal decisions as to whether particular proceedings are quasi-judicial or not, but it can take some work to find it on

our website. The Commission does not currently have the authority to eliminate the uncertainty in this area by writing a regulation that would clarify when state legislators can represent clients before state agencies; full regulatory authority would enable the Commission to do that.

2. Former Public Employees and Business Partners - G.L. c. 268A, Sections 5, 12 and 18

A. Explanation

Turning to the next topic on the Task Force's agenda for today, Sections 5, 12, and 18 of the conflict of interest law place restrictions on what former public employees may do for their new employers. In general, a former public employee cannot work for a new employer on any particular matter that he personally worked on at his public job. In addition, after a public employee leaves his public job, there is a one-year cooling off period during which he cannot communicate with his former public employer about any particular matter that was under his official responsibility in his former public job. The sections of the conflict of interest law that impose these restrictions are Section 5 for state employees, Section 12 for county employees, and Section 18 for municipal employees.

Moreover, some of these restrictions apply to the partners of former public employees. A partner of a former public employee may not, for one year after her partner's departure from public employment, act as agent or attorney for anyone in any particular matter on which the partner worked personally while in public employment. (These sections also restrict acts of private agencies by partners of current public employees, which will not be discussed here in the interest of brevity.)

B. Area of Uncertainty

The Commission is frequently asked for advice about how the restrictions on former public employees apply in particular situations involving what may or may not be partnership arrangements. For example, are these restrictions applicable if a firm is organized as an LLC rather than a traditional partnership? What if people are referred to as "partners" in promotional materials or on a firm's website, even if they do not have an ownership interest in the firm?

The Commission has precedent on these questions, and in many cases it is available on our website, but finding the answer requires reading these precedents or asking a Commission

attorney for an opinion. This is another area where full regulatory authority would allow the Commission to codify existing precedent. The public notice and comment requirements for rulemaking would ensure that existing precedent could be re-examined in light of any criticisms that were raised.

3. Public Employees Who Have Financial Interests in Government Contracts – G. L. c. 268A, Sections 7, 14 and 20

A. Explanation

Today's final topic is the sections of the law that impose restrictions on government employees having financial interests in government contracts. Section 7 of the law provides that a state employee may not have a financial interest in a state contract, unless an exemption applies. Sections 14 and 20 of the law apply these restrictions respectively to county and municipal employees. (These sections apply less restrictively to "special" state, county and municipal employees, however, in the interest of brevity those lesser restrictions will not be discussed here.)

These sections of the law sweep broadly. For example, they apply in every situation in which someone has multiple positions with the same public employer, such as when a state employee wants to take a second paid position with the state, or even a second paid position with a private employer that is paid for with state funds. These sections also apply in situations in which a public employee wants to enter into a contract with his or her public employer. For example, these restrictions apply if a police officer who has a private business selling uniforms wants to sell to his own town. They also apply if a municipal employee wants to sell real estate to her own town, or purchase surplus property from her own town.

There is general agreement that Sections 7, 14 and 20 are the least intuitive, and most confusing, sections of the conflict of interest law. Over time these prohibitions have been found to apply to prohibit some types of conduct that not only does not strike most people as wrong, but may even be desirable. For that reason, many exemptions from these sections of the law have been created both by the Legislature (Section 7 - 10; Section 14 – 4; Section 20 – 14) and by the Commission (930 CMR 6.00 et seq. – 13). Just to list all the existing exemptions to these three sections would be a lengthy task and will not be done here.

The Commission's limited regulatory authority means that it can create exemptions as it becomes aware of situations where these restrictions should not apply, but it cannot simplify or explain the law.

B. Area of Uncertainty

One area of significant uncertainty and confusion that affects numerous public employees is the application of Sections 7, 14 and 20 to the employees of regional public entities. The conflict of interest law dates back to 1962, before most regional entities existed. As currently drafted, the law has specific provisions that apply to state, county, and municipal entities, but no provisions that apply to regional entities. Examples of regional entities are regional school districts that encompass numerous municipal school districts, educational collaboratives, or regional public health authorities.

Under court precedent, a public agency that is made up of multiple municipalities that have come together for some purpose, such as a regional school district, must be considered a regional municipal entity. The employees of such an entity must be considered to be the employees of every member municipality. Educational collaboratives not infrequently may have dozens of member municipalities that have come together, for instance, to supply specialized educational services on a regional basis. For purposes of the conflict of interest law, each employee of such a collaborative is considered an employee of every participating municipality.

It is difficult to apply the restriction on having a financial interest in a municipal contract to employees of regional municipal entities. Here's how it works, under the law as it currently stands:

A person who teaches for an educational collaborative is an employee of each of the member municipalities. For that reason, she is prohibited from having a financial interest in a contract with any of those member municipalities. This means that she cannot be hired by any of those member municipalities to provide services during the summer, or after regular school hours.

Two specific types of situations of which we are aware where this is problematic are as follows:

(1) Member school district wishes to hire educational collaborative teacher to provide services to a particular student during the summer, but cannot due to the prohibition against having a financial interest in a contract with the same municipality.

(2) Member school district wishes to hire educational collaborative teacher to provide professional development, but cannot for the same reason.

The main existing exemption potentially available in these types of situations requires the permission of the employing municipality for the employee to have multiple municipal jobs. This mechanism can be made to work when dealing with a single municipality, and a municipal employee who wants a second job with the same town. It is unworkable when it requires a teacher to get such permission from 20 different towns that are members of the regional district or collaborative.

A number of times over the past few years the Commission has attempted to come up with solutions to the problem just described, but has been unable to do so because of its limited regulatory authority. Extending full regulatory authority to the Commission would enable it to come up with a sensible, workable set of rules for regional entities.

APPENDIX G

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES
STATE HOUSE, BOSTON 02133-1054

JAY D. LIVINGSTONE
STATE REPRESENTATIVE
8TH SUFFOLK DISTRICT

Committees:
Housing
Community Development and Small Business
State Administration and Regulatory Oversight
Environment, Natural Resources and Agriculture

STATE HOUSE, ROOM 136
TEL. (617) 722-2396
Jay.Livingstone@MAhouse.gov

February 23, 2017

The Honorable Peter Kocot
Chairman, Joint Committee on State Administration and Regulatory Oversight
State House, Room 22
Boston, MA 02133

The Honorable Christopher Markey
Chairman, House Committee on Ethics
State House, Room 527A
Boston, MA 02133

Re: *Taskforce on Integrity in State and Local Government*

Dear Chairman Kocot and Markey:

Thank you for your work regarding a review of the State's conflict of interest laws. I think it is appropriate to take a comprehensive look at the laws and how the various laws and interpretations of them interrelate.

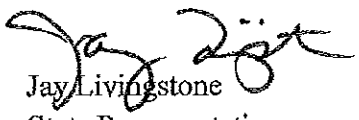
One specific provision that I think deserves closer examination is M.G.L. 268A, Sec. 4(c)(3) and particularly its definition of a "quasi-judicial proceeding." The current definition provides that a proceeding is quasi-judicial if it is (1) adjudicatory and (2) "the action of the state agency in [sic] appealable to the courts." I understand the Ethics Commission interprets this definition to mean that the particular proceeding needs to be directly appealable. This means if there is a two-step, agency process – even an adversarial one – the first part of the process does not qualify as a quasi-judicial proceeding. In other words, the Ethics Commission interprets this to mean "the action of the state agency at the conclusion of the particular proceeding is directly appealable to the courts."

The Ethics Commission has used this interpretation to exclude preliminary MCAD proceedings from the definition. I think its interpretation and this result are inappropriate.

It seems the purpose of the current exceptions, which include court proceedings as well adjudicatory agency proceedings, should cover all adjudicatory agency proceedings as long as the final agency decision is appealable to court, which would cover MCAD proceedings. Such an interpretation would fulfill the purpose of the law and create more consistency across agencies with adjudicatory proceeding, whether there is a one-step or multiple-step process.

Thank you for your consideration.

Respectfully,



Jay Livingstone
State Representative
8th Suffolk District

APPENDIX H

TASK FORCE ON INTEGRITY IN STATE AND LOCAL GOVERNMENT

Meeting 4 – February 28, 2017 – Testimony of David A. Wilson, Executive Director, State Ethics Commission

Good morning. On behalf of the State Ethics Commission, thank you for once again affording us the opportunity to speak to you about the conflict of interest law. I understand that today you plan to focus on two areas in which the law imposes restrictions on public employees: (1) financial interests of public employees and their relatives or associates; and (2) the standards of conduct.

As I did at the last Task Force meeting, I would like to address each of these topics in two ways. First, I will give a very brief explanation of how each restriction works. Second, I will give you an example of uncertainty or confusion in each area, and some thoughts on how the uncertainty or confusion might be addressed.

I understand that you also intend to examine the Commission's structure and authority as established by its enabling law, G. L. c. 268B. I addressed those topics in my testimony to the Task Force on January 11, 2017, and will be happy to address questions on those topics further.

1. Financial Interests of Public Employees and their Relatives or Associates – G. L. c. 268A, sections 6, 6A, 13 and 19

A. Explanation

The basic principle behind the sections of the conflict of interest law that deal with public employees and their financial interests, and the financial interests of persons and entities who are their relatives or other close associates, is relatively straightforward and intuitive. Public employees are prohibited from participating in their public roles in government business in which they have a personal financial interest; and are also prohibited from participating in their

public roles in government business in which their immediate family members, and other persons and entities with whom they are closely associated, have a financial interest. In other words, the conflict of interest law attempts to ensure that governmental decisions serve the public interest rather than the private interests of governmental decision-makers and their close associates by keeping public employees out of matters in which they might be tempted to make decisions based on personal advantage rather than the public interest. The sections of the conflict of interest law that impose this restriction are Section 6, which applies to state employees; Section 13, which applies to county employees; and Section 19, which applies to municipal employees. These sections are commonly referred to as the "anti-nepotism" sections of the conflict of interest law.

The law defines which relationships are so close that a public employee has to stay out of matters involving someone with whom he or she has such a relationship. A public employee has to stay out of matters in which any of the following has a reasonably foreseeable financial interest:

- The public employee herself
- Member of public employee's immediate family: parents, children, siblings, spouse, spouse's parents, children, siblings
- Business organization of which public employee director, officer, trustee, or employee
- Potential employer

The law gives public agencies the ability to grant their employees exemptions from this section of the law, if the agency determines that the public employee's interest, or that of the

family member or other associate, is not so substantial that it is likely to affect the integrity of the public employee's services. This mechanism requires that the public employee make a written disclosure about the financial interest to the head of his or her agency in advance of participating, and obtain written permission from the agency head. (NOTE: Forms for making these disclosures are available on the Commission's website.) The following are examples of how the law works in this area.

- A state employee cannot participate in a hiring process in which his child is a candidate for employment by the state agency.
- A selectman cannot participate in making decisions about a municipal contract if his private employer is one of the entities competing to be awarded the municipal contract.

Some public employees make decisions that affect large numbers of people, including themselves. For example, state legislators may make decisions about legislation that affects everyone who lives in the Commonwealth. City councilors may make decisions about municipal water systems that affect everyone who lives in their city. The law creates exemptions to allow these kinds of necessary public work to be done. State legislators are allowed to vote on general legislation that affects everyone in the Commonwealth the same way, such as general legislation that changes the tax code. (NOTE: If the general legislation would have a substantial effect on the legislator's financial interests greater than that on the general public, the legislator would need to do a written disclosure to the State Ethics Commission under Section 6A prior to participating in the legislation. A form for making the required disclosure is available on the Commission's website.) Municipal employees are allowed to participate in municipal decisions that involve general policy decisions that affect substantial segments of the population.

B. Area of Uncertainty

As I just mentioned, the prohibition that prohibits municipal employees from participating in particular matters in which they have a reasonably foreseeable financial interest does not apply if the particular matter involves a determination of "general policy," and the public employee's financial interest, or that of his family member, is shared with a "substantial segment" of the population of the municipality. The conflict of interest law defines some of the terms that it uses, but it does not define the term "general policy" or the term "substantial segment." So, what do these terms mean? How would a municipal employee who wanted to understand the law figure out whether this exemption applied to him?

Over the years, the Commission has had occasion to apply these terms and to give them meaning in the context of particular situations. At one point, the Commission was asked whether a decision by a Board of Selectmen to adopt a "residential factor" which would have the effect of applying a higher annual tax rate to commercial property than to residential property could be considered to be a determination of "general policy." The Commission determined that it would. The Commission also determined that where that classification would affect 10% of the town's population, that amounted to a "substantial segment" of the town's population.

The Commission makes its interpretations of the law publicly available in various ways. The decision interpreting the law that I just described is a public opinion that is available on the Commission's website, www.mass.gov/ethics, where anyone can look at it. Almost all the Commission's public decisions, including all that are considered to have precedential weight, are available on our website. There are a few opinions from the Commission's earliest years of existence, 1978-1982, that are not available on the website; we make those available when they are requested, which may happen a couple of times per year (we have to redact identifying

information before making some types of Commission opinions publicly available). Someone who wanted to learn about how the Commission interprets the terms "general policy" and "substantial segment" of the population and understand how they applied to him could also call our Legal Division, and receive free, confidential advice about how the law applied to their specific situation.

Thus, there are ways that a municipal employee could proceed in order to determine whether a matter in which he wishes to participate is a determination of "general policy" in which a "substantial segment" of the population has a financial interest. Full regulatory authority would enable the Commission to craft regulations explaining how the law is interpreted that would be easier to find and understand than hunting through Commission precedent.

2. "Standards of Conduct" – G. L. c. 268A, section 23

A. Explanation

Now I will turn to Section 23 of the conflict of interest law. Section 23 is titled "standards of conduct" and it applies to all state, county, and municipal employees in the Commonwealth, including those with volunteer and part time positions. The standards of conduct for public employees include a number of different provisions, which I will explain in turn.

1. Inherently incompatible employment

Public employees are prohibited, by Section 23(b)(1) of the law, from accepting other employment involving compensation of substantial value, the responsibilities of which are "inherently incompatible" with the responsibilities of their public offices. The Commission has interpreted this restriction to be intended to prevent the impairment of a public employee's

independence of judgment in the performance of his official duties that may result from certain types of private employment. The following are examples of situations where the Commission has determined that proposed private employment was inherently incompatible with an existing public position:

- A municipal police officer may not be hired for private security work in his employing municipality outside of the municipal detail system established by the town, because of the danger that the officer's judgment in the performance of his police duties might be compromised by his duty to his private employer.
- A state legislator with a private government relations consulting business may not advise a private client on how to lobby his legislative colleagues.

2. Misuse of Official Position – Section 23(b)(2)

One of the single most important sections of the conflict of interest law is Section 23(b)(2) of the law. Any system of governmental ethics rules must include a prohibition against abuse of power. The Massachusetts conflict of interest law, G.L. c. 268A, deals with this subject in Section 23(b)(2), which, in broad terms, prohibits the misuse of official position. The Ethics Commission receives numerous complaints alleging misuse of official position each year, and it also receives numerous inquiries from public officials anxious not to misuse their position or even appear to have done so. There is a substantial body of Commission precedent interpreting Section 23(b)(2) in numerous different contexts.

Section 23(b)(2) of the law prohibits public employees from asking for or accepting anything of substantial value for themselves because of their public position, unless some statute authorizes them to do so. In addition, Section 23(b)(2) prohibits public employees from using their official position to obtain "unwarranted privileges or exemptions" of substantial value for

themselves or anyone else, if the unwarranted privileges or exemptions are not properly available to similarly situated individuals.

The Commission's most recent public adjudicatory case provides a good example of the kind of conduct forbidden by Section 23(b)(2). A police lieutenant was called to the scene of an incident in which an officer under his command was found intoxicated by the side of a state highway, having been observed driving down it the wrong way. The evidence showed that a civilian found by the police in those circumstances would have been arrested, pursuant to written department policy. The lieutenant did not arrest his subordinate but instead had her driven home. The Commission found that that conduct violated Section 23(b)(2) of the law.

3. Appearance of Conflict of Interest – Section 23(b)(3)

Our conflict of interest law seeks to prevent not only actual conflicts of interest but even the appearance of such conflicts. The section of the law that implements this objective is Section 23(b)(3) of the law. Section 23(b)(3) requires public employees to avoid conduct that creates a reasonable impression that any person may improperly influence them, or unduly enjoy their official favor, or that they are likely to act, or fail to act, because of kinship, rank, position, or undue influence of any party or person.

A reasonable impression of favoritism or bias may arise, for example, when a public employee acts on matters involving the financial interest of a friend or a family member who is not an "immediate" family member. The conflict of interest law allows public employees to act on such matters, even if it creates the appearance of a conflict, if they openly admit all the facts surrounding the appearance of bias prior to any official action. Specifically, Section 23(b)(3) states that if a reasonable person having knowledge of the relevant circumstances would

conclude that a public employee could be improperly influenced, the public employee can dispel this impression of favoritism by disclosing all the facts that would lead to such a conclusion. An appointed public employee must make such a disclosure in writing to the person or board who appointed her to her public job. An elected public employee must make such a disclosure in a writing that is filed in a public place, such as a municipal clerk's office or, for state officers, with the Commission. (NOTE: A form for use in making a Section 23(b)(3) disclosure is available on the Commission's website.) The following are examples of situations in which such a disclosure would be appropriate:

- A municipal Conservation Commission is reviewing an application. The application is supported by a study prepared by a consulting engineer who is also advising a member of the Conservation Commission on her own home renovation project. The engineer's participation in the process would create a reasonable basis for the impression that the Conservation Commission member would unduly favor the engineer. To dispel this appearance of bias, the Conservation Commission member should disclose their relationship in writing to her appointing authority prior to acting on the matter.
- A longtime friend of a state agency head applies for a job with the agency. If the agency head is involved in the hiring process, it may appear to a reasonable person that he would be biased in favor of his friend. To dispel that appearance, the agency head must file a disclosure of the relationship with his appointing authority. The appointing authority may then determine whether to take any further steps to avoid the appearance of a conflict.

4. <u>False Claims –Section 23(b)(4)</u>

Public employees are prohibited from presenting false or fraudulent claims to their employers for any payment or benefit of substantial value by Section 23(b)(4) of the law. An example of the kind of conduct prohibited by this section of the law would be submitting a request to use sick leave to cover time away from a public job, when the time would in fact be spent working on a second job. (NOTE: Section 26 imposes civil penalties on one who with fraudulent intent violates Sections 23(b)(2) or (4), or causes another to violate those sections, or offers or gives privileges or exemptions in violation of Sections 23(b)(2) or (4) with a total value of more than $1,000 in any 12 month period.)

5. Use of Confidential Information – Section 23(c)

Section 23 also regulates public employees' use of confidential information that they learn in the context of their public employment. A public employee may not accept employment or engage in any business or professional activity that will require disclosure of confidential information that the employee learned in his public position. The public employee also may not improperly disclose materials or data that are not considered public records, when the employee acquired that information in the course of his official duties. Finally, a public employee may not use such confidential information to further his or her own personal interests.

B. Area of Uncertainty

The restrictions described above, and in particular those dealing with misuse of official position and appearance of a conflict, have resulted in the creation of a significant body of Commission precedent, as the Commission has been asked to determine whether the law was violated in particular circumstances, or to give advice about how to avoid violations of the law. I would like to give an example of a particular kind of situation in which these restrictions apply;

what the Commission has done to make accessible its precedents in this area; and what more might be done.

Private dealings between official superiors and official subordinates are an area rife with the possibility of conflict of interest issues, and specifically, violations of Section 23(b)(2) and 23(b)(3) of the law. Examples of such situations are the school superintendent who asks the high school shop instructor to build a private deck on the superintendent's home, or the state agency manager who asks her direct reports to contribute to her favorite private charity. Situations in which a public employee uses the power he or she has over someone by virtue of the public employee's official position to ask for something when the target can't really say no very frequently result in complaints to the Commission.

Several years ago, to make its precedents in this area more accessible, the Commission directed its staff to prepare an advisory explaining the law in this area. Commission Advisory 14-1: Public Employees' Private Business Relationships And Other Private Dealings With Those Over Whom They Have Official Authority Or With Whom They Have Official Dealings, available on the Commission's website at http://www.mass.gov/ethics/education-and-training-resources/educational-materials/advisories/advisory-14-1.html, is the result. The Advisory explains how the conflict of interest law applies to situation in which a public official wishes to enter into any type of private dealing with persons who are either under the public official's authority, or are having dealings with the public official. However, Commission advisories are purely educational in character, and do not have the force of law. Full regulatory authority would give the Commission the ability to create definitions of undefined statutory terms and give the Commission the ability to go through a public process of developing interpretations of the law.

APPENDIX I

Commonwealth of Massachusetts
STATE ETHICS COMMISSION
One Ashburton Place - Room 619
Boston, Massachusetts 02108

Hon. Barbara A. Dortch-Okara (ret.)
Chair

David A. Wilson
Executive Director

To: Task Force on Integrity in State and Local Government
From: State Ethics Commission
Re: Proposed Legislative and Regulatory Changes
Date: March 20, 2017

At the last Task Force meeting on February 28, 2017, the Task Force requested that the Commission provide (1) a list of proposed changes to Chapters 268A and 268B, and (2) a list of proposed regulations that the Commission would adopt if granted full regulatory authority, with an anticipated time frame within which that work could be completed.

The Commission discussed these requests at its meeting on March 16, 2017, and voted to authorize the Executive Director to provide the Task Force with the materials that follow. A list of potential changes to Chapters 268A and 268B that the Commission requests that the Task Force consider is set forth at pp. 1-8 of this memorandum. The Commission may request that the Task Force consider additional changes to these laws if time permits. A list of areas that the Commission could address if granted full regulatory authority is set forth below at p. 8 of this memorandum. The Commission estimates that at its current level of staffing, the work on these regulations, from commencement to promulgation, would take approximately 18 months to two years.

Potential changes to c. 268A and 268B

1. **C. 268A, Section 1(d): amend definition of "county employee" to exclude members of a charter commission, so that this definition mirrors definition of "municipal employee."**

Statutory language with changes redlined:
Section 1(d): "County employee", a person performing services for or holding an office, position, employment, or membership in a county agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding members of a charter commission.

2. **C. 268A, Section 1(g): amend definition of "municipal employee" to delete "elected" before "members of town meeting," to clarify that all town meeting members, whether elected or not, are not subject to c. 268A.**

Statutory language with change redlined:
Section 1(g): "Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) ~~elected~~ members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.

3. **C. 268A, Section 1: add definition of "regional municipal agency"**

New language:
"Regional municipal agency," any municipal agency of two or more member municipalities. The governing body of a regional municipal agency may designate as a "special municipal employee" any employee of the regional municipal agency who satisfies the criteria for such designation set forth in section one(n) of chapter two hundred and sixty-eight A.

4. **C. 268A, Section 8B: amend to update reference to name of agency.**

Statutory language with changes redlined:
Section 8B. No member of the commonwealth utilities commission, appointed pursuant to section 2 of chapter 25, or the commissioner of the department of public utilities~~telecommunications and cable~~ shall, within one year after his service has ceased or terminated on said commission, be employed by, or lobby said commission on behalf of, any company or regulated industry over which said commission had jurisdiction during the tenure of such member of the commission.

5. **C. 268A, Section 23(b)(3): Amend to better address appearing to favor or disfavor someone**

Statutory language with changes redlined:
Section 23(b). No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know: [subsections 1 and 2 omitted]

(1) Act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence him or unduly enjoy his favor or suffer his disfavor in the performance of his official duties, or that he is likely to act officially or fail to act officially as a result of kinship, rank, position, or undue influence of any party or person. It shall be unreasonable to so conclude if prior to taking official action, or failing to take official action at the time for such action, such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, has disclosed~~discloses~~ in a manner which is public in nature, the facts which would

otherwise lead to such a conclusion and then fairly and impartially performs his official actions and duties; or

6. **C. 268A, section 27: Amend to make requirement of distribution of summaries of the law every two years, rather than every year.**

Statutory language with changes redlined:
Section 27. The commission shall prepare, and update as necessary, summaries of this chapter for state, county, and municipal employees, respectively, which the commission shall publish on its official website. Every state, county and municipal employee shall, within 30 days of becoming such an employee, and ~~on an annual basis~~ every two years in the even numbered years thereafter, be furnished with a summary of this chapter prepared by the commission and sign a written acknowledgment that he has been provided with such a summary. Municipal employees shall be furnished with the summary by, and file an acknowledgment with, the city or town clerk. Appointed state and county employees shall be furnished with the summary by, and file an acknowledgment with, the employee's appointing authority or his designee. Elected state and county employees shall be furnished with the summary by, and file an acknowledgment with, the commission. The commission shall establish procedures for implementing this section and ensuring compliance.

7. **C. 268A, section 28: Amend to make coordinate with requirement of distribution of summaries of the law every two years, so that requirement to complete online training applies in years in which summary is not required to be distributed.**

Statutory language with changes redlined:
Section 28. The state ethics commission shall prepare and update from time to time the following online training programs, which the commission shall publish on its official website: (1) a program which shall provide a general introduction to the requirements of this chapter; and (2) a program which shall provide information on the requirements of this chapter applicable to former state, county, and municipal employees. Every state, county and municipal employee shall, within 30 days after becoming such an employee, and every 2 years in the odd numbered years thereafter, complete the online training program. Upon completion of the online training program, the employee shall provide notice of such completion to be retained for 6 years by the appropriate employer. The commission shall establish procedures for implementing this section and ensuring compliance.

8. **C. 268B, Section 1: definition of "amount": add additional categories of value so that amounts reported on statements of financial interest may be reported more accurately**

Statutory language with changes redlined:
Section 1. "Amount": a category of value, rather than an exact dollar figure, as follows:

greater than $1,000, but not more than $5,000; greater than $5,000 but not more than $10,000; greater than $10,000 but not more than $20,000; greater than $20,000 but not more than $40,000; greater than $40,000 but not more than $60,000; greater than $60,000 but not more than $100,000; greater than $100,000 but not more than $250,000; greater than $250,000 but not more than $500,000; greater than $500,000 but not more than $1,000,000; greater than $1,000,000 but not more than $5,000,000; greater than $5,000,000.

9. C. 268B, Section 1: definition of "major policymaking position": amend to delete reference to out of date statute

Statutory language with changes redlined:
Section 1. "Major policymaking position": the executive or administrative head of a governmental body, all members of the judiciary, any person ~~whose salary equals or exceeds that of a state employee classified in step 1 of job group XXV of the general salary schedule contained in section 46 of chapter 30 and~~ who reports directly to said executive or administrative head, except a person whose duties consist primarily of administrative tasks such as scheduling, record keeping, document handling, word processing and typing, and similar tasks, and~~,~~ the head of each division, bureau or other major administrative unit within such governmental body and persons exercising similar authority.

10. C. 268B, Section 1: definition of "business": expressly exclude some family trusts.

Current statutory language with potential changes redlined:

> Section 1. "Business", any corporation, partnership, sole proprietorship, firm, franchise, association, organization, holding company, joint stock company, receivership, business or real estate trust or any other legal entity organized for profit or charitable purposes, but excluding trusts created solely for the purpose of holding property where the filer, or a family member of the filer, resides.

11. C. 268B, Section 3: amend to give Commission full regulatory authority.

Statutory language with changes redlined:
Section 3. The commission shall:

(a) Prescribe and publish, pursuant to chapter 30A, rules and regulations: (1) to carry out this chapter, including rules governing the conduct or proceedings hereunder; and (2) to carry out chapter 268A, including but not limited to ~~; provided, however, that the rules and regulations shall be limited to providing~~ exemptions from the provisions of ~~sections 3 to 7, inclusive, sections 11 to 14, inclusive, sections 17 to 20, inclusive, and section 23 of~~ said chapter 268A.

12. C. 268B, Section 3(f): amend requirement that all statements of financial interest be inspected to provide that it shall be at discretion of Commission.

Current statutory language with potential changes redlined:

Section 3. The commission shall [subsections (a) through (e) omitted)
(f) develop methods ~~inspect all statements of financial interests filed with the commission in order~~ to ascertain whether any reporting person required to file a statement of financial interests pursuant to section five of this chapter has failed to file such a statement or has filed a deficient statement. If, upon inspection, it is ascertained that a reporting person has failed to file a statement of financial interests, or if it is ascertained that any such statement filed with the commission fails to conform to the requirements of section five of this chapter, then the commission shall, in writing, notify the delinquent; such notice shall states in detail the deficiency and the penalties for failure to file a statement of financial interests.

13. C. 268B, Section 3(j): amend to require designating official to inform public employee who is required to file of that obligation, and to give Commission updated contact information upon filer's departure from agency.

Statutory language with changes redlined:
Section 3. The commission shall [subsections (a) through (i) omitted]
(j) on or before February 1st of each year the executive director of the commission shall request a list of all major policymaking positions for the governmental bodies below from the persons listed below:
(1) the house of representatives, the speaker of the house;
(2) the senate, the president of the senate;
(3) the state secretary's office, the state secretary;
(4) the attorney general's office, the attorney general
(5) the state auditor's office, the state auditor;
(6) the treasurer and receiver's office, the state treasurer;
(7) for each court of the commonwealth, the chief judge of such court;
(8) for each executive office in the commonwealth and all governmental bodies within such executive office, the secretary for such executive office;
(9) the governor's office, the governor;
(10) the lieutenant governor's office, the lieutenant governor;
(11) for each county, the chairman of the county commissioners;
(12) for each authority or other governmental body not covered by clauses one through eleven above, the executive or administrative head of such authority or governmental body; and such persons shall furnish such lists within sixty days. Designating officials shall inform persons designated as holding major policymaking positions that they have been so designated, and are required to file statements of financial interests pursuant to

section five of this chapter, at the time that said lists are furnished to the commission. The executive director may add any position that he determines to be a major policymaking position in such governmental body to such list. Any person aggrieved by such action of the executive director may appeal such action to the commission. Designating officials shall inform the commission when a person who has been so designated leaves state employment, and shall provide contact information for the departing employee to the commission at that time.

14. C. 268B, Section 4(a): amend to eliminate requirement that preliminary investigation be opened upon receipt of sworn complaint.

Statutory language with changes redlined:
Section 4. (a) Upon ~~receipt of a sworn complaint signed under the penalties of perjury, or upon~~ receipt of evidence which is deemed sufficient by the commission, the commission shall initiate a preliminary inquiry into any alleged violation of chapter 268A or 268B. At the commencement of a preliminary inquiry into any such alleged violation, the general counsel shall notify the attorney general in order to avoid overlapping civil and criminal investigations. All commission proceedings and records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry shall be confidential, except that the general counsel may turn over to the attorney general, the United States Attorney or a district attorney of competent jurisdiction evidence which may be used in a criminal proceeding. The general counsel shall notify any person who is the subject of the preliminary inquiry of the existence of such inquiry and the general nature of the alleged violation within 30 days of the commencement of the inquiry.

15. C. 268B, Section 5: amend to (1) require electronic filing, (2) eliminate confusing references to "third degree of consanguinity," and (3) requiring reporting of out of state real estate.

Statutory language with changes redlined:
Section 5. (a) Every candidate for public office shall file a statement of financial interest for the preceding year electronically with the commission on or before the date on which a certificate of nomination or nomination papers for such candidate are submitted to the state secretary. Every candidate for public office who has not filed nomination papers with the state secretary, but on whose behalf a statement of organization of a political committee has been filed with the director of campaign and political finance under section five of chapter fifty-five, and who is seeking public office by the so-called "write in" or "sticker" method, shall within three days after such filing file a statement of financial interests with the commission.
(b) Every public official shall file a statement of financial interests for the preceding calendar year electronically with the commission on or before the last Tuesday in May of the year in which such public official first enters such public office and of each year that such public official holds such office, and on or before May first of the year after such public official leaves such office; provided, however, that no public official shall be required to file a statement of financial interests for the year in which he ceased to be a

public official if he served for less than thirty days in such year.

(c) Every public employee shall file a statement of financial interests for the preceding calendar year electronically with the commission within thirty days after becoming a public employee, on or before May first of each year thereafter that such person is a public employee and on or before May first of the year after such person ceases to be a public employee; provided, however, that no public employee shall be required to file a statement of financial interests for the year in which he ceased to be a public employee if he served less than thirty days in such year.

[subsections d through f omitted]

(g) Reporting persons shall disclose, to the best of their knowledge, the following information for the preceding calendar year, or as of the last day of said year with respect to information required by clauses (2), (3) and (6) below; such persons shall also disclose the same information with respect to their immediate family provided, however, that no amount need be given for such information with regard to the reporting person's immediate family:

[subsections (g)(1) and (2) omitted]

(1) The name and address of each creditor to whom more than one thousand dollars was owed and the original amount, the amount outstanding, the terms of repayment, and the general nature of the security pledged for each such obligation except that the original amount and the amount outstanding need not be reported for a mortgage on the reporting person's primary residence; provided, however, that obligations arising out of retail installment transactions, educational loans, medical and dental expenses, debts incurred in the ordinary course of business, and any obligation to make alimony or support payments, shall not be reported; and provided, further, that such information need not be reported if the creditor is ~~a relative of the reporting person within the third degree of consanguinity or affinity~~ the reporting person's parent, grandparent, great grandparent, child, grandchild, great grandchild, aunt, uncle, sister, brother, niece, nephew, or the spouse of any such relative;

[subsections (g)(4) and (5) omitted]

(6) the description, as appearing on the most recent tax bill, and the amount of assessed value of all real property ~~located within the commonwealth~~, in which a direct or indirect financial interest was held, which has an assessed value greater than one thousand dollars; and, if the property was transferred during the year, the name and address of the person furnishing consideration to the reporting person or receiving it from him in respect to such transfer;

[subsection (g)(7) omitted]

(8) The name and address of any creditor who has forgiven an indebtedness of over one thousand dollars, and the amount forgiven; provided, however, that no such information need be reported if the creditor is a ~~relative within the third degree of consanguinity or affinity of the reporting person, or the spouse of such a relative~~ the reporting person's parent, grandparent, great grandparent, child, grandchild, great grandchild, aunt, uncle, sister, brother, niece, nephew, or the spouse of any such relative;

[subsections (g)(9) and (10) omitted, and two final paragraphs]

The commission may in its discretion exempt individuals from the requirement of filing

electronically in cases where that requirement would cause hardship.

Areas Commission Could Address With Full Regulatory Authority

1. Definition of significant statutory terms that are not currently defined by c. 268A
    a. Acting as agent
    b. Business organization
    c. Financial interest
    d. Financial interest, directly or indirectly, in a contract made by a state, county, or municipal agency
    e. General policy
    f. Partner
    g. Public notice
    h. Otherwise than as provided by law
    i. Similarly situated individuals
    j. Substantial segment
    k. Unwarranted privilege

2. Simplify and explain existing statutory definitions of some terms
    a. Immediate family
    b. Special state, county, and municipal employee
    c. Ministerial
    d. Quasi-judicial

3. Sections 4, 11, 17 (prohibition against acting as agent or attorney):
    a. Provide a plain English explanation of the prohibited conduct, with examples of what is and is not prohibited
    b. Address issues of regional municipal entities

4. Sections 7, 14, 20 (prohibition against having a financial interest in a public contract):
    a. Provide a plain English explanation of the prohibited conduct, with examples of what is and is not prohibited
    b. Address issues of regional municipal entities

5. Section 23(b)(2): provide a plain English explanation of situations in which use of official position is prohibited because it is inherently coercive or abusive

APPENDIX J

Commonwealth of Massachusetts
STATE ETHICS COMMISSION
One Ashburton Place - Room 619
Boston, Massachusetts 02108

Hon. Barbara A. Dortch-Okara (ret.)
Chair

David A. Wilson
Executive Director

To: Task Force on Integrity in State and Local Government
From: State Ethics Commission
Re: Response to Task Force requests
Date: April 25, 2017

The conflict of interest law, G.L. c. 268A, was first enacted more than fifty years ago to eliminate undesirable pressures on public employees and public officials resulting from potentially conflicting influences of private and public interests. The various sections of the law address situations in which public employees may be subjected to such influences to the detriment of their ability to perform their public functions. The law imposes restrictions on acting in such situations to prevent such conflicts of interests, and thereby promote the public's confidence in the integrity of government.

This Task Force is charged with investigating and studying the conflict of interest law, the financial disclosure law, and the regulations of the State Ethics Commission. In addition, Speaker of the House Robert A. DeLeo, who filed the Resolve establishing the Task Force, wrote in support of that Resolve, that the purpose of this examination is to determine whether these laws and regulations "need to be updated, strengthened or clarified to ensure that their prohibitions and restrictions are clear to the tens of thousands of state, municipal and county employees who are subject to the laws." In furtherance of that objective, the Task Force has so far met five times (January 17, February 1, February 15, February 28, and March 21, 2017), and is scheduled to meet again on April 25, 2017.

In the four months since the Task Force was first convened, Commissioners and staff of the State Ethics Commission have devoted considerable time to fully supporting its efforts. The Commission's Executive Director David Wilson and General Counsel Deirdre Roney have attended every Task Force meeting, provided written testimony at each, and responded to questions raised by Task Force members. The Commission's Chair, Hon. Barbara A. Dortch-Okara (ret.), and Vice Chair, Hon. Regina Quinlan (ret.), attended the March 21, 2017 Task Force meeting and answered questions from Task Force members. Over the past four months, in testimony and in written submissions, in addition to describing and explaining the conflict of interest and financial disclosure laws, the Commission and the Commission staff have made numerous recommendations to the Task Force regarding how to update, strengthen and clarify the laws.

The most significant among these recommendations is that the single most important improvement in the conflict of interest law that this Task Force could recommend would be to give the Commission full regulatory authority; that is, authority to issue regulations interpreting the conflict of interest law. With this authority, the Commission would follow an open public process to promulgate accessible and understandable regulations clarifying the restrictions imposed by the sometimes difficult language of the statute. As it has done in the past, the Commission would go well beyond the required public comment and public hearing processes, and would solicit and incorporate in its new regulations ideas from affected stakeholders throughout the Commonwealth. This authority would give the Commission the ability to better serve the public by clarifying the law for stakeholders and making transparent the Commission's interpretation of the statute.

In addition to its request for full regulatory authority, the Commission has provided the Task Force with several recommendations for specific potential changes to the existing language of the statute. On March 20, 2017, the Commission provided a list of recommended statutory changes for the March 21st Task Force meeting. At that meeting, the Task Force requested that the Commission provide any additional recommendations for changes to Chapters 268A and 268B at the April 25, 2017 Task Force meeting. Tabs A and B hereto are provided in response to that request.

Tab A supplements the list of recommended changes that the Commission provided to the Task Force on March 20th, and sets forth three additional potential amendments to c. 268A proposed by the Commission for the Task Force's consideration, including proposed draft language. The first of these changes would amend the statutory definition of "special" municipal employees to require municipalities to provide updated information about positions they have designated as "special" to the Commission. Second, Section 7 would be amended to delete an out-of-date statutory reference. Third, sections 17 and 20 would be amended to address problems specific to employees of regional municipal entities.

At the last Task Force meeting, some Task Force members asked the Commission to identify areas of the law as to which the Commission believes that there are issues that could be addressed by statutory revision, even if the Commission had not yet prepared proposed draft statutory language. Tab B is provided in response to that request.[1]

Tab B lists sections of the law, the values protected by those sections, and issues that have arisen in their interpretation. Inclusion of a section on this list should not be understood as a statement by the Commission that the section is essentially deficient and not the fundamentally sound expression of a vitally important principle of law. The existing statutes were enacted because the restrictions they impose, which were modeled on similar federal provisions, were believed to serve the beneficial purpose of preventing

[1] Tab B includes issues related to Sections 4 and 7 of the law, as requested by Mr. Kennedy. Mr. Kennedy asked if the Commission has any concerns with respect to Section 6 and its prohibition on state legislators participating officially in local property matters in which they have a financial interest as abutters; the Commission is not seeking any change in that prohibition.

public employees from making decisions tainted by conflicts of interest; and they still serve that purpose. This does not mean that all of the statutory restrictions are entirely well expressed or easily understood; they are not. It may be that the current restrictions should be somewhat simplified in order for there to be better public understanding of the law; but this must be done in a thoughtful way that is consistent with, and does not undercut, the values represented by those restrictions. To that end, Tab B includes a statement of the values protected by each indicated section of law. The Commission's hope is that any proposed revisions will be consistent with those values. If the Task Force wishes to give further consideration to any of these issues, the Commission will be happy to assist in drafting statutory language. The Task Force will observe that there is substantial overlap between this list, and the list provided by the Commission to the Task Force on March 20th, of issues that the Commission would address through an open and thoughtful public regulatory process if granted full regulatory authority.

Senator Creem asked the Commission to address whether the Statements of Financial Interests required by G.L. c. 268B, Section 5 should include reporting of Individual Retirement Accounts. The Commission shares Senator Creem's concerns and intends to address them; it does not believe that doing so would require any statutory change.

Representative Dooley asked the Commission to give further consideration to the proposed amendment to G.L. c. 268B, Section 1, which would exclude family trusts from the definition of "business"; the Commission will do so, and will advise the Task Force if there are further changes to the proposed amendment.

Finally, Mr. Kennedy requested that the Commission provide to the Task Force the materials that were before the Commission for consideration at its meeting on January 25, 2017. Attached hereto as Tab C are those materials.

Tab A

Recommended additional changes to C. 268A (Tab A)

1. **C. 268A, Section 1(n): amend definition of "special" employee to include requirement that municipalities provide updated list of specials to Commission.**

Current statutory language with potential changes redlined:

> Section 1(n): "Special municipal employee", a municipal employee who is not a mayor, a member of the board of alderman, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of alderman if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. Each municipality shall inform the State Ethics Commission of positions it has classified as "special" as provided herein within a reasonable time after such classification has been made.

In favor of change: Currently, municipalities are not required to inform the Commission of "special" designations. The Commission, from time-to-time, has reached out to all municipalities to collect this information, but this has not been done on a consistent basis. Consequently, the list of special designations maintained by the Commission is incomplete and inaccurate. This requirement would remove the unnecessary step of having the Commission reach out to the municipalities first in order to obtain this information, and instead require municipalities to provide it automatically. It is helpful not only to the Commission, but also to those under the Commission's jurisdiction, for the Commission to have a complete and accurate list of special designations, because, amongst other things, advice can be provided more accurately. The Commission is currently exploring ways in which this information could be provided electronically to the Commission and made available on the Commission's website, to make the process as easy as possible, and promote transparency of this information.

2. **C. 268A, Section 7: eliminate out of date statutory reference.**

Current statutory language with potential change redlined:

> This section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for the care of mentally ill or mentally retarded persons, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in, or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, ~~and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty,~~ and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

In favor of change: The salary schedule currently referred to in this section of the law is no longer updated, and the out-of-date statutory reference should be eliminated.

3. C. 268A, Sections 17 and 20: revise these sections to address issues specific to employees of regional municipal entities.

Potential new language, to be added at end of current Section 17:

> This section shall not prohibit an employee of a regional municipal agency from serving as a municipal employee in a municipality that is a member of the regional municipal entity and from acting in, and receiving the compensation provided for, such office.

Potential new language, to be added at the end of current Section 20:

> An employee of a regional municipal agency may have a financial interest in a contract with a member municipality, or a contract with the regional municipal agency, if there has been public notice of the employment or contractual opportunity, or that employment or contractual opportunity was created by means of an open competitive process, or he was elected to that additional office or position, and if he files a statement making full disclosure of his interest with the head of the regional municipal agency, and the head of the regional municipal agency approves the exemption of his interest from this section.

In favor of change: Regional municipal employees are considered municipal employees in each municipality that is a member of their regional employer agency, and this creates issues under both Sections 17 and 20 for persons who hold a regional position and a position in one of the member municipalities. The proposed language would address these issues.

Tab B

Tab B to April 25, 2017 Ethics Commission Memo to Task Force
Topics for Possible Further Task Force Consideration

1 **Sections 4, 11, and 17 of c. 268A.** These sections generally prohibit public employees from acting (with or without compensation) on behalf of anyone (the statutes use the terms "acting as agent" and "acting as attorney") other than the level of government (state, county, municipal) by which they are employed, in matters in which their public employer is a party or has a direct and substantial interest. For example, a state employee cannot act on behalf of someone else in a state matter, and a municipal employee cannot act on behalf of someone else in a matter involving that municipality.

a. Values protected by these sections:

i. The law recognizes that public employees may need to deal with public agencies at their own level of government in the performance of their official duties. Thus, the sections do not prohibit acts of agency which are performed in the proper discharge of official duties, and state legislators are permitted to act on behalf of their constituents in dealings with state agencies, but are more limited in what they can do for paying clients.

ii. Other than in situations in which a public employee's job requires him to interact with other public agencies at the same level of government, these sections of the law prohibit public employees from assisting private interests in matters involving the level of government which they serve. The basic idea is that public employees should not be allowed to use the influence from their public positions for the benefit of their private connections. In short, where a public employee's employing level of government has an interest in a matter, the public employee normally must remain on the public employer's side and not have divided loyalties.

iii. Confidence in government is undermined if public officials use or are perceived to use their official prestige and influence on behalf of private persons or entities in government matters.

iv. Public employees often have official and/or informal influence or involvement with public agencies other than the ones that employ them. This is unquestionably true when the public employee's official role gives him or her power over other public agencies, such as the power to make funding decisions, appointments, and changes to governing legal requirements. These sections of the law recognize this reality by extending their prohibitions to all matters at the same level of government, whether or not a particular public employee has any contact with, or responsibility for, any matter at another agency, unless the public employee's official duties require such contact.

v. The law also recognizes that these restrictions should be more narrowly applicable to persons serving a public agency on an unpaid volunteer or part-time paid basis, through the mechanism of "special" public employees. "Special" public employees are subject to these restrictions only as to matters in which they have participated in their public roles, or

which are under their official responsibility in their public roles, or (in some cases) which are pending in their public agencies.

b. Issues arising from these sections that could be addressed by statutory revision:

i. These restrictions are not limited to acting on behalf of others for compensation; they also apply to any uncompensated actions on behalf of another. In addition, they are not limited to situations in which a public employee actually has some ability to influence another public agency. The argument can be made that the law should not prevent a public employee from assisting someone else in dealing with another government agency of their same level of government, when this is done without compensation, and when there is no reason to think that the public employee or his employing agency has any particular influence over the other government agency.

ii. Any change to these sections of the law should be limited to permitting uncompensated actions. Also, any such change should continue to prohibit public employees at all levels from acting on behalf of others in matters before agencies over which the public employee has power or influence because of his public position.

iii. Any change to these sections of the law should retain the existing exemption allowing public employee to represent family members and certain others in specified circumstances.

iv. There should be no change in the current statutory provisions allowing state legislators to represent constituents in dealings with state agencies, but limiting the situations in which state legislators may represent paying clients before state agencies.

2 **Sections 7, 14, and 20 of c. 268A.** These sections generally prohibit public employees from having a known direct or indirect financial interest in a contract with their employing level of government. For example, a state employee cannot have a financial interest in a state contract, and a municipal employee cannot have a financial interest in a contract with that municipality.

a. Values protected by these sections:

i. These sections of the law generally prohibit public employees from having financial interests in public contracts. The basic idea is to prevent the possibility that public employees will have an "inside track" for new public contracts because of their positions and will seek to enrich themselves by using their knowledge and connections to obtain and enter into public contracts that advance their own pecuniary interests.

ii. These sections protect the public interest from government action which might result, or appear to result, from the influence of an insider. Even if a public employee had no role in creating an opportunity or position, the employee, as a government insider, may have an unfair advantage in obtaining the opportunity or position, to the detriment of others interested in obtaining the public contract.

iii. Confidence in government is undermined if public employees have or are perceived to have an inside track to public opportunities, giving the impression that "it's who you know that matters."
iv. The law recognizes that the danger that a public employee will use his or her position to enter into advantageous public contracts is greater when the public employee has more power or influence because of his or her position.
v. These sections also guard against public employees having a financial stake in government business in excess of the compensation they receive for their public employment, a situation which could lead to an undesirable intermingling of private and public interests and potentially raise issues under other sections of the conflict of interest law, e.g. sections 6, 13, 19 and 23(b).

b. Issues arising from these sections that could be addressed by statutory revision:

i. These sections of the law apply very broadly:
   1. Not just direct but indirect financial interests in public contracts are prohibited;
   2. Not just acquiring such an interest but having them is prohibited – this means that the statutes prohibit public employees from having financial interests in contracts that exist prior to their taking their current position; the most recent regulation promulgated by the Commission addresses this for pre-existing non-employment contracts, but does not cover pre-existing employment contracts;
   3. The word "contract" has been given a broad reading by the Commission that covers all types of employment arrangements as well as other contractual arrangements; and
   4. The definitions of state, county, and municipal employees are quite broad, so these restrictions cover not just full-time regular employees, but also volunteers and key employees under government contracts (which means most contracts for professional services), although these sections apply less restrictively to such non-regular employees. As the result of the breadth of these prohibitions, the statutes themselves include numerous exemptions that have been added over time, and the Commission has also created numerous exemptions by regulations.

ii. These sections of the law cover many situations in which public employees seek second jobs with the same public employer. The Commission has created some specific exemptions in this area, such as the exemption that permits state employees to take second jobs providing services to state agency clients (example: DDS worker who wants to take second job providing in home services to DDS clients on weekends).
iii. These sections of the law could be revised to make it easier for public employees to take second positions with agencies other than their own. Another revision worthy of consideration would be defining a minimum level of financial interest in a public contract beneath which the statutory

restrictions would not apply. However, the current greater level of restriction on positions with greater power should be maintained, to avoid undermining the values protected by these sections of the law.

3 **Section 1(m, n, o) of c. 268A (definition of "special" public employees).**

a. Values protected by these sections:

i. The conflict of interest law distinguishes regular, full-time public employees from "special" public employees, who in general are volunteer or part-time, and imposes fewer restrictions on "special" public employees in some respects. The statute defines "special" state, county, and municipal employees.

ii. It is useful to distinguish regular public employees from those who are volunteers or part-time. The relaxed restrictions on the latter make it easier for them to do business in or with their level of government and enable the government to take advantage of the special expertise of private parties that may not exist among public employees. This is particularly important at the municipal level, where many positions are volunteer or part-time, and where it might be difficult to fill such positions if the restrictions applicable to full-time employees applied to those part-time or volunteer positions.

b. Issues arising from these sections that could be addressed by statutory revision:

i. The current statutory definitions of "special" public employees include the phrase "in fact does not earn compensation . . . for an aggregate of more than eight hundred hours during the preceding three hundred and sixty five days." This definition is hard to understand and can be difficult to apply. An easier to apply definition of a special municipal employee would be for a position that is half time or less.

ii. The current statutory definitions of special state and county employees require that the terms of employment be filed with the State Ethics Commission, which is laborious for the employees and the Commission.

iii. The current statutory definition of a special municipal employee allows each municipality to decide whether or not to designate as "special" positions that meet stated criteria. In effect, this means that each municipality in the Commonwealth has its own unique list of special positions, and consequently, the law applies differently in every municipality. It is worth considering making special municipal employee status automatic when the stated criteria are met, as is already the case with special state and special county municipal employees. In other words, the requirement that a position can only be a "special" municipal position if so designated by the municipality would be eliminated. The value of local control could be protected by permitting municipalities to opt out of such automatic status.

4 **Section 1 of c. 268A.** The conflict of interest law uses the following statutory terms, but does not specifically define them: "acting as agent," "business organization," "financial

interest," "public notice," "as provided by law," and "similarly situated individuals." The Commission has arrived at definitions of all these terms in giving advice under the law, and adjudicating claims that the law was violated. It would increase transparency if the definitions were incorporated into the statute; this could also be done by regulation, if the Commission were given full regulatory authority. The Commission proposes the following draft definitions:

"Acting as agent", to represent or communicate or act on behalf of someone else by any means, including speaking on behalf of someone else, attending a meeting on behalf of someone else, signing a letter or other document on behalf of someone else, certifying a plan or other document that will be submitted on behalf of someone else; and communicating in person or in writing in any medium on behalf of someone else.

"Business organization", an entity that substantially engages in business activities, such as selling goods or providing services in exchange for fees or other payments.

"Financial interests", any anticipated gain or loss, of any size, with respect to money, anything of value, or any economic benefit, that is direct and immediate, or reasonably foreseeable.

"Public notice," written notice of an opportunity that is sufficient in the circumstances to make the general public aware of an opportunity to provide goods to, or paid work for, a public employer, and sufficient time to respond to that opportunity, including but not limited to advertisement in a newspaper of general circulation or multiple public postings in public offices and on public websites.

"As provided by law", expressly authorized by statute, regulation, ordinance, by-law, or court decision.

"Similarly situated individuals", individuals who are alike in all ways relevant in the particular situation for purposes of lawful entitlement to a privilege or exemption.

5 **Sections 1(e) and 6B of c. 268A, definitions of family.** Section 1(e) defines the term "immediate family," for purposes of the statutory prohibition against participating in a particular matter in which an immediate family member has a financial interest, as including "the employee and his spouse, and their parents, children, brothers and sisters." The disclosure requirement in Section 6B requires disclosure by applicants for state employment if any of the following family members is a state employee: "spouse, parent, child or sibling or the spouse of the candidate's parent, child or sibling." This definition differs from the Section 1(e) definition in that it does not include the applicant's spouse's parents, children, or siblings; but does include step-parents, children-in-law, and all siblings-in-law. It is confusing to some to have what are, in effect, two different definitions of family in the conflict of interest law. Ideally, the same definition would apply throughout.

6 **Section 23(c) of c. 268A.**

a. Values protected by these sections:

i. This section prohibits disclosure of confidential information learned by a public employee in the context of public employment.

b. Issues arising from these sections that could be addressed by statutory revision:

i. It is unclear from the current statutory language whether the prohibition applies only in situations in which someone discloses an actual public record (more restrictive reading), or whether it also applies if someone discloses information contained in a public record, but does not disclose the public record itself (more expansive reading). For example, if a public board member orally discloses protected health information about an agency employee that was discussed in an executive session of the board, but does not disclose the document that contains that information, has the statute been violated? This should be clarified and strengthened, such that such a disclosure would be prohibited.

ii. Currently, the statute prohibits disclosure of materials that are exempt from public records disclosure, but there are other statutes that impose confidentiality requirements; should these also be subject to a sanction under this section if disclosed?

7 **Section 3(d) of c. 268B.** This section specifies how the Commission should respond to requests for Statements of Financial Interest (SFIs). In particular, it provides that, in responding to such a request, the Commission may redact the filer's home address. However, subsequent to the enactment of this section, the Public Records Law was amended to require protection also of the names of public employees' family members, their home addresses, and their telephone numbers. The Commission also redacts this information when responding to requests for SFIs, and this interpretation has been upheld by the Supervisor of Public Records. The statutory language should reflect this interpretation.

Tab C

Potential changes to c. 268A and 268B
Items for further discussion

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1. **C. 268A, Section 1(m), (n), (o): amend definitions of "special" employees**

Current statutory language with potential changes redlined:

Section 1(m): "Special county employee", a county employee who is performing services or holding an office, position, employment, or membership for which no compensation is provided; or who is not an elected official and (1) occupies a position which, by its classification in the county agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, ~~provided that disclosure of such classification or permission is filed in writing with the State Ethics Commission and the office of the county commissioners prior to the commencement of any personal or private employment,~~ or (2) ~~in fact does not earn compensation as a county employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.~~ is part time or less. ~~For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day.~~ A special county employee shall be in such a status on days for which he is not compensated as well as days on which he earns compensation.

Section 1(n): "Special municipal employee", a municipal employee who is not a mayor, a member of the board of alderman, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons ~~and whose position has been expressly classified by the city council, or board of alderman if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter~~; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or ~~unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.~~ is part time or less. ~~For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day.~~ A special municipal employee shall be in such status on days for which he is not compensated as

well as days on which he earns compensation. ~~All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception.~~

Section 1(o): "Special state employee", a state employee"

(1) Who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) Who is not an elected official and

a. Occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, ~~provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment~~, or

b. ~~In fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days.~~ Is part time or less. ~~For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day.~~ A special state employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation.

2. C. 268A, Section 1(n): amend definitions of "special" employee, alternate version

Current statutory language with potential changes redlined:

Section 1(n): "Special municipal employee", a municipal employee who is not a mayor, a member of the board of alderman, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of alderman if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a "special municipal employee" unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as days on which he earns compensation. All employees of any city or town wherein no such classification has been made shall be deemed to be "municipal employees" and shall be subject to all the provisions of this chapter with respect thereto without exception. Annually, each municipality shall inform the State Ethics Commission of positions it has classified as "special" as provided herein.

Potential changes to c. 268A and 268B
Items for further discussion

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1. C. 268A, Section 4: substantial redraft

Current statutory language:

Section 4. (a) No state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.
Whoever violates any provision of this section shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

Neither a member of the general court nor a member of the executive council shall be subject to paragraphs (a) or (c). However, no member of the general court or executive council shall personally appear for any compensation other than his legislative or executive council salary before any state agency, unless:

(1) The particular matter before the state agency is ministerial in nature; or
(2) The appearance is before a court of the commonwealth; or
(3) The appearance is in a quasi-judicial proceeding.

For the purposes of this paragraph, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:

(1) The action of the state agency is adjudicatory in nature; and
(2) The action of the state agency is appealable to the courts; and
(3) Both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

A special state employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days. This section shall not prevent a state employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a state employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the state official responsible for appointment to his position approves. This section shall not prevent a present or former special state employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the commonwealth; provided, that the head of the special state employee's department or agency has certified in writing that the interest of the commonwealth requires such aid or assistance and the certification as been filed with the state ethics commission.

This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt. This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

This section shall not prevent a state employee, other than an employee in the department of revenue, from requesting or receiving compensation from anyone other than the commonwealth in relation to the filing or amending of state tax returns.

Potential new statutory language:

Section 4. A state employee may not (a) communicate with the agency in which he or she is serving on behalf of anyone other than the Commonwealth, or (b) be paid by anyone other than the Commonwealth in connection with any particular matter (1) in which he or she has participated as a state employee, or (2) which is or within one year has been a subject of his or her official responsibility, or (3) which is pending in the state agency in which he or she is serving. This section shall not prohibit a state employee from holding a municipal or county office or position or from receiving the compensation provided for such office; such a state employee may not, in his or her municipal or county role, vote or act on any particular matter which is under the responsibility of the state agency in which he or she serves. Whoever violates this section shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

2. C. 268A, Section 4: alternate version

Current statutory language with potential changes redlined:

Section 4. (a) No state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.

(b) No person shall knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly give, promise or offer such compensation.

(c) No state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest. However, a state

employee may appear before a state agency other than the agency he serves in a ministerial matter.

Whoever violates any provision of this section shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

Neither a member of the general court nor a member of the executive council shall be subject to paragraphs (a) or (c). However, no member of the general court or executive council shall personally appear for any compensation other than his legislative or executive council salary, or for any paying client of himself or his employer whether compensated for that specific appearance or not, before any state agency, unless:

(4) The particular matter before the state agency is ministerial in nature; or
(5) The appearance is before a court of the commonwealth; or
(6) The appearance is in a quasi-judicial proceeding.

For the purposes of this paragraph, a matter is "ministerial" if it involves acting pursuant to someone else's direction without exercising one's own judgment; ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:

(4) The action of the state agency is adjudicatory in nature; and
(5) The action of the state agency is appealable to the courts; and
(6) Both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

A special state employee shall be subject to paragraphs (a) and (c) only in relation to a particular matter (a) in which he has at any time participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending in the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves on no more than sixty days during any period of three hundred and sixty-five consecutive days. This section shall not prevent a state employee from taking uncompensated action, not inconsistent with the faithful performance of his duties, to aid or assist any person who is the subject of disciplinary or other personnel administration proceedings with respect to those proceedings.

This section shall not prevent a state employee, including a special employee, from acting, with or without compensation, as agent or attorney for or otherwise aiding or assisting members of his immediate family or any person for whom he is serving as guardian, executor, administrator, trustee or other personal fiduciary except in those matters in which he has participated or which are the subject of his official responsibility; provided, that the state official responsible for appointment to his position approves.
This section shall not prevent a present or former special state employee from aiding or assisting another person for compensation in the performance of work under a contract with or for the benefit of the commonwealth; provided, that the head of the special state employee's department or agency has certified in writing that the interest of the commonwealth requires such aid or assistance and the certification as been filed with the state ethics commission.

This section shall not prevent a state employee from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.
This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

This section shall not prevent a state employee, other than an employee in the department of revenue, from requesting or receiving compensation from anyone other than the commonwealth in relation to the filing or amending of state tax returns.

Potential changes to c. 268A and 268B
Items for further discussion

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1. C. 268A, Section 7: substantial redraft

Current statutory language:

Section 7. A state employee who has a financial interest, directly or indirectly, in a contract made by a state agency, in which the commonwealth or a state agency is an interested party, of which interest he has knowledge or has reason to know, shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

This section shall not apply if such financial interest consists of the ownership of less than one per cent of the stock of a corporation.

This section shall not apply (a) to a state employee who in good faith and within thirty days after he learns of an actual or prospective violation of this section makes full disclosure of his financial interest to the contracting agency and terminates or disposes of the interest, or (b) to a state employee other than a member of the general court who is not employed by the contracting agency or an agency which regulates the activities of the contracting agency and who does not participate in or have official responsibility for any of the activities of the contracting agency, if the contract is made after public notice or where applicable, through competitive bidding, and if the state employee files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, and if in the case of a contract for personal services (1) the services will be provided outside the normal working hours of the state employee, (2) the services are not required as part of the state employee's regular duties, the employee is compensated for not more than five hundred hours during a calendar year, and (3) the head of the contracting agency makes and files with the state ethics commission a written certification that no employee of that agency is available to perform those services as a part of their regular duties, or (c) to the interest of a member of the general court in a contract made by an agency other than the general court or either branch thereof, if his direct and indirect interests and those of his immediate family in the corporation or other commercial entity with which the contract is made do not in the aggregate amount to ten per cent of the total proprietary interests therein, and the contract is made through competitive bidding and he files with the state ethics commission a statement making full disclosure of his interest and interests of his immediate family or (d) to a special state employee who does not participate in or have official responsibility

for any of the activities of the contracting agency and who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, or (e) to a special state employee who files with the state ethics commission a statement making full disclosure of his interest and the interests of his immediate family in the contract, if the governor with the advice and consent of the executive council exempts him.

This section shall not apply to a state employee who provides services or furnishes supplies, goods and materials to a recipient of public assistance, provided that such services or such supplies, goods and materials are provided in accordance with a schedule of charges promulgated by the department of transitional assistance or the division of health care policy and finance and provided, further, that such recipient has the right under law to choose and in fact does choose the person or firm that will provide such services or furnish such supplies, goods and materials.

This section shall not prohibit a state employee from teaching or performing other related duties in an educational institution of the commonwealth; provided, that such employee does not participate in, or have official responsibility for, the financial management of such educational institution; and provided, further, that such employee is so employed on a part-time basis. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

This section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for the care of mentally ill or mentally retarded persons, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in, or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forth-six of chapter thirty, and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

This section shall not preclude an officer or employee of the Massachusetts Port Authority from eligibility for any residential sound insulation program or the bayswater environmental program provided that the officer or employee has no responsibility for the administration for that program from which he is to receive the benefit.

Potential new statutory language:

> Section 7. A state employee may not acquire an additional compensated office or position with, or perform work under a contract with, or enter into or otherwise acquire a financial interest in a contract with, the executive office or agency which he serves, or an executive office or agency in the activities of which he participates or for which he is responsible, unless there has been public notice of the employment or contractual opportunity, or that employment or contractual opportunity was created by means of an open competitive process, or he was elected to that additional office or position. A state employee who acquires an additional compensated state position or office, or contractual opportunity with the state, pursuant to this section, shall be required by his or her appointing authority to disclose his or her other state offices, positions and contracts in writing at the time of appointment. A state employee who violates this section shall be punished by a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both.

2. C. 268A, Section 7: alternate version

Current statutory language with potential change redlined:

> This section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for the care of mentally ill or mentally retarded persons, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in, or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, ~~and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forth-six of chapter thirty,~~ and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

APPENDIX K

Task Force on Integrity in State and Local Government
Testimony of Peter Sturges, Chairman, Common Cause Massachusetts
Tuesday, April 25, 2017

Senator Creem, Representative Markey and members of the Task Force on Integrity in State and Local Government (the "Task Force"), thank you for your work over the past several months on this task force. Thank you, as well, for giving me the opportunity to testify today. I also want to commend Speaker DeLeo and President Rosenberg for establishing this Task Force to review the conflict of interest and financial disclosure law, G.L. c. 268A and 268B, in order to strengthen and clarify these laws.

My name is Peter Sturges. I am here to testify on behalf of Common Cause Massachusetts and currently serve as its chairman. As you may know, I was also the executive director of the State Ethics Commission from 2000 to 2007 and served on the Governor Patrick's Task Force on Ethics, along with task force member Pam Wilmot, the executive director of Common Cause Massachusetts. The Governor's task force proposed a number of significant changes to the conflict of interest and financial disclosure laws, most of which were enacted as Chapter 28 of the Acts of 2009, that helped to strengthen and clarify these laws. It is my hope that this task force will further that effort significantly.

Attached to my testimony are specific statutory proposals that Common Cause Massachusetts is recommending to the conflict of interest and financial disclosure laws. We believe that these changes will help achieve the goal of this task force. Along with each statutory recommendation, we've included a brief comment explaining our reasons for the specific proposal.

Full Regulatory Authority: No other reform would accomplish more to implement the Task Force's goal of clarifying and strengthening the conflict of interest law. This change would amend section 3 of chapter 268B, which establishes the State Ethics Commission and currently provides the Commission with full regulatory authority to carry out the financial disclosure law but only partial regulatory authority to create exemptions to the conflict of interest law. This proposal would substantially strengthen

the conflict of interest law by giving the Commission full authority to issue regulations to carry out the purposes of the conflict of interest law. Frankly, in our view, such authority is essential for any ethics agency to have to be effective.

As members of the Task Force, along with the Commission's Executive Director David Wilson and its General Counsel Deidre Roney, have noted on a number of occasions during the Task Force's hearing, full regulatory authority would make it possible for the Commission to engage in a public rulemaking process to codify, and simplify, existing precedent. Because regulations are by their nature written in more straightforward language, they would help clarify and simplify the law. Similarly, because the regulatory process would be public, it would provide an opportunity to promote public understanding and acceptance of the Commission and the conflict of interest law. Indeed, granting the Commission full regulatory authority is, perhaps, the single most significant change that the Task Force could make to strengthen and clarify the conflict of interest law.

When amending the statute to provide for full regulatory authority, however, it is critical that the specific language currently granting the power to create exemptions not be deleted. This is because the power to carry out the purposes of the conflict of interest law likely does not include to ability to create exemptions. Hence, a Court might well conclude that its deletion was intended to remove this authority. This would be an extraordinary mistake in view of the way this power has made it possible for the Commission to address some significant shortfalls in a conflict of interest law.

Disclosure: As has been discussed during the Task Force's hearings, appointed public employees file conflict of interest disclosures with their appointing authority while elected public employees file such disclosures in a manner that is public in nature. As a result, disclosure filed by appointed public employees are filed throughout the Commonwealth and in many different locations in municipalities without any required consistency. Similarly, this is true for elected officials who are required to file such

disclosures in a manner that is public in nature. State legislators, for example, may file such disclosures with the Commission, the Senate or House clerk, or, arguably, just keep them available for inspection in their offices. As a result of the current law and practice, gaining access to disclosures is not easy. Common Cause Massachusetts believes that conflict of interest disclosures, like campaign finance disclosures, should be readily available online and easily searchable. Our proposal would provide for such disclosure. At the same time, our proposal would also clarify an apparent conflict between the existing disclosure law and the public records law.

Like conflict of interest disclosures, Statement of Financial Interests or SFI's filed pursuant to the financial disclosure law are also not easily accessible. In the SFI case, this is true for two reasons. First, a person requesting a copy of an SFI, that is, the requester, must make a request in writing and must provide identification. Next, after receiving the request, the Commission must notify the filer. It is a burdensome two-step process that for some also creates a chilling effect. The proposed changes would make SFI disclosures accessible online to anyone and without identification.

We recognize that our proposals for direct online filing and disclosure would require some initial funding. In the long term, however, we believe that it would significantly reduce costs, such as staff time and materials, at the state and local government. This is because there would be no time or personal required to file, copy or, if mandated by statute, redact disclosures or take other actions to make them available to the public.

I'd like to address briefly three other issues.

Substantial Value: Some years ago, the Commission drafted regulations that provided that no disclosure was required for gifts of less than substantial value, that is, $50.00. The Commission then changed the regulation so that a determination whether disclosure is required has to be made for any gift regardless of amount. We find this

impractical and believe that many others see this as an over-reach by the Commission. Moreover, the impact of an ethics provision that most perceive as overly broad actually ends up undercutting respect for the law and the agency that must advise and enforce it. Further, to my knowledge, the Commission has never, and I can't imagine that it ever would, prosecute a case involving a gift of less than substantial value.

Municipal Private Right of Action: Prior to 2009, Section 21(a) along with its counterparts for state and county government, sections 9(a) and 15(a), respectively were interpreted by the Supreme Judicial Court as providing a private right of action. See Everett Town Taxi v. Aldermen of Everett, 366 Mass. 534 (1974). In 2009, the Legislature amended section 9(a) only. The amendment was subsequently interpreted by the SJC as removing this private right of action. See Leder v. Superintendent of Schools of Concord & Concord-Carlisle Regional School District, et. al., 465 Mass. 305 (2013). Although the provision is not used often, we believe it important that the conflict of interest law provide a private right of action for alleged violations at all levels of government.

Statement of Financial Interests - Statutory Amounts: This change is similar to the proposals that the Commission and Common Cause have made in the past. Its purpose is simply to bring the SFI category amounts up to date. It does this in two ways. First, it simplifies reporting by compressing the current values into fewer categories, e.g. $1,000 to $10,000 instead of $5,000. Second, it adds categories between $100,000 and $5,000,000. Common Cause has supported this change in the past continues to do so.

Again, thank you for the opportunity to testify today on behalf of Common Cause Massachusetts.

2017 Task Force on Integrity – CCMA Recommendations

I. G.L. c. 268A - Conflict of Interest Law

(1) Full Regulatory Authority

Section 3. The commission shall:

(a) Prescribe and publish, pursuant to chapter 30A, rules and regulations: (1) to carry out this chapter, including rules governing the conduct or proceedings hereunder; and (2) to carry out chapter 268A; including ~~provided, however, that the~~ rules and regulations ~~shall be limited to~~ providing exemptions from the provisions of section 3 to 7, inclusive, sections 11 to 14, inclusive, sections 17 to 20, inclusive, and section 23 of said chapter 268A.

Comment: This change amends section 3 of chapter 268B. It is included here because it relates solely to chapter 268A, the conflict of interest law. It would give the Commission authority to issue regulations to carry out the purposes of the conflict of interest law, an authority that any ethics agency must have to be effective. It is also one of the stated reasons for the Task Force. The specific language granting the power to create exemptions must not be deleted. The power to carry out the purposes of the statute does not include to ability to create exemptions and there is no reason to delete the provision in any case.

(2) Gifts of Less than Substantial Value – No Disclosure Required

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude (a) if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion or (b) such officer or employee's action involves the accepting of an unsolicited gift that is not of substantial value; or

Comment: Some years ago, the Commission drafted regulations that provided that no disclosure was required for gifts of less than substantial value, i.e. $50.00. The Commission then changed the regulation so that a "reasonable person/appearance" determination has to be made for any gift regardless of amount. We find this impractical and many find it an over-reach, which actually ends up undercutting respect for the Commission and the law. Moreover, the Commission has never, and we can't imagine that it ever would, prosecute a case involving a gift of less than substantial value.

(3) Online Disclosure

Section 30. The commission shall develop an electronic reporting system for the submission, retrieval, storage and public disclosure of all disclosures required to be filed pursuant to this chapter. Once such electronic reporting system has been developed, all disclosures required to by filed by this chapter shall be filed electronically in accordance with regulations adopted by the commission. Such regulations shall provide that appointing authorities will receive notification of any electronically filed disclosure prior to such disclosures being made available to the public if such disclosure is required to be filed with an appointing authority. Such regulations shall provide that appointing authorities may withhold or redact materials or data within such disclosures that fall within the exemptions to the definition of public records in subparagraphs (a) through (u), inclusive, of section 7(26) of chapter 4 of the General Laws.

Comment: Appointed public employees file conflict of interest disclosures with their appointing authority while elected public employees file such disclosures in a manner that is public in nature. Legislators, for example, could file such disclosures with the Commission, the Senate or House clerk, or, arguably, just keep them available for inspection in their offices. In any case, accessing these disclosures is not easy. Conflict of interest disclosures, like campaign finance activity, should be readily available online and easily searchable. The first sentence of the proposed language tracks the language from the campaign finance law.

(4) Restore Municipal Private Right of Action

Section 21. (a) In addition to any other remedies provided by law, ~~a finding by the commission pursuant to an adjudicatory proceeding that there has been~~ any violation of sections 2, 3, 8, 17 to 20, inclusive, or section 23, which has substantially influenced the action taken by any municipal agency in any particular matter, shall be grounds for avoiding, rescinding or canceling the action of said municipal agency ~~upon request by said municipal agency~~ on such terms as the interests of the municipality and innocent third persons shall require.

Comment: Prior to 2009, Section 21(a) along with its counterparts for state and county government, sections 9(a) and 15(a), respectively was interpreted by the SJC as providing a private right of action. See Everett Town Taxi v. Aldermen of Everett, 366 Mass. 534 (1974). In 2009, the Legislature amended section 9(a) only. The amendment was interpreted by the SJC as removing this private right of action. See Leder v. Superintendent of Schools of Concord & Concord-Carlisle Regional School District, et. al., 465 Mass. 305 (2013). Although the provision is not used often, We believe it important for the conflict of interest law to provide a private right of action for alleged violations at all levels of government.

II. G.L. c. 268B – Financial Disclosure Law

Full Regulatory Authority – See (1) above.

SFI Categories

Section 1. "Amount": a category of value, rather than an exact dollar figure, as follows: greater than $1,000, but not more than $10,000; greater than $10,000 but not more than $50,000; greater than $50,000 but not more than $100,000; greater than $100,000 but not more than $250,000; greater than $250,000 but not more than $500,000; greater than $500,000 but not more than $1,000,000; greater than $1,000,000 but not more that $5,000,000; greater than $5,000,000.

Comment: This change brings the SFI category amounts up to date. It does this in two ways. First, it compresses the current values into fewer categories, e.g. $1,000 to $10,000 instead of $5,000. Second, it adds categories between $100,000 and $5,000,000, as does the Commission staff's recommendations. Common Cause has supported this change in the past.

SFI Online Disclosure

Section 3. The commission shall . . . . (d) make statements and reports filed with the commission available for public inspection and copying during regular office hours upon the written request of any individual ~~who provides identification acceptable to the commission, including his affiliation, if any~~, at a charge not to exceed the actual administrative and material costs required in reproducing said statements and reports; provided, however, that the commission shall be authorized, in its discretion, to exempt from public disclosure those portions of a statement of financial interest filed pursuant to section 5 which contain the home address of the filer; ~~and provided, further, that the commission shall forward a copy of said request to the person whose statement has been examined;~~

Section 5. (a) Every candidate for public office shall file a statement of financial interest for the preceding year electronically . . .

(b) Every public official shall file a statement of financial interest for the preceding year electronically . . .

(c) Every public employee shall file a statement of financial interest for the preceding year electronically . . .

The commission may in its discretion exempt individual form the requirement of filing electronically in cases where that requirement would cause hardship.

(f) The commission shall develop an electronic reporting system for the submission, retrieval, storage and public disclosure of all statements of financial interests required to be filed pursuant to this chapter. Such statements shall be signed under the penalty of perjury by the report person. ~~The statement of financial interests filed pursuant to the provisions of this section shall be on a form prescribed by the commission and shall be signed under penalty of perjury by the reporting person.~~

Comment: SFI's are not easily accessible for two reasons. First, a person requesting a copy of an SFI, the requester, must make a request in writing and must provide identification. Next, after receiving the request, the Commission must notify the filer. It is burdensome two-step process that for some also creates a chilling effect. The proposed changes would make SFI disclosures accessible online to anyone without identification. As with the proposal for conflict of interest disclosures, the first sentence of paragraph (f) tracks the language of the campaign finance law.

Major Policy Making Positions

Section 1. "**Major policymaking position**": the executive or administrative head of a governmental body, all members of the judiciary, any person ~~whose salary equals or exceeds that of a state employee classified in step 1 of job group XXV of the general salary schedule contained in section 46 of chapter 30 and~~ who reports directly to said executive or administrative head, except a person whose duties consist primarily of administrative tasks such as scheduling, record keeping, document handling, word processing and typing, and similar tasks, and, the head of each division, bureau or other major administrative unit within such governmental body and persons exercising similar authority.

Comment: This change, which is supported by the Commission, removes an outdated statutory salary reference and would exempt certain clerical or administrative personnel from filing SFIs because they happen to work for an administrative head.

APPENDIX L

The Commonwealth of Massachusetts
MASSACHUSETTS SENATE
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May 12, 2017

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Massachusetts State Ethics Commission
One Ashburton Place, Room 619
Boston, MA 02108

Dear Mr. Wilson:

I respectfully submit for your consideration the following questions related to the filing of Statements of Financial Interest as required under Section 5 of Chapter 269B:

1. Currently paragraph (g) (2) of said section 5 requires the reporting of – as of the last day of the year – "the identity of all securities and other investments with a fair market value of greater than one thousand dollars which were beneficially owned, not otherwise reportable..." It is my understanding that current policy exempts securities or investments that are held in Individual Retirement Accounts (IRAs).

   As most IRAs are self-directed and make up a large portion of many filers investment portfolios would the inclusion of such investments in the SFI report better support the intent of this section?

2. Within the same section, the annual reporting of securities and other investments is currently limited to only those that are held by the filer as of the last day of the calendar year. By limiting reporting in this way it seems to raise the possibility of avoiding the disclosure of securities or other investments, which have not been reported in previous filings, by disposing of them during the course of the year.

   In order to capture those holdings that do not appear in a prior year's filing, or in the current year's filing due to the fact that they were disposed of during the course of the year, should consideration be given to adding to the current reporting requirements a provision which also includes the reporting of all securities or other investments that were sold or otherwise disposed of during the year that were not included in the prior year's SFI report?

Thank you for your efforts and consideration of these matters. Please feel free to contact me should you have any questions on this issue.

Sincerely,

Cynthia S. Creem
State Senator

APPENDIX M

The Task Force on Integrity in State and Local Government

May 12, 2017

Recommendations to the Task Force by:

HON. CHRISTOPHER M. MARKEY
Co-Chair
State Representative
9th Bristol District

HON. PETER V. KOCOT
Co-Chair
State Representative
1st Hampshire District

JAMES C. KENNEDY
Member
Chief Legal Counsel to
the House of Representatives

Introduction

The Task Force on Integrity in State and Local Government, established by Chapter 4 of the Resolves of 2016, has been tasked with reviewing the existing legal and regulatory framework governing the conduct of all public employees. To this end, the Task Force has conducted seven public hearings to date, at which we have received testimony regarding the Conflict of Interest Law (G.L. c. 268A), the Financial Disclosure Law (G.L. c. 268B), and the regulations of the State Ethics Commission (or the Commission). We have received assorted testimony from the Massachusetts Gaming Commission, Massachusetts Peace Action, Ms. Susan Lucas, Representative Kenneth Gordon, Representative Jay Livingstone; comprehensive testimony on the status of the law from the Executive Director and General Counsel of the State Ethics Commission, Mr. David Wilson and Ms. Deirdre Roney; and testimony from two Commissioners of the State Ethics Commission, the Honorable Barbara A. Dortch-Okara, Chair, and the Honorable Regina L. Quinlan, Vice-Chair.

We have also received proposed statutory and regulatory changes from the State Ethics Commission; some of which are Commission-approved, formal proposals, and some of which have only been proposed by staff of the Ethics Commission at this time for consideration.

Over the course of the last four months, we have heard a great deal regarding the history and purpose of the Conflict of Interest Law and the Financial Disclosure Laws. These two statutes, and the accompanying Commission regulations, are critical for maintaining integrity in public service and the public's faith in government. We have also heard, however, a number of concerns regarding ambiguities in the statutes as well as different methods by which the ambiguities could be resolved.

Proposal Summary

We are proposing targeted changes to certain sections of the Conflict of Interest Law and the Financial Disclosure Law. The State Ethics Commission, in its Memorandum dated April 25, 2017 (Tab B), described the values protected by a number of sections of the Conflict of Interest Law. We fully agree with the Commission's characterization of these values, some of which we restate below. We believe the changes proposed below further these values, with the added benefit of clarifying the way in which the law applies to the thousands of public employees who are expected to uphold these values on a daily basis.

G.L. c. 268A, Section 1 – Defining and Clarifying Key Statutory Terms

- The purpose of Section 1 of the Conflict of Interest Law is to provide clear meanings to certain terms and phrases used throughout Chapter 268A, especially those which are unique to the Conflict of Interest Law and potentially difficult to interpret by the public employees to whom the Conflict of Interest Law applies.
- <u>Defining New Terms</u>
    - In its Memorandum dated March 20, 2017, the State Ethics Commission recognized that several "significant statutory terms" (listed directly below) remain undefined in the

Conflict of Interest Law. In its Memorandum dated April 25, 2017, the Commission proposed definitions for some, but not all, of those definitions.[1]

- "Acting as agent"
- "Business organization"
- "Financial interest"[2]
- "General policy"
- "Ministerial"[3]
- "Partner"
- "Public notice"
- "Otherwise than as provided by law"
- "Quasi-judicial"[4]
- "Regional municipal agency"[5]
- "Similarly situated individuals"
- "Substantial segment"
- "Unwarranted privilege"

- We agree with the Commission that by defining these key statutory terms we would be clarifying the Conflict of Interest Law. Moreover, we agree, that "[i]t would increase transparency if the definitions were incorporated into the statute . . . ."[6] While we recognize that the Commission could, if granted full regulatory authority, define certain terms through regulation, we believe that all key *statutory* terms should be defined directly within the statute because doing so would make it easier for someone subject to the Conflict of Interest Law to ascertain and understand the limitations imposed on him or her as a public employee. Of course, if granted full regulatory authority, the

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[1] In its Memorandum dated April 25, 2017, the Commission proposed statutory definitions for "Acting as agent", "Business Organization", "Financial interests", "Public notice", "As provided by law" and "Similarly situated individuals."

[2] In its Memorandum dated March 20, 2017, the Commission also listed "Financial interest, directly or indirectly, in a contract made by a state, county, or municipal agency" as a significant statutory term that is not currently defined.

[3] In its Memorandum dated March 20, 2017, the Commission indicated that it could "simplify and explain statutory definitions of some terms", including "ministerial". We included the term "ministerial" in the list of new definitions because it is not yet defined in Chapter 268A.

[4] In its Memorandum dated March 20, 2017, the Commission indicated that it could "simplify and explain statutory definitions of some terms", including "quasi-judicial." We included the term "quasi-judicial" in the list of new definitions because it is not yet defined in Chapter 268A.

[5] In its Memorandum dated March 20, 2017, the Commission proposed a draft definition of "Regional municipal agency." In addition, in its Memorandum dated April 25, 2017, the Commission proposed changes to Sections 17 and 20 that would allow regional municipal employees to hold a regional position *and* a position in one of the member municipalities. We agree with the changes to those sections; except we recommend that "regional municipal *entity*" be changed to "regional municipal *agency*" in Section 17.

[6] In its Memorandum dated April 25, 2017, the Commission stated that "[i]t would increase transparency if the definitions were incorporated into the statute; this could also be done by regulation, if the Commission were given full regulatory authority."

Commission would be able to clarify or interpret key statutory terms as needed, within the framework provided by the General Court.

- In addition to those terms identified by the State Ethics Commission, we recommend that each of the following terms also be defined in Section 1:
  - "Adjudicatory"
  - "Constituent"
  - "General legislation"
  - "Inherently incompatible"
  - "In relation to a particular matter"
  - "Official authority"
  - "Official dealings"
  - "Party"
  - "Person"
  - "Public office"
  - "Public official"
  - "Substantial value"
  - "Unwarranted exemption"
- As stated above, we believe that providing clear meanings directly within the statute is critical to help clarify the Conflict of Interest law for the thousands of public employees who are subject to its limitations and restrictions.

- Strengthening, Updating and Clarifying Existing Statutory Terms
  - In its Memorandum dated March 20, 2017, the State Ethics Commission recommended statutory changes to the definitions of "County employee" and "Municipal employee." We agree with the Commission's recommended changes.
  - In addition, the Commission suggested that it could "simplify and explain" the statutory definitions of "Special county employee", "Special municipal employee"[7] and "Special state employee."[8] We agree with the Commission that these definitions could benefit from further explanation. However, we recommend addressing the definitions directly in Chapter 268A to make it easier for public employees to ascertain and understand the limitations and restrictions they are subject to under the Conflict of Interest Law. Furthermore, we recommend clarifying the following existing statutory terms:
    - "Official responsibility"
    - "Particular matter"

[7] In its Memorandum dated April 25, 2017, the Commission also recommended a statutory change to the definition of "Special municipal employee." Additional changes to the definition of "Special municipal employee" and "Special county employee" were also discussed at the Commission's meeting held on January 25, 2017. See Commission's Memorandum dated April 25, 2017 (Tab C).

[8] See Commission's Memorandum dated March 20, 2017.

G.L. c. 268A, Section 4[9]

- Purpose & value: Section 4 generally prohibits state employees from having divided loyalties, i.e., acting on behalf of anyone other than the state in matters where the state is a party or has a direct and substantial interest. We agree with the Commission's characterization of the important values protected by this section, specifically, that the section: (i) allows state employees to interact with state agencies on behalf of others as part of their official duties but limits employees' ability to receive outside compensation or advocate for private interests where the state is concerned; (ii) applies differently to legislators, who act on behalf of their constituents, but restricts what legislators may do on behalf of paying clients; and (iii) recognizes that, in certain situations, state employees have significant influence over state agencies other than the one in which they serve. As the Commission notes, it is critical that state employees do not use – and are not *perceived* to use – their official prestige or influence as public employees to benefit private parties. Doing so undermines confidence in government.
- Recommended changes: We also agree with the Commission, however, that Section 4 is one of the "least intuitive and most confusing" sections of the Conflict of Interest Law; and its restrictions are not always obvious.[10] Therefore, we propose the following statutory amendments to Section 4:
    - Allow appointed state employees to appear for others before a state agency other than the one in which they serve, for only ministerial matters, and without compensation.[11]
    - Allow appointed state employees to appear for others before a state agency other than the one in which they serve, without compensation, with certain approvals and disclosures.[12]
    - Clarify when members of the General Court and/or Executive Council may appear before state agencies for outside compensation; by, for example, establishing uniform parameters for "quasi-judicial" proceedings, and eliminating a loophole that could allow someone to appear for a paying client so long as they do not receive compensation for a particular appearance.[13]
    - Clarify the scope of the exemption that allows state employees to also serve in municipal roles.[14]
- Rationale:

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[9] We are proposing changes to Section 4 only, for ease of discussion. We recognize, however, that any changes agreed to may require companion edits to Section 11 (for county employees) and Section 17 (for municipal employees).

[10] See Mr. Wilson's written and verbal testimony to the Task Force on February 15, 2017.

[11] See Commission's Memorandum dated April 25, 2017 (Tab C), as proposed by Commission staff. We agree with Commission staff.

[12] Comparable to the redraft of Section 4 proposed by Commission staff and included in the Commission's Memorandum dated April 25, 2017 (Tab C).

[13] Closing this loophole was a potential change to Section 4 proposed by Commission staff and included in the Commission's Memorandum dated April 25, 2017 (Tab C). We agree with Commission staff.

[14] Included in the redraft of Section 4 proposed by Commission staff and included in the Commission's Memorandum dated April 25, 2017 (Tab C). We agree with Commission staff on the need to clarify.

- We believe certain exceptions for lower-level appointed employees fully uphold the values of Section 4 while recognizing that state agencies and entities have only grown in number and reach since the enactment of the Conflict of Interest Law. As citizens of the Commonwealth, employees often have compelling reasons for needing or wanting to interact with "the state" on behalf of another. Where circumstances would not truthfully allow an anonymous appointed employee to exert undue influence over the state agency or entity, or risk divided loyalties, we believe the appearance should be allowed.
- It is critical that members of the General Court and Council only be allowed to receive outside compensation for representing the interests of private parties in limited circumstances that are inherently fair, and in which they cannot exert undue influence. However, it is also equally critical that members of the General Court and Council are able to understand when and how they are restricted; and that those restrictions are uniform. Again, the reach of "state agencies" is broad; and legislators in particular are expected to be active working members of their communities. A restriction on outside employment that is unclear or unwieldy disincentivizes a truly representative legislature.
- The statute already recognizes an exemption to encourage public service at both the state and local level. Clarifying the scope of the exemption removes ambiguity that could otherwise expose employees to liability.

G.L. c. 268A, Section 6[15]

- Purpose & value: Section 6 prohibits state employees from participating – in their public roles – in certain public business in which they, their immediate family members, and other persons and entities with which they are closely associated have a financial interest. This prevents state employees from being tempted to serve private interests rather than the public interest.[16] There is a disclosure process through which appointed state employees may participate in these matters, if their appointing authority determines the circumstances are not likely to affect the integrity of the employee's work. Elected state officials have no such disclosure option and are expressly prohibited from participating in their public roles in *any* particular matters (i.e., everything other than general legislation or home rule petitions) in which a financial interest is present.
- Recommended change: We recommend an amendment to this section, allowing elected state officials to participate in certain matters in which they or a member of their immediate family, but *not* any outside business interests, may have a financial interest. Participation would only be allowed if the interest is shared with a significant portion of the population, or if the interest

[15] We are proposing changes to Section 6 only, for ease of discussion. We recognize, however, that any changes agreed to may require companion edits to Section 13 (for county employees) and Section 19 (for municipal employees).

[16] See Mr. Wilson's written testimony to the Task Force on February 28, 2017.

relates only to home ownership or residence within the elected official's district, and they have been requested to participate by a constituent; a disclosure would also be required.

- Rationale: Elected officials are in a unique position in which they must represent the interests of the individuals they were elected to serve. To completely prohibit them from participating officially in particular matters that would impact their constituencies, simply because they may also be impacted, disenfranchises voters; particularly smaller groups of voters who may be uniquely vulnerable or impacted because of geography (e.g., a neighborhood near a proposed development site).[17] And this prohibition results in less transparency than the proposed exemption because at present, elected officials can participate in these particular matters in their private capacity without the need to file a disclosure. We believe that providing a process whereby elected officials, in certain limited situations, can disclose and participate increases transparency- a position that the Commission has already recognized.[18] We believe, however, that it is preferable to establish such an exemption in statute and clarify its terms.[19]

G.L. c. 268A, Section 6A

- Purpose & value: As it has been interpreted, Section 6A requires public officials (i.e., those elected at a state election) to file a disclosure with the Commission prior to participating in general legislation that would affect the public official's personal financial interests in a way that differs from the legislation's effect on the general public. This allows legislators to make decisions regarding legislation that may apply to everyone in the Commonwealth, including them, while also making it transparent when public officials' personal interests will be uniquely affected by their own actions.
- Recommended change: We propose limited, clarifying changes to this section to make clear that it applies to "general legislation" (a term not currently used in the section), to define what it means to "substantially affect" one's financial interests, and to reduce duplicative disclosures.
- Rationale: Without clarification, the language of this section is very confusing, and the undefined key terms may lead to wildly differing and subjective interpretations amongst practitioners and/or public officials. We believe the statute should be clear on its face. Additionally, in practice, this section results in multiple, duplicative disclosure for legislators – due to the frequency with which the same or substantially similar legislative proposals are refiled each session; they do not represent any new or previously undisclosed financial interests.

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[17] In his footnote to the Commission's Memorandum dated April 25, 2017, Mr. Wilson characterized the current prohibition as one wherein legislators may not participate in local property matters in which they have a financial interest as *abutters*. It is our understanding, however, that the restriction has been applied much more broadly, to property matters within approximately 1 mile of the legislator's residence.

[18] See 930 CMR 6.25.

[19] For example, the regulatory exemption in 930 CMR 6.25 applies to determinations of "general policy" but does not define what a matter of "general policy" is. Certain examples are given, but it has been our experience that these examples are not helpful in practice.

G.L. c. 268A, Section 6B

- Purpose & Value: Section 6B requires candidates for state employment to disclose certain, specifically listed, family members who are also state employees. These named relatives differ from "immediate family" as defined throughout the chapter.
- Recommended change: Amend the section to apply only to "immediate family."
- Rationale: We agree with the Commission that requiring prospective employees to disclose certain listed family members rather than "immediate family members" as defined in Section 1 is confusing.[20]

G.L. c. 268A, Section 7[21]

- Purpose & value: Section 7 generally prohibits state employees from having a financial interest in a state contract. We agree with the Commission's characterization of the important values protected by this section, specifically, that the section: (i) prevents state employees from gaining an "inside track" on state contracts to further their personal financial interests; (ii) protects the public interest from state action which might result, or appear to result, from the influence of an insider; (iii) ensures that confidence in government is not undermined by a perception that state employees have or appear to have an "inside track" on state contract opportunities; (iv) recognizes that the danger that a state employee will use his or her position to enter into a state contract for his or her own financial gain is greater when the employee has more power or influence; and (v) seeks to limit a state employee's financial interest in state business to the compensation the state employee receives as a state employee.
- Recommended change: With the purpose and value of Section 7 in mind, we agree with the Commission that Section 7 could benefit from a statutory revision[22] and a "plain English explanation of the prohibited conduct."[23] Specifically, the Commission noted that Section 7 applies very broadly, particularly with respect to employment.[24] Unfortunately, the Commission did not offer any substantive amendments to address its concerns. While we believe Section 7 could be clarified by separating the provisions therein that affect state contracts from those that affect outside employment, we may need further guidance from the Commission.
- Further recommended change: We agree with the Commission's proposed change to eliminate an out-of-date reference to the "general salary schedule contained in section forty six of chapter

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[20] As noted in the Commission's Memorandum dated April 25, 2017 (Tab B).

[21] We are providing comments and proposing changes to Section 7 only, for ease of discussion. We recognize, however, that any changes agreed to may require companion edits to Section 14 (for county employees) and Section 20 (for municipal employees).

[22] See Commission's Memorandum dated April 25, 2017 identifying multiple "issues arising from [Section 7] that could be addressed by statutory revision."

[23] See Commission's Memorandum dated March 20, 2017 stating that the Commission could address Section 7 by providing a "plain English explanation of the prohibited conduct".

[24] See Commission's Memorandum dated April 25, 2017 in which the Commission recognized that Section 7: applies very broadly; (ii) covers situations where state employees should be able to seek second jobs with the same employee; and (iii) could be revised to (1) make it easier for state employees to take second positions with agencies other than their own and (2) define a minimum level of financial interest in a state contract.

thirty."[25] We also recommend changing an out-of-date reference to "mentally retarded persons."

- Rationale: In order to update Section 7, the references to the "general salary schedule" and "mentally retarded persons" must be eliminated by statutory amendment.

G.L. c. 268A, Section 21

- Purpose & value: Section 21 establishes certain penalties and remedies for violations of the chapter.
- Recommended change: Amend wording of paragraph (a) to allow for a private right of action regarding violations on the municipal level.
- Rationale: We agree with Common Cause's rationale, noted in Peter Sturges' Testimony dated April 25, 2017, that this is an important right to preserve.

G.L. c. 268A, Section 23

- Purpose & value: Section 23 provides supplementary standards of conduct, to which all public employees at every level of government are held. They further the goal of prohibiting even the appearance of conflicts of interest and/or abuses of power.
- Recommended changes:
    - We agree with the changes to 23(b)(3) proposed by the State Ethics Commission in its Memorandum dated March 20, 2017.
    - We agree with the changes to 23(b)(3) proposed by Common Cause included in Peter Sturges' Testimony dated April 25, 2017.
    - We recommend amending 23(b)(2), to clarify the scope of the paragraph's prohibitions, and what it means to provide an "unwarranted privilege."
    - We also recommend an amendment noting that certain inherently private circumstances of a public employee's life will not be considered to create an "appearance of conflict" for that employee; including inherently personal information such as personally identifiable health information.
- Rationale:
    - We agree with the rationales provided by the Commission and Common Cause regarding their changes.
    - We believe that the restrictions of 23(b)(2) – the violation of which is a felony – are very subjective, given the undefined terms; and should be clarified in statute.
    - We believe that there are certain details of public employees' lives that should not be subject to a public disclosure. Even where a disclosure may be made confidentially under current Commission regulations, an appointed state employee would still be required to disclose highly personal information to his or her appointing authority; information that we believe they have an inherent right to keep private.

[25] See Commission's Memorandum dated April 25, 2017 (Tab A).

G.L. c. 268B, Section 1

- Purpose & value: Section 1 of the Financial Disclosure Law provides definitions for key statutory terms used throughout Chapter 268B.
- Recommended change: In its Memorandum dated March 20, 2017, the Commission proposed statutory changes to the definitions of "Amount"[26], "Business"[27] and "Major policymaking position."[28] We agree with the changes proposed by the Commission.
- We also recommend amending the definition of "Gift" to make it clear that a gift does not include anything of value that the Commission permits employees to receive through a regulatory exemption for purposes of filing Statements of Financial Interests.
- Rationale: These statutory changes update and clarify key statutory terms used in the Financial Disclosure Law.

G.L. c. 268B, Section 3

- Purpose & value: Section 3 lists the powers and duties of the State Ethics Commission including, but not limited to, the power to promulgate regulations to: (i) carry out the Financial Disclosure Law (G.L. c. 268B) and (ii) provide exemptions to the Conflict of Interest Law (G.L. c. 268A).
- Recommended change: The Commission has made clear that it believes "the single most important improvement in the conflict of interest law that this Task Force could recommend would be to the give the Commission full regulatory authority." In his Testimony dated April 25, 2017, Peter Sturges echoed the Commission's belief. While we agree that the State Ethics Commission should be granted full regulatory authority over the Financial Disclosure Law and the Conflict of Interest Law, we strongly recommend that certain oversight be built into the law. Specifically, we recommend that regulations proposed by the Commission pursuant to Section 3 be submitted to the General Court for comment. Additionally, we recommend that the regulations also be reviewed by a newly created advisory committee to be appointed by the Governor and consist of: former state, county and municipal elected officials; active state, county and municipal appointed officials; and attorneys with experience counseling clients on matters related to the Conflict of Interest Law.
- Rationale: We agree with the Commission that providing it with full regulatory authority would enable it to further clarify the law in certain areas. With that said, given the breadth of conduct affected and the wide assortment of public employees to whom these regulations would apply, we believe it is critical to include a more diverse group of experienced practitioners and stakeholders in the regulatory process.

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[26] In his Testimony dated April 25, 2017, Peter Sturges also recommended a statutory change to the definition of "Amount."

[27] We have no objections to further amending the definition of "Business" to make clear that it does not include family trusts; if such a change is necessary, as discussed by the SEC in its April 25, 2017 memo to the Task Force.

[28] In his Testimony dated April 25, 2017, Peter Sturges also recommended a statutory change to the definition of "Major policymaking position."

G.L. c. 268B, Section 4

- Purpose & value: Section 4 governs the process by which the Commission may investigate alleged violations of the Conflict of Interest or Financial Disclosure Law.
- Recommended changes: We agree with the proposed change to subsection (a) recommended by the Commission in its Memorandum dated March 20, 2017 to eliminate an existing requirement that the Commission initiate a preliminary inquiry upon receipt of a sworn complaint, even if the Commission does not necessarily consider the sworn statement to include sufficient evidence of an alleged violation.
- Rationale: This change provides a clear and fair standard for initiating inquiries.

APPENDIX N

Commonwealth of Massachusetts
STATE ETHICS COMMISSION
One Ashburton Place - Room 619
Boston, Massachusetts 02108

Hon. Barbara A. Dortch–Okara (ret.)
Chair

David A. Wilson
Executive Director

To: Task Force on Integrity in State and Local Government
From: State Ethics Commission
Re: Comprehensive list of proposed changes to G.L. c. 268A and c. 268B; Commission opinion as to whether such changes may be accomplished by regulation or statutory amendment, and whether they are desirable
Date: May 25, 2017

At the last Task Force meeting on April 25, 2017, the Task Force decided that its members would provide to the Commission by May 12th their individual lists of proposed changes to the conflict of interest and financial disclosure laws, G.L. c. 268A and 268B. The Task Force requested that the Commission use those lists to create a comprehensive list of all proposed changes, indicating, as to each, whether the Commission believes that it could be accomplished by a regulation if the Commission were given full regulatory authority to carry out c. 268A, or whether it could only be accomplished by a statutory amendment, and that the Commission provide that comprehensive list to the Task Force by May 25th, for discussion by the Task Force at its next scheduled meeting on May 31, 2017.

In response to that request, this memorandum sets forth a complete list of all proposed changes to c. 268A and 268B proposed by the Commission (in its memoranda to the Task Force of March 20, 2017 and April 25, 2017), and, in addition, the proposed changes received from Task Force members Pam Wilmot, Executive Director, Common Cause of Massachusetts; Senator Cynthia Stone Creem; and Representative Christopher M. Markey, Representative Peter V. Kocot, and House Counsel James C. Kennedy.

Changes to c. 268A and c. 268B proposed by the Commission are set forth below in Subsections A, B, and C. Subsection A is a list of four changes proposed by the Commission that the Commission believes could only be accomplished by statutory amendment; proposed statutory language is set forth for each. Subsection B is a list of changes proposed by the Commission which could be accomplished by regulation, if the Commission were given full regulatory authority to carry out c. 268A, the conflict of interest law. The content of these lists will be familiar to the Task Force; all were raised by the Commission in its previous submissions to the Task Force (memoranda dated March 20, 2017 and April 25, 2017). Subsection C is a list of changes to the financial disclosure law, c. 268B, that the Commission believes are desirable, and that the Commission currently has the power to make by regulation, because the Commission already has full regulatory to carry out c. 268B; these changes were included in the

Commission's earlier submissions to the Task Force, and are included here, in the interest of completeness. Subsections D, E, and F list the changes proposed by Ms. Wilmot, Senator Creem, and Representatives Markey and Kocot and Mr. Kennedy respectively. As to each, the Commission has indicated whether or not it believes the proposed change can be accomplished by regulation; whether the Commission agrees with or opposes the change; and, as to those proposed changes which the Commission opposes, the reasons for the Commission's view.

A. Potential changes to c. 268B proposed by State Ethics Commission that require statutory amendment

The Commission believes that changes to its statutory authority to act can only be accomplished by statutory amendment.[1] It proposes 3 such changes: (1) full regulatory authority to carry out c. 268A, the conflict of interest law (the Commission already has full regulatory authority to carry out c. 268B, the financial disclosure law); (2) elimination of the requirement that the Commission open a preliminary investigation when it receives a sworn complaint (as opposed to when there is sufficient evidence of a violation); and (3) discretion when to review Statements of Financial Interests ("SFIs"), in place of the current requirement of automatic review of all SFIs. The Commission also requests changes to the categories of value used in SFIs, and believes that that change, as it arguably expands the applicable statutory filing requirements, should be a statutory amendment. Each proposed change is explained in more detail below. Also set forth below is the existing statutory language of the relevant sections, with the proposed changes shown in red (proposed new language underlined, proposed deleted language stricken through).

1. C. 268B, Section 3: amend to give Commission full regulatory authority to carry out the conflict of interest law.

When the Commission was created in 1978, it was given full regulatory authority to carry out the financial disclosure law, c. 268B, but was not given similar authority to carry out the conflict of interest law, c. 268A. In 2004, the Commission was given partial regulatory authority over the conflict of interest law: the Commission currently has the power to provide exemptions from the prohibitions of that law, but not full regulatory authority to carry it out. Throughout its presentations to the Task Force, the Commission has emphasized its view that giving the Commission full regulatory authority to carry out the conflict of interest law, not just to create exemptions from that law, is the most significant and beneficial change that could be made to the law, because it would enable the Commission to address areas where the law is at present poorly understood by creating comprehensive explanatory regulations interpreting the law.

The great majority of ethics commissions of other states have full regulatory authority: of 36 other states that have ethics commissions comparable in organization to

[1] An administrative agency may only act to the extent that it has express or implied statutory authority to do so, Commissioner of Revenue v. Marr Scaffolding Co., Inc., 414 Mass. 489, 493 (1993).

the Massachusetts State Ethics Commission, 32 have given their ethics commissions full regulatory authority.[2] Massachusetts is one of only three states (the other two are Nevada and Ohio) that have granted only partial regulatory authority to their ethics commissions. Many other Massachusetts agencies have full regulatory authority to carry out the statutes for which they are responsible, including the Office of Campaign Finance (the agency perhaps closest in mission and organization to the State Ethics Commission)[3], as well as other offices that exercise investigative functions and enforce applicable standards of conduct, such as the Massachusetts Commission Against Discrimination, the Gaming Commission, the Comptroller's Office, and the Boards of Registration in Medicine, Allied Health Professions, Nursing, Architects, and Sanitarians.[4] Granting the Commission full regulatory authority to carry out the conflict of interest law would bring Massachusetts in line with the majority of other states that have ethics commissions, and with its own practice with respect to agencies with comparable duties.

Granting the Commission full regulatory authority to carry out the conflict of interest law would not be an improper delegation of legislative authority. It is well established that the Legislature may delegate to a board or officer the working out of the details of a policy adopted by the Legislature. Construction Industries of Mass. v. Comm'r of Labor and Industries, 406 Mass. 162, 171 (1989); Mass. Bay Transp. Auth. v. Boston Safe Deposit and Trust Co., 348 Mass. 538, 544 (1965). Such delegation may include the authority to define more precisely by regulation the nature of prohibited conduct. Commonwealth v. Racine, 372 Mass. 631, 635-6 (1977). The Legislature may delegate the definition of terms in a statute that carries criminal penalties to an administrative agency. Commonwealth v. Clemmey, 447 Mass. 121, 135-136 (2006) (delegation to agency of duty to define statutory terms "simply directed the department to work out the details necessary to the implementation of the policy" expressed in statute). Delegating to an expert administrative agency the power to define by regulation the range of prohibited conduct, rather than enumerate every deleterious activity intended to be prohibited by statute, is not an improper delegation of legislative authority. Entergy Nuclear Generation Co. v. Dep't. of Envtl. Prot., 459 Mass. 319, 331 (2011).

In asking the Task Force to recommend that it be granted full regulatory authority to carry out the conflict of interest law, the Commission emphasizes that its past practice in creating exemption regulations using its current limited regulatory authority has been extremely inclusive, and that it would expect to use the same inclusive process if granted full regulatory authority. The process begins with Commission staff thoroughly researching applicable Commission precedent and creating a draft; proceeds to revision of that draft by the Commissioners, who are experienced former jurists and practicing lawyers; then involves informal comment by experienced practitioners and other

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[2] These states are Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, West Virginia, and Wisconsin. The Ethics Commission can provide statutory citations for these grants of authority if desired.

[3] G.L. c. 55, § 3.

[4] Respectively G.L. c. 151B, § 3; c. 23K, § 4; c. 7A, § 15; c. 13, §§ 10, 11A, 14, 44C, 52.

interested parties outside the agency; and culminates with the resulting draft being put out for public hearing and comment. Persons interested in these issues have multiple opportunities to be heard and help influence the final product. The range of persons commenting on Commission regulations, both informally and formally, is extremely broad, and includes public employees at every level of state, county, and municipal government, as well as persons representing private interests.[5] The Commission takes comments from all sources into account in arriving at a final version, and firmly believes that doing so results not only in a better end product, but in better public understanding and acceptance of the resulting regulations. Admittedly this process takes time; but the Commission believes that the expenditure of time is justified by arriving at a set of rules that addresses the diverse concerns of the public and the persons regulated by the law.

As the Task Force considers the various changes to c. 268A and c. 268B that have been proposed and how they may best be effectuated, the Commission asks that the Task Force consider the following advantages of the regulatory process just described over the legislative process, in light of the ultimate goal of promoting public employee understanding of and compliance with the law. First, as just described, broad participation in the rulemaking process promotes understanding and acceptance of the law. Second, regulations can be written in an informal, plain English style which is uncommon in statutes. The Commission's regulations generally include factual examples which illustrate the principles set forth, to promote concrete understanding; in our frequent interactions with public employees seeking to understand how the law applies to them, we are often told that these examples make it easier to do so. Third, regulations are easier to amend than statutes, and give more flexibility to adjust to changing circumstances. Finally, giving the Commission power to engage in such a process would allow the agency with specialized knowledge of the conflict of interest law to work out the details of the prohibitions against specified types of conduct set forth in c. 268A. The Supreme Judicial Court cases cited on the previous page establish that this is common practice and in no way an improper delegation of legislative authority. For all these reasons, therefore, the Commission respectfully suggests that it be granted fully regulatory authority to carry out c. 268A.

Proposed amended statutory language with changes redlined:

Section 3. The commission shall:

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[5] Among those who have commented on proposed Commission regulations since 2010 are counsel for the Supreme Judicial Court, the Trial Court, the Governor, the Attorney General, the House of Representatives, the Senate, the Executive Office of Energy and Environmental Affairs, the Executive Office of Administration and Finance, the Executive Office of Health and Human Services, the Departments of Conservation and Recreation and Energy Resources, the Secretary of State's Elections Division, and Massport; the Massachusetts Town Clerks Association and the Town Clerks for Whately, Brimfield, Orange, Auburn, Needham, Sunderland, Montague, Pelham, Buckland, and Shelburne; Common Cause; the Mass. Association of School Committees; employees of regional school districts; attorneys in private practice in the areas of land protection and utilities law; the Massachusetts Municipal Lawyers Association and individual members of that Association; and distinguished private practitioners in the field of ethics such as attorneys Carl Valvo and Thomas R. Kiley.

(a) Prescribe and publish, pursuant to chapter 30A, rules and regulations: (1) to carry out this chapter, including rules governing the conduct or proceedings hereunder; and (2) to carry out chapter 268A, including but not limited to ~~; provided, however, that the rules and regulations shall be limited to providing~~ exemptions from the provisions of ~~sections 3 to 7, inclusive, sections 11 to 14, inclusive, sections 17 to 20, inclusive, and section 23 of~~ said chapter 268A.

2. C. 268B, Section 4(a): amend to eliminate requirement that preliminary investigation be opened upon receipt of sworn complaint.

Currently, the statute requires that the Commission must open a preliminary inquiry if it receives a sworn complaint alleging a violation of the conflict of interest law, regardless of how scanty or implausible the supporting evidence may be. Opening a preliminary inquiry requires notification to the person accused of violating the law and also to the Attorney General. The Commission's experience has been that this statutory requirement leads to preliminary inquiries being opened even if there is no evidence to suggest a violation of the conflict of interest law; and the requirement of notification means that persons receiving that notice are put to the worry and inconvenience that such notice inevitably creates, even if the matter will never go forward because of lack of evidence or for some other reason. The Commission therefore proposes elimination of the requirement that a preliminary inquiry must be opened just because the complainant swears to it; this would leave the requirement that a preliminary inquiry be opened when sufficient evidence of a violation is received by the Commission.

Proposed amended statutory language with changes redlined:

> Section 4. (a) Upon ~~receipt of a sworn complaint signed under the penalties of perjury, or upon~~ receipt of evidence which is deemed sufficient by the commission, the commission shall initiate a preliminary inquiry into any alleged violation of chapter 268A or 268B. At the commencement of a preliminary inquiry into any such alleged violation, the general counsel shall notify the attorney general in order to avoid overlapping civil and criminal investigations. All commission proceedings and records relating to a preliminary inquiry or initial staff review used to determine whether to initiate an inquiry shall be confidential, except that the general counsel may turn over to the attorney general, the United States Attorney or a district attorney of competent jurisdiction evidence which may be used in a criminal proceeding. The general counsel shall notify any person who is the subject of the preliminary inquiry of the existence of such inquiry and the general nature of the alleged violation within 30 days of the commencement of the inquiry.

3. C. 268B, Section 1: definition of "amount": add additional categories of value so that amounts reported on statements of financial interest may be reported more accurately

Currently, the categories of value used for the Statements of Financial Interests

required by the financial disclosure law, G.L. c. 268B, have been unchanged since 1978. The largest category is currently $100,000 or more. Adding additional categories of greater value would make possible more accurate reporting of the value of assets required to be reported by the law.

Proposed amended statutory language with changes redlined:

Section 1. "Amount": a category of value, rather than an exact dollar figure, as follows: greater than $1,000, but not more than $5,000; greater than $5,000 but not more than $10,000; greater than $10,000 but not more than $20,000; greater than $20,000 but not more than $40,000; greater than $40,000 but not more than $60,000; greater than $60,000 but not more than $100,000; greater than $100,000 but not more than $250,000; greater than $250,000 but not more than $500,000; greater than $500,000 but not more than $1,000,000; greater than $1,000,000 but not more than $5,000,000; greater than $5,000,000.

4. **C. 268B, Section 3(f): amend requirement that all Statements of Financial Interests be inspected to provide that it shall be at discretion of Commission.**

Currently, the statute imposes a mandatory duty on the Commission of inspecting all SFIs it receives. In the Commission's experience, such inspection, in the absence of any additional information about the filer's financial situation, does not lead to the development of any useful information. Instead, the Commission proposes that it be given the authority to develop methods to determine what inspection or auditing of such statements would advance the purposes of the law.

Proposed amended statutory language with potential changes redlined:

> Section 3. The commission shall [subsections (a) through (e) omitted)
> (f) develop methods ~~inspect all statements of financial interests filed with the commission in order~~ to ascertain whether any reporting person required to file a statement of financial interests pursuant to section five of this chapter has failed to file such a statement or has filed a deficient statement. If, upon inspection, it is ascertained that a reporting person has failed to file a statement of financial interests, or if it is ascertained that any such statement filed with the commission fails to conform to the requirements of section five of this chapter, then the commission shall, in writing, notify the delinquent; such notice shall states in detail the deficiency and the penalties for failure to file a statement of financial interests.

B. Potential changes to c. 268A proposed by State Ethics Commission that could be accomplished by regulation, if the Commission is given full regulatory authority to carry out c. 268A

This section of this memorandum lists improvements to the conflict of interest law that the Commission believes could be accomplished by regulation, if the

Commission is given full regulatory authority to carry out that law. In many cases, these improvements address situations in which the Commission has an existing interpretation of the law, and the proposed change would add language to the statute to reflect that interpretation, to make the law easier to understand. The Commission proposed amended statutory language for many of these improvements in its prior communications with the Task Force. However, if the Commission is given full regulatory authority to carry out the conflict of interest law, it will undertake an inclusive process of public comment, as described earlier in this memorandum, that will likely result in improvements to the draft language previously provided. Consequently, the existing draft language is not included in this document (but may be found in the Commission's March 20, 2017 and April 25, 2017 memoranda to the Task Force).

1. **Creation and amendment of definitions of statutory terms.**

    a. **C. 268A, Section 1(d): define "county employee" to exclude members of a charter commission, so that this definition mirrors definition of "municipal employee."**

    b. **C. 268A, Section 1(e) and 6B: adopt a consistent definition of immediate family.**

    c. **C. 268A, Section 1(g): define "municipal employee" to clarify that town meeting members, whether elected or not, are not subject to c. 268A.**

    d. **C. 268A, Section 1(m, n, o): define "special" state, county, and municipal employees as those in volunteer or part time positions, eliminating references to 800 hours, eliminating requirement that terms of employment be filed with Ethics Commission, and making special municipal employee status automatic when stated criteria are met, as is already the case for special state and county employees (or, alternatively, requiring municipalities to provide updated lists of specials they designate to Commission).**

    e. **C. 268A, Section 1: create definition of "regional municipal agency" to codify existing Commission interpretation.**

    f. **C. 268A, Section 1: define statutory terms "acting as agent," "business organization," "financial interest," "financial interest, directly or indirectly, in a contract," "general policy," "partner," "public notice," "provided by law," "similarly situated individuals," "substantial segment," and "unwarranted privilege," to codify, and where necessary improve upon, existing Commission precedent.**

g. **C. 268A, Section 4: define "ministerial" and "quasi-judicial" to codify and improve on existing Commission precedent, and eliminate current areas of confusion.**

2. **C. 268A, Sections 4, 11, 17: consider whether public employees should be allowed to assist someone else in dealing with another government agency of their same level of government, when this is done without compensation, and when there is no reason to think that the public employee or his employing agency has any particular influence over the other government agency.**

3. **C. 268A, Section 7: eliminate out of date statutory reference (to salary schedule which is no longer updated)**

4. **C. 268A, Sections 7, 14, 20: consider whether it should be easier for public employees to take second positions with agencies other than their own, and whether it would be desirable to define a minimum level of financial interest in a public contract beneath which the statutory restrictions would not apply.**

5. **C. 268A, Section 8B: amend to update reference to name of agency (substitute commissioner of department of public utilities for commissioner of telecommunications and cable).**

6. **C. 268A, Sections 17 and 20: address issues specific to employees of regional municipal entities who hold a regional position as well as a position in a municipality that is a member of the regional entity.**

7. **C. 268A, Section 23(b)(2): codify Commission precedent applying prohibition against use of official position in private dealings in situations in which it is inherently coercive or abusive.**

8. **C. 268A, Section 23(b)(3): better address appearing to favor or disfavor someone; codify existing Commission interpretation that statute prohibits acting in a manner that creates an appearance that a public employee will give unfavorable treatment for improper reasons, and not just favorable treatment.**

9. **C. 268A, Section 23(c): clarify that this section prohibits disclosure of confidential information contained in a public record, whether or not the record itself is disclosed.**

10. **C. 268A, sections 27 and 28: amend mandatory education requirements to make requirement of distribution of summaries of the law every two years, rather than every year, and to provide that such distribution will occur every two years in even numbered years, while the requirement to complete the online training will apply every two years in odd numbered years.**

C. Potential changes to c. 268B proposed by State Ethics Commission that the Commission can accomplish using its existing regulatory authority to carry out c. 268B

As noted above, the Commission currently has full regulatory authority to carry out the financial disclosure law, c. 268B. In its previous communications with the Task Force, the Commission listed a number of changes to c. 268B that it believes are desirable, in the interest of completeness. The Commission intends to revise its existing regulations implementing c. 268B once its new electronic application for filing Statements of Financial Interests required by c. 268B is fully operational, and expects to address the issues below at that time. These proposed changes thus do not require Task Force action, but are included here in the interest of providing a complete list of the changes to the law that the Commission considers desirable.

1. **C. 268B, Section 1: definition of "business": expressly exclude some family trusts, when these are created with the sole purpose of providing a home for an elderly or disabled relation, so that these arrangements are not required to be reported on Statements of Financial Interests.**

The Commission will take into account the concerns expressed by Representative Dooley in reworking this definition.

2. **C. 268B, Section 1: definition of "major policymaking position": amend to delete reference to out of date statute (salary schedule in c. 30, § 46).**

3. **C. 268B, Section 3(d): clarify that in responding to public records requests, Commission redacts information protected by the Public Records Law; this would codify an existing interpretation of the Supervisor of Public Records.**

4. **C. 268B, Section 3(j): amend to require official who designates public employees as being required to file Statements of Financial Interests to inform those so designated of that obligation, and to give Commission updated contact information upon filer's departure from agency; this would codify existing Commission practice.**

5. **C. 268B, Section 5: amend to (1) require electronic filing of Statements of Financial Interests, (2) eliminate confusing references to "third degree of consanguinity," and (3) require reporting of out of state real estate.**

D. Potential changes to c. 268A and 268B proposed by Pam Wilmot, Executive Director, Common Cause

1. **C. 268B, Section 3: amend to give the Commission full regulatory authority.**

The Commission favors this change, and agrees that it must be a statutory change, as explained above in section A1, p. 2 of this memorandum. The Commission does not,

however, favor the draft amending language proposed by Common Cause, which is different from the language proposed by the Commission in that it limits the Commission's authority to specified sections of c. 268A, and leaves out, among others, the sections of that chapter that impose the mandatory education requirements (Sections 27 and 28). The Commission is seeking full regulatory authority to carry out c. 268A, and therefore proposes language that will have that effect, as set out above in section A1, p. 2 of this memorandum.

2. **C. 268A, Section 23(b)(3): amend section of the law dealing with appearances of a conflict of interest to eliminate the requirement that a disclosure be made if a public employee accepts an unsolicited gift worth less than $50.**

This change could be made by regulation, rather than statute, since it amounts to an exemption from Section 23(b)(3) of G.L. c. 268A, and as noted above the Commission already has the power to create exemptions by regulation. Common Cause previously proposed this change at the time when the Commission adopted the current gift exemption regulations. The Commission decided not to adopt this change at that time because of concern that there are in fact situations in which acceptance of a gift worth less than $50 creates an appearance of a conflict of interest that should be disclosed. The Commission's current regulations, at 930 CMR 5.08, give several examples of such situations. Once such example is if a building inspector accepts a $40 bottle of wine from a developer whose projects he frequently inspects. Another such example is if a business association's representatives meet regularly with city councilors to discuss association issues, and several weeks after the city council votes in favor of a significant association bill, the association sends a concert ticket worth $30 to each to the councilors who voted in favor. The Commission continues to believe that a disclosure is appropriate in situations such as these, because these gifts do in fact create an appearance of improper influence. By contrast, small gifts that do not create an appearance of a conflict because no reasonable person would think that the public employee's conduct would be influenced by such a gift – for example, if a student gives a plate of homemade cookies to the teacher – do not require a disclosure under current Commission interpretation, as codified in 930 CMR 5.07. For these reasons, the Commission does not support this proposed change.

3. **Create a new section of c. 268A that would require the Commission to develop an online reporting system for all disclosures required to be filed by the conflict of interest law, and require all disclosures to be filed electronically with the Commission.**

This proposed change would significantly change existing law, and would impose an enormous new area of responsibility upon the Commission. It could only be made by a statutory change, not by regulation.

Currently, there are many situations in which the conflict of interest law requires a disclosure to be made. In most situations, however, such disclosures are <u>not</u> required to

be made to the Ethics Commission. Rather, in most cases, these disclosures are made to, and retained as public records by, the disclosing public employee's appointing authority. In many cases, the appointing authority is required to take some action concerning the disclosure, to authorize or forbid action by the disclosing public employee. Even if no action on the part of the appointing authority is required by law, the appointing authority may wish to take some action when advised of an appearance of a conflict of interest.

The great majority of persons subject to the conflict of interest law are municipal employees. Most disclosures required by the conflict of interest law are therefore filed at the municipal level: either with the disclosing employee's appointing authority, or, in the case of elected municipal officials, with the town or city clerk. Disclosures by appointed state and county employees are, for the most part, filed with and retained by the disclosing employees' appointing authorities. The only disclosures that are currently filed with the Ethics Commission are those filed by elected state and county officials (who have no appointing authority), and certain specific types of disclosures by appointed state employees (those pursuant to Sections 6 and 7 of the law).

Common Cause's proposal would require the creation of an entirely new electronic filing system to receive disclosures from the more than 375,000 persons subject to the conflict of interest law.[6] The Commission's most recent experience with the development of a new electronic filing system has been with its new electronic filing application for Statements of Financial Interests. That system, which serves approximately 4,000 filers, all of whom are state and county employees, took three years to build, and cost over $600,000. Absent a commitment of significant funding and staff resources, the Commission would simply be unable to comply with the proposed new requirement, and therefore does not support the proposed change.

4. **C. 268A, Section 21: eliminate current statutory prerequisites to a private right of action for alleged violations of the conflict of interest law by municipal officials.**

This proposed change would legislatively overrule the Supreme Judicial Court decision in Leder v. Superintendent of Schools of Concord, 465 Mass. 305 (2013). The proposed change could only be made by statute, not by regulation. In Leder, the Court construed G.L. c. 268A, Section 21(a), as imposing the following prerequisites to any private right of action for alleged violation of the conflict of interest law by municipal officials: (1) the Commission must first have found that a violation occurred, and (2) the municipality must request rescission of the action that the suit seeks to rescind. Absent satisfaction of those prerequisites, a private party may not sue a municipality or its employees for an alleged violation of the conflict of interest law. The Commission submitted an amicus brief to the Court seeking that result.

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[6] The January 6, 2009 Governor's Task Force on Public Integrity, at p. 1, stated that Massachusetts, as of 2002, had 376,793 state and local government employees.

The Commission continues to believe that the Supreme Judicial Court correctly decided Leder, based on the plain meaning of the statutory language. The Commission also believes that that result was good policy as well as good law, for the following reasons. First, the fundamental purpose of the conflict of interest law is not to provide the occasion for private litigation, but rather to ensure that the government operates with integrity and without the distorting pressure of private influences upon governmental decision-making. Second, there are numerous complaints every year raising claims of conflicts of interest; public resources will be spent most effectively by sending these complaints initially to an administrative agency with both investigative capacity and particular and specialized expertise in interpreting the conflict of interest law – the Commission – for a disinterested determination of their merits, rather than permitting them to be added to court dockets in the form of civil actions, without any such prior determination. Third, since the conflict of interest law governs the conduct of public employees, persons charged with violations of that law will in most cases be public employees; permitting private litigation asserting such violations only when the Commission has determined that there is merit to the claim means that the public does not have to bear the expense of defending against non-meritorious claims of violation. This is a point of obvious importance to municipalities, which in most cases will have few if any resources to devote to handling private litigation of this kind against their employees. The Commission believes that municipalities would strongly oppose the proposed change for that reason. Finally, requiring that relief under § 21(a) undoing municipal action be available to private parties only where the affected municipal agency has requested such relief means that the interests of the municipality itself, as well as those of any innocent third parties, will be taken into account before any such action is contemplated, and will only go forward when the affected municipal agency believes that undoing its original action is the best alternative in the circumstances. For all these reasons, the Commission believes that Leder was correctly decided, and therefore does not support the proposed change in the law.

5. **C. 268B, Section 1: update categories of amount for Statements of Financial Interests.**

The Commission favors this change, and agrees that it must be a statutory change, as explained above in section A3, p. 5 of this memorandum.

6. **C. 268B, Section 3: require online filing of Statements of Financial Interests; require the Commission to create an electronic system for filing such statements; eliminate requirement that filers of Statements of Financial Interests be notified prior to release of their financial disclosures and that persons requesting such statements must show identification.**

The Commission has already created a system for electronic filing and disclosure of Statements of Financial Interests, so this change is unnecessary. The Commission agrees that all filers, except those exempted for reasons of hardship, should be required to file electronically, see section C5, p. 9 above.

Common Cause also proposes to eliminate the current requirements that anyone requesting a Statement of Financial Interests must show identification when making the request, and that the Commission notify the filer that his or her statement has been requested by that individual. Because the Commission already has full regulatory authority over c. 268B, this is a change that could be made by regulation, if considered desirable. The Commission has considered whether to make this change on a number of past occasions, and is aware of arguments for and against the proposed change. As the Commission understands it, these requirements are intended to protect filers, by making them aware that identified individuals are seeking their personal information. This knowledge might be useful in certain contexts; for example, it would enable public employees in certain sensitive jobs, such as judges, who are required filers, to learn if a person whom they sentenced, or a dissatisfied litigant, has requested the judge's filing, so that the judge (or other public employee) may take whatever steps he or she deems appropriate in the circumstances. The argument in favor of eliminating these requirements is that they no longer serve the intended purpose, given that most people's home addresses can be found on the Internet without much effort. In particular, now that it is common practice for press organizations to request Statements of Financial Interest and then post them on the Internet where anyone can see them, a filer cannot rely upon notice from the Commission to be sure that only the person so identified will see his or her filing. On balance, and recognizing that there are arguments on both sides, the Commission does not support the proposed change.

7. C. 268B, Section 1: definition of "major policymaking position": amend to delete reference to out of date statute (salary schedule in c. 30, § 46).

The Commission favors the substance of this change, but believes it could be made by regulation, see above, section C2, p. 9 of this memorandum.

E. <u>Potential changes to c. 268A and 268B proposed by Senator Cynthia Stone Creem</u>

1. G.L. c. 268B, Section 5: require reporting of Individual Retirement Accounts (IRAs) on Statements of Financial Interests.

Currently, persons required to file Statements of Financial Interests are required to report, among other things, their "securities and other investments" worth over $1,000. The instructions to the current form, however, permit filers not to report certain types of investments that the Commission has considered present a low risk of any type of conflict of interest or other prohibited behavior, because they are publicly available on the same terms to anyone who seeks them, as opposed to being individually negotiated. Among the types of investments not required to be reported, as a matter of Commission interpretation (not statute or regulation), are retirement and college fund savings, as well as cash, bank, and money market accounts.

Recently, the Commission has become aware of the possibility that some types of Individual Retirement Accounts (IRAs) may be set up as unique arrangements negotiated

individually by the person creating the IRA with, for example, an issuer of stock, rather than being uniform arrangements that offer the same, publicly available terms to anyone who sets up such an account. Where that is the case, the Commission agrees with Senator Creem that the rationale for excluding such arrangements from the reporting requirements of c. 268B may not be appropriate. The Commission intends to explore this area further and determine whether its current interpretation should be changed. No statutory or regulatory change is necessary to accomplish this change; it is a matter of Commission interpretation that can be changed by the Commission at any time, for prospective application to the next filing cycle. Given the concerns expressed by Senator Creem, the Commission will make it a priority to do this prior to the next full filing cycle, in 2018.

2. **C. 268B, Section 5: amend to require reporting of securities or other investments sold or otherwise disposed of during the year in addition to required end of year reporting on Statements of Financial Interests.**

Since this change would increase the current filing requirements, it would need to be a statutory change. Currently, persons required to file Statements of Financial Interests pursuant to G.L. c. 268B must do so once a year, and must report the investments that they hold as of the end of that year. It is true that this means that a required filer might buy and then sell an investment, and if the transaction was complete before December 31st, would not be required to report the transaction on their Statement of Financial Interests. However, this does not mean that no disclosure of such a transaction would be required; the conflict of interest law, and specifically G.L. c. 268A, Sections 6, 6A, and 23(b)(3), would require that a public, written disclosure be made if the public employee who made such an investment had to act officially in a matter in which he or she had a financial interest, or in which the investment would create an appearance of a conflict. Thus, the conflict of interest law provides a mechanism that should prevent any conflicts of interest from going unnoticed, even if a transaction is not reported on the filer's Statement of Financial Interests. That being so, the Commission would be reluctant to add an additional reporting requirement that would make the filing of Statements of Financial Interests a more than annual requirement, or that would require quarterly reporting on this particular category of financial holding.

F. Potential changes to c. 268A and 268B proposed by Representatives Christopher M. Markey and Peter V. Kocot, and House Counsel James C. Kennedy

1. **C. 268A, Section 1: add new definitions of undefined statutory terms, and clarify existing definitions.**

These proposed changes largely overlap with those discussed above in section B1, p. 7 of this memorandum. In addition, it is proposed to add definitions of the following additional terms: adjudicatory; constituent; general legislation; inherently incompatible; in relation to a particular matter; official authority; official dealings; party; person; public

office; public official; substantial value; and unwarranted exemption; and to clarify the existing definitions of official responsibility and particular matter.

There is no question that it would be useful to have explicit definitions of terms commonly used in the law. The question is whether it is preferable to create and refine these definitions through a legislative or a regulatory process; the latter would be possible if the Commission were given full regulatory authority to carry out c. 268A. The Commission believes that a regulatory process is preferable, for the reasons set forth above in section A1, p. 2 of this memorandum.

2. **C. 268A, Section 4: amend to allow:**
    a. **appointed state employees to appear for others before a state agency other than the one they serve, without compensation, in ministerial matters, and in non-ministerial matters subject to certain approvals and disclosures;**
    b. **clarify when members of the General Court may appear before state agencies for outside compensation, by establishing uniform parameters for quasi-judicial proceedings, and eliminating a loophole that could allow someone to appear for a paying client as long as they do not receive compensation for a particular appearance;**
    c. **clarify the municipal exemption, which allows state employees to serve in municipal roles.**

These changes could be accomplished by regulation, if the Commission were given full regulatory authority, and to a large extent overlap what the Commission has proposed in sections B1g and B2, p. 8 above. The Commission believes that a regulatory process would be desirable in accomplishing these changes for the reasons set forth in section A1, p. 2 above.

3. **C. 268A, Section 6: amend to allow elected state officials to participate in certain matters in which they or a member of their immediate family, but not outside business interests, have a financial interest, if the interest is shared with a significant portion of the population, or if the interest relates only to home ownership or residence within the elected official's district, and they have been requested to participate by a constituent; a disclosure would be required.**

The conflict of interest law prohibits persons holding public office from participating in their official roles in particular matters in which they have a personal financial interest. These prohibitions are set forth in Sections 6, 13, and 19 of the law. These sections prohibit public officials from participating in their official roles in, among other things, local governmental determinations about land use in which the official has a personal financial interest because the official lives next door or close to the property in question, and the determination will change the value of the official's property or his ability to use and enjoy the property. The law does not prohibit voicing an opinion in

one's private capacity as a citizen by, for example, appearing before a town board to state a position on a project as a resident whom the project will affect; what is prohibited is using official position to lend weight to one's private interests, by acting officially in the matter.

In 2012, House Counsel proposed the creation of a regulatory exemption from Section 6 of the law to permit elected state officials to participate in determinations of general policy when the state official shares a financial interest with a substantial segment of the public. For example, the argument was put forward that a state legislator ought to be able to participate in general policy decisions about residential insurance rates, where those rates affect every homeowner in the legislator's district, and the legislator owns a home in the district. It was argued that creation of such an exemption would make Section 6, which applies to state employees, consistent with Section 19, which applies to municipal employees, and already contains a statutory exemption allowing elected municipal employees to participate in determinations of general policy in which their financial interest is shared with a substantial segment of the population in the municipality.

The Commission found persuasive the argument that state elected officials should have an exemption permitting them to participate in decisions of general policy analogous to that already available to municipal elected officials, and accordingly used its existing partial regulatory authority to create a regulatory exemption, 930 CMR 6.25. The existing regulatory exemption does most of what is proposed here: it permits elected state officials to participate in determinations of general policy when they have a financial interest that is shared with a substantial segment of the public. The regulatory exemption imposes various restrictions and safeguards, including a disclosure in some situations.

What is proposed here goes beyond the existing statutory exemption for municipal elected officials, and the existing regulatory exemption for state elected officials, in that it is not limited to general policy determinations. It is proposed to permit state elected officials to participate in determinations in which they have a financial interest (i.e., that of a homeowner) even if the determination has no general policy implications. For example, an elected state official would be able, if asked by a constituent to take official action, to oppose a 40B development close to his or her own residence, even though the official would be considered to have a financial interest in the decision about the development because it would change the value of the official's home. The proposed change would potentially permit an elected state official to use the extra weight of his or her elected office to advance his own personal financial interests, and those of nearby landowners, at the expense of other members of the community who might be benefitted by the project. Put another way, the proposed change would potentially permit a state elected official to favor neighbor constituents over constituents living at a distance in a matter in which he personally has a financial interest. The Commission does not believe that this would be a desirable change.

4. **C. 268A, Section 6A: amend to make clear that it applies to general legislation, to define what it means to substantially affect financial interests, and to reduce duplicative disclosures.**

Currently, Section 6A applies only to elected state and county officials, and it requires them to make a disclosure when required to act officially in any matter which would substantially affect the official's financial interests, unless the effect on the official is no greater than the effect on the general public. It is a valid criticism of the current state of the law, that this disclosure is often duplicative of the disclosure required by Section 23(b)(3) of the law, which requires any public employee (including those to whom Section 6A currently applies) to make a disclosure when there are circumstances that create an appearance of conflict of interest. In practice, the Commission advises those subject to both requirements that a single disclosure is sufficient, i.e., that it is unnecessary to make two separate disclosures about the same factual circumstances. The Commission could draft regulations that would make clear that a person making one disclosure is not required to make a second, duplicative disclosure of the same facts.

5. **C. 268A, Section 6B: amend to require disclosure of "immediate family members" as that term is defined in c. 268A, Section 1, rather than disclosure of listed family members.**

The Commission agrees with the substance of this proposed change, see section B1b, p. 7 above, but believes it could be done by regulation.

6. **C. 268A, Section 7: amend to provide a statutory revision, a plain English explanation of the prohibited conduct, and to eliminate out of date references to a salary schedule that is no longer updated and to "mentally retarded persons."**

The Commission agrees with the substance of these proposed changes, see section B3, 4, and 6, p. 8 above, but believes they could best be accomplished through an inclusive and comprehensive regulatory process, as described above in section A1, p. 2.

7. **C. 268A, Section 21: amend to eliminate current statutory prerequisites to a private right of action against municipal officials accused of violating the conflict of interest law.**

The Commission opposes this proposed change, for the reasons set forth above in section D4, p. 11 above.

8. **C. 268A, Section 23: amend as follows:**
    a. **to better address appearing to favor or disfavor someone, and codify existing Commission interpretation that statute prohibits acting in a manner that creates an appearance that a public employee will give unfavorable treatment for improper reasons, and not just favorable treatment.**

b. to eliminate the requirement that a disclosure be made if a public employee accepts an unsolicited gift worth less than $50.
c. to clarify the scope of the paragraph's prohibitions, and define "unwarranted privilege."
d. to note that certain inherently private circumstances of a public employee's life will not be considered to create an appearance of a conflict for that individual, including inherently personal information such as personally identifiable health information.

The Commission agrees with the substance of proposals (a) and (c), for the reasons set forth above in sections B8, and B1f and B7, pp. 7-8, but believes they could best be accomplished through an inclusive and comprehensive regulatory process, as described below in section A1, p. 2. The Commission opposes proposal (b), for the reasons set forth above in section D2, p. 10 above. As to proposal (d), the Commission is concerned that an exception for "inherently personal information" could in effect swallow the statutory requirement, since almost any conflict of interest situation may well be considered "inherently personal," and a person in such a situation will be unlikely to want to disclose it. The conflict of interest law puts the public's interest in avoiding official action free from conflicts of interest ahead of that privacy interest. If a person has a conflict which they are unwilling to disclose, then the better course of action would be to avoid official action, not to act officially but decline to disclose the facts. Accordingly, the Commission opposes proposal (d).

9. C. 268B, Section 1: amend to revise definitions of amount, business, and major policymaking position; also amend definition of gift to state expressly that a gift does not include anything permitted to be received pursuant to a regulatory exemption.

The proposed changes to the definitions of amount, business, and major policymaking position are as proposed by the Commission, see sections A3, p. 5 above, and C1and C2, p. 9 above. The Commission believes that the change to the definitions of amount must be a statutory change, because it imposes a new statutory requirement for filers, but that the other changes could be made by regulation.

The proposed amendment to the definition of gifts would have the effect of making it unnecessary to disclose on a Statement of Financial Interests the acceptance of any gifts which are permitted to be accepted by exemptions from the conflict of interest law. The Commission opposes this change, because it believes that the conflict of interest and financial disclosure laws serve related, but separate purposes. Even if a gift is permitted to be accepted because the Commission has created an exemption permitting acceptance because, for example, acceptance serves a public purpose, such as permitting a public employee to accept offered training or useful information, such gifts should still be disclosed on the Statement of Financial Interests when the donor has official business pending before the recipient, in the interest of transparency.

10. C. 268B, Section 3: amend to give Commission full regulatory authority; require Commission regulations to be submitted to the General Court for comment; require Commission regulations to be reviewed by a newly created advisory committee to be appointed by Governor.

The Commission has requested full regulatory authority, as set forth above in section A1, p. 2, and agrees that this must be a statutory change. The Commission has described above the inclusive process it would follow if granted such authority. Thus, the Commission believes that its established practices with respect to administrative rulemaking, and the existing requirements for such rulemaking, accommodate the interest, which it fully shares, in obtaining the broadest possible set of comments, and best possible advice and suggestions, from knowledgeable individuals interested in improving the conflict of interest and financial disclosure laws. The Commission is concerned that creation of a new advisory committee has the potential to delay the rulemaking process; which is already not usually a short one. Perhaps for that reason, none of the other 32 states that have given their Ethics Commission full regulatory authority impose such a requirement. The Commission therefore proposes that the Task Force create a list of all the persons and entities to whom it would wish to see draft Commission regulations submitted for comment; the Commission commits to seeking such comment and engaging fully with those persons and entities in its rulemaking process. The Commission does not support creation of an advisory committee.

11. C. 268B, Section 4: amend to eliminate requirement that a preliminary inquiry be opened upon receipt by the Commission of a sworn complaint.

The Commission agrees with this change, and that it must be a statutory change, as set forth above in section A2, p. 5.