RULINGS

Enforcement Actions

Advisory Opinions

for Calendar Year 1997

STATE
ETHICS
COMMISSION

MASSACHUSETTS

The Massachusetts State Ethics Commission
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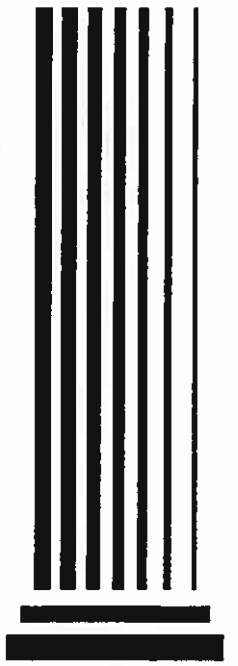

MASSACHUSETTS

The Massachusetts State Ethics Commission

Included in this publication are:

- **State Ethics Commission Decisions and Orders, Disposition Agreements and Public Enforcement Letters issued in 1997.** Cite Enforcement Actions by name of respondent, year, and page, as follows: *In the Matter of John Doe*, 1997 Ethics Commission (page number).

Note: Enforcement Actions regarding violations of G.L. c. 268B, the financial disclosure law, are not always included in the *Rulings* publications.

- **State Ethics Commission Formal Advisory Opinions issued in 1997.** Cite Conflict of Interest Advisory Opinions as follows: *EC-COI-97-(number)*. Cite Financial Disclosure Advisory Opinions as follows: *EC-FD-97-(number)*.

Note: all 1997 Advisory Opinions regarding G.L. c. 268B, the financial disclosure law, are included in this volume.

Typographical errors in the original texts of Commission documents have been corrected.

TABLE OF CASES

(By Subject or Respondent from 1979 through 1997)

(CASES WITHOUT PAGE NUMBERS WERE NOT PUBLISHED, BUT ARE AVAILABLE UPON REQUEST.)

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Summaries of Enforcement Actions
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In the Matter of Roger W. Howlett - In a Disposition Agreement, Raynham Assessor Roger W. Howlett was fined $500 for participating in the July 1995 hiring of his daughter, Lisa McDonald, as a full-time senior clerk in the assessor's office. In the Disposition Agreement, Howlett admitted he violated G.L. c. 268A, §19 first by formulating questions to be asked of candidates and then by asking the candidates some of the questions. While Howlett sat in the interviews of all candidates including his daughter's, he did not ask his daughter any questions. In addition, Howlett abstained from the vote to appoint his daughter to the position. Section 19 of the conflict law generally prohibits municipal officials from taking official actions affecting the financial interests of an "immediate family" member. McDonald resigned the clerk position on November 29, 1996.

In the Matter of Mark P. Reed - In a Disposition Agreement, Southampton Conservation Commissioner Mark P. Reed admitted violating the conflict of interest law in 1994 and 1995. In the Agreement, Reed, a surveyor for Heritage Surveys, Inc. admitted appearing before the Conservation Commission on behalf of four Heritage clients. The Commission fined Reed $1,500. Reed admitted his actions violated G.L. c. 268A, §17(c), which generally prohibits a municipal official from acting as an agent for anyone other than the town in connection with matters in which the town has a direct and substantial interest. According to the Agreement, Reed personally appeared before the Conservation Commission on four occasions in 1994 on behalf of Jeffrey Swanson in relation to a new house, on two occasions in 1994 on behalf of Henry Hochman in relation to a new barn, on five occasions in 1994 on behalf of Paul Lussier in relation to a proposed subdivision and on one occasion in 1995 on behalf of Mark W. and Carolyn A. Blackmer in relation to a new house. As a result of discussions with selectmen and other Conservation Commission members, Reed incorrectly believed it was permissible to represent Heritage and its clients before the Conservation Commission as long as he did not participate in such matters. Reed did not participate as a Conservation Commissioner in any of these matters.

In the Matter of Goldman, Sachs & Co.
In the Matter of Steven J. Kaseta
Public Enforcement Letter 97-3 (In the Matter of Edward M. Murphy) - The Commission fined Goldman, Sachs & Co. ("Goldman Sachs") $3,500 for providing illegal gratuities to former Deputy Treasurer Steven Kaseta ("Kaseta") and former Massachusetts Health and Education Facilities Authority ("HEFA") Executive Director Edward M. Murphy ("Murphy"). Kaseta was fined $1,500 and the Commission issued a Public Enforcement Letter to Murphy. In a Disposition Agreement, Goldman Sachs admitted that it violated G.L. c. 268A, §3(a) in March 1992 when Goldman Sachs Vice President Daniel J. McCarthy provided Kaseta with two theater tickets to "Man of La Mancha" and provided dinner for Kaseta and a guest at Locke-Ober Restaurant. In December 1992, McCarthy provided Kaseta with drinks and dinner in New York City. In addition, Goldman Sachs Vice President Larry Kohn provided Kaseta with theater tickets for shows in New York City on two occasions between December 1991 and June 1992. The total cost of the dinners and tickets was approximately $500. Goldman Sachs also admitted to providing to Murphy, through Goldman Sachs Vice President Benjamin Wolfe, dinner at Cafe Budapest in Boston in 1990, dinner and theater tickets to "Phantom of the Opera" in New York City in 1992 and dinner in Phoenix, Arizona in 1993. The total cost of the dinners and tickets was approximately $630. Section 3(a) of the conflict of interest law prohibits anyone from directly or indirectly giving to a public employee anything of substantial value which is given for or because of an official act performed or to be performed by the public employee. Gratuities worth $50 or more are considered to be "of substantial value" for purposes of the conflict law. Kaseta, who as deputy treasurer was a member of the selection committee which recommended awarding a contract managing state pension funds to Goldman Sachs and also monitored the contract once it was awarded, admitted in a separate Disposition Agreement that he violated G.L. c. 268A, §3(b) by accepting the above free meals and tickets. Section 3(b) of the conflict law prohibits public employees from accepting anything of substantial value which is given to them "for or because of any official act ... performed or to be performed" by them. Finally, a Public Enforcement Letter cited Murphy for accepting the above free meals and tickets in violation of G.L. c. 268A, §§3(b) and 23(b)(3). Section 23(b)(3) generally prohibits public employees from acting in a manner which would cause a reasonable person to conclude that anyone can improperly influence or unduly enjoy their favor in the performance of their official duties. According to the Public Enforcement Letter, as executive director of HEFA, an independent state authority which provides capital financing to higher education institutions and health facilities through issuing tax exempt bonds, Murphy had official responsibility for all of HEFA's actions including assigning staff to work with borrowing institutions to develop proposals and to present such proposals to the

HEFA board of directors, participating in pricing bonds and participating in decisions to choose which firm would be selected as HEFA's short-term investment and pool managers. Goldman Sachs was the lead underwriter for approximately 25 percent of the $6.4 billion in bonds issued by HEFA between 1989 and 1995 and earned commissions of at least several million dollars on these bonds, according to the Public Enforcement Letter. The Commission cites as the major reasons for resolving Murphy's conduct with a Public Enforcement Letter the quasi-private business nature of HEFA's activities, the friendship which developed between Murphy and Wolfe, and Murphy's reciprocation for some of the gratuities received by paying for certain dinners and events.

In the Matter of Casper Charles Sanzone - The Commission fined former Monument Mountain Regional High School guidance counselor Casper Charles Sanzone $2,000 for altering the grades of his daughter and another student. Sanzone raised some of his daughter's grades and lowered several grades of a transfer student. These changes resulted in Sanzone's daughter ranking first and the transfer student ranking third in the class of 1998. In a Disposition Agreement, Sanzone admitted to violating G.L. c. 268A, §23(b)(2) by changing the grades. Had Sanzone accurately entered the transfer student's grades and not raised his daughter's grades, the transfer student would have been ranked first in the class and his daughter would have ranked third. Section 23(b)(2) of the conflict law prohibits a municipal employee from using his position to obtain for himself or others an unwarranted privilege. According to the Disposition Agreement, Sanzone's daughter's class rank, which she had not earned, "enhanced his daughter's chances for scholarships, acceptance into certain colleges and universities, and position for valedictorian." The fine imposed, $2,000, is the maximum allowed by law for a single violation of the conflict of interest law. "The size of the fine in this Disposition Agreement reflects the seriousness of the conduct and that the action was intentional and adversely affected innocent third parties," according to the Disposition Agreement. Sanzone resigned from his position on April 3, 1997.

Public Enforcement Letter 98-1 (In the Matter of Walter Hewitson) - The Commission issued a ruling advising public officials that they will violate the conflict law if they accept compensation or represent private employees in matters which they know *are likely to* come before the board on which they serve *unless* the matter subsequently does not come before their board *or* they receive assurance from their client that no such filing is contemplated. In a Public Enforcement Letter, the Ethics Commission cited Bridgewater Conservation Commissioner Walter Hewitson, a wetlands botanist who consults with engineering firms and individual property owners, for preparing approximately 38 wetland delineation reports. At the time Hewitson prepared the reports, he knew that most of them would be submitted to his board. In fact, more than half were submitted to the Conservation Commission. As the Public Enforcement Letter explained, a public official may not participate privately in or receive compensation for matters such as wetlands delineations or reports about delineations if the public official knows that *it is likely* that the report would be submitted to the public official's board, unless the matter does not come before the board or the public official receives assurances from his client that it will not be filed with the board. The Public Enforcement Letter also cited Hewitson for representing a client before the Commission in February 1995 at an on-site review to determine whether a wetlands boundary should be expanded which might exclude two buildable house lots on Four Leaf Circle for which Hewitson had previously delineated wetlands boundaries. At the site review, Hewitson made a presentation and defended his earlier wetlands delineation. The Public Enforcement Letter noted that Hewitson received incorrect advice from the Conservation Commission chairman and agent which led him to understand that he could submit his reports for review but could not participate as a Conservation Commissioner in matters where he had done the wetlands delineations. Except in the issue of the boundaries for the house lots on Four Leaf Circle, Hewitson abstained as a Conservation Commissioner whenever a matter came before the Conservation Commission which involved a delineation he had done. Section 17 of G.L. c. 268A, the state's conflict of interest law, in general prohibits a municipal official from receiving compensation from or acting as an agent for anyone other than the town in connection with matters in which the town has a direct and substantial interest.

In the Matter of Brian Main - The Commission fined Hopedale Building Commissioner Brian Main $1,000 for participating as building commissioner in a subdivision permit application in which he had a financial interest. In a Disposition Agreement, Main admitted that he violated G.L. c. 268A, §19 in September 1994 by reviewing the drawings and site plans that accompanied an application by Joseph Gorby for a comprehensive permit to construct a 16 unit subdivision on Boyd Street under a so-called Local Initiative Program (LIP). Under the LIP, a developer is allowed to construct a multi-unit housing development under less stringent zoning guidelines than would otherwise apply, provided that a certain percentage of the homes are priced to sell to low-income home buyers.

Gorby hired Main's architectural firm, Bri-Con Associates, to draft preliminary plans for the subdivision in 1993 or 1994. Main also admitted that he violated §19 in October 1994 when he certified that the development was in a certain zoning district and that the site plans and application were accurate. Section 19 of the conflict law generally prohibits a municipal official from taking official actions affecting his financial interests. Main had a financial interest in the permit application because he knew that it was reasonably foreseeable that Gorby would hire him as the architect for the detailed home construction plans, because Main planned to bid to become the construction manager for the project and because any revisions to the preliminary drawings would be directed back to his company, BriCon.

In the Matter of Life Insurance Association of Massachusetts - The Commission issued a Decision and Order concluding the adjudicatory hearing of the Life Insurance Association of Massachusetts ("LIAM") by finding that LIAM violated M.G.L. c. 268A, the state's conflict of interest law, by illegally providing free meals and/or golf to Massachusetts legislators and officials on eight occasions and by providing a former legislator with free dinner and a set of golf clubs on one occasion. The Commission ordered LIAM to pay a civil penalty of $13,500. In the Decision and Order, the Commission found that LIAM violated §3(a) of the Massachusetts conflict of interest law, which prohibits anyone from providing anything of substantial value to state employees, including legislators, "for or because of any official act . . . performed or to be performed" by them. The Commission found, consistent with its precedent over the past 15 years, that the term "substantial value" applied to anything valued at $50 or more. According to the Decision and Order, LIAM provided the following illegal gratuities each valued at $50 or more:

- on July 21, 1989, dinner at the Marriott Hotel in Boston for former Rep. Francis Woodward and his spouse from LIAM Executive Director William Carroll ("Carroll");
- on December 20, 1989, dinner at Locke-Ober in Boston for former Rep. Francis Mara and Joint Committee on Insurance staffer Robert Smith from LIAM lobbyist Luke Dillon;
- on March 22 and 23, 1990, dinners at Fountains Restaurant in Tulsa, Oklahoma for Woodward and his spouse from Carroll;
- on November 24, 1990, dinner for former Rep. Francis Emilio and his spouse at Stouffers Restaurant in Orlando, Florida from Carroll;
- on January 8, 1991, golf clubs and dinner for former Rep. Emilio at Joe Tecce's Restaurant in Boston from Carroll;
- on October 16, 1991, dinner at the Avanti Restaurant, Scottsdale, Arizona for former Rep. Woodward, his spouse, Sen. Robert Havern, his spouse, Sen. Marc Pacheco, former Rep. Daniel Ranieri and his spouse from Carroll;
- on May 13, 1992, dinner at the Four Seasons Restaurant in Boston for former Massachusetts Insurance Commissioner Katherine Doughty from Carroll; and
- on March 12, 1993, dinner at the Grill Restaurant at the Ritz Carlton Hotel on Amelia Island, Florida for former Rep. Francis Mara, his spouse, former Rep. Thomas Walsh, his spouse, former Rep. William Cass, former Rep. Michael Walsh, his spouse, Rep. Kevin Honan, his guest, Rep. Angelo Scaccia, former Rep. John Cox, his spouse and Rep. Kevin Poirier from Carroll.

According to the Decision and Order, LIAM is a trade association of Massachusetts-based commercial life, health and disability insurers. Its primary purpose is to represent its members collectively on matters related to insurance legislation and regulatory matters. An average of over 100 bills filed in the Massachusetts legislature each year affect the insurance business; about six bills affecting the insurance business are enacted into law each year in the Commonwealth. The Decision and Order found that the gratuities were given at a time when the recipients "had already taken official acts and/or reasonably can be expected to take future official acts concerning matters of interest to [LIAM]" because, for example, numerous bills and other matters, such as the accreditation of Massachusetts insurance companies, were pending before the legislative committee or state agency in which the recipients of the gratuities served.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY
DOCKET NO. 561

IN THE MATTER
OF
ROGER W. HOWLETT

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Roger W. Howlett ("Howlett") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On February 14, 1996, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Howlett. The Commission has concluded its inquiry and, on January 15, 1997, found reasonable cause to believe that Howlett violated G.L. c. 268A, §19.

The Commission and Howlett now agree to the following findings of fact and conclusions of law:

1. At all relevant times Howlett was an elected assessor for the Town of Raynham. As such, Howlett was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. In July 1995, the Raynham Assessor's office posted a position for a full-time senior clerk in the assessor's office.

3. At that time the senior clerk position paid an hourly wage of approximately $10.00, with benefits, but no overtime.

4. The assessors received ten applications for the position, and from those an assessor and the assistant assessor selected the four candidates to interview.[1] One of the four candidates was Lisa McDonald ("McDonald"), Howlett's daughter.

5. Before interviewing the applicants at an assessor's meeting on July 25, 1995, Howlett, the other two assessors and the assistant to the assessors discussed questions to ask the candidates (during their interviews). Howlett participated in this discussion and suggested some of the questions which the candidates were asked.

6. At the assessor's meeting on July 25, 1995,each of the four candidates met individually with Howlett, the other two assessors and the assistant.

7. Howlett sat in on each interview, including the interview of his daughter, McDonald. Most of the questions were asked by one of the other assessors, but, Howlett asked a few questions of some of the candidates. (Howlett, however, did not ask his daughter any questions.)

8. According to the Assessors' minutes of July 25, 1995, "Mr. Lynn, Mr. Ritchie, and Maureen voted for Lisa McDonald. Mr. Howlett abstained from voting."[2]

9. On July 26, 1995, McDonald began working at the assessor's office as the senior clerk. The nine applicants who were not hired were sent letters signed by Howlett as chairman of the board of assessors, informing them that the position had been filled.[3]

10. Section 19 of G.L. c. 268A, except as permitted by paragraph (b) of that section, prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he or an immediate family member[4] has a financial interest. None of the exceptions contained in §19(b) apply in this case.

11. The determination to hire someone for the full-time senior clerk position was a particular matter.[5]

12. As set forth above, Howlett participated[6] as an assessor in the hiring determination by proposing questions and participating in the interviews.

13. As an applicant for the senior clerk position, McDonald had a financial interest in the appointment to this position. Howlett knew of his daughter's financial interest at the time he participated in the hiring process.

14. Accordingly, by participating in the hiring process for the position, as set forth above, Howlett participated as an assessor in a particular matter in which he knew that an immediate family member had a financial interest, thereby violating G.L. c. 268A, §19.[7]

15. Howlett cooperated with the Commission's investigation.

In view of the foregoing violations of G.L. c. 268A by Howlett, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings on the basis of the following terms and conditions agreed to by Howlett:[8]

(1) that Howlett pay to the Commission the sum of five hundred dollars ($500.00) as a civil penalty for violating G.L. c. 268A, §19 as stated above;

(2) that Howlett will act in conformance with the requirements of G.L. c. 268A, §19 in the future; and

(3) that Howlett waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: January 22, 1997

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[1] Howlett did not participate in deciding whom to interview.

[2] Howlett did not participate in the vote because he thought it would be a conflict of interest to vote to hire his daughter; he did not think it would be a conflict of interest to participate in the interviews or help formulate the interview questions.

[3] It is customary practice for the chairman to sign all correspondence.

[4] "Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. G.L. c. 268A, §1(e). As his daughter, McDonald is a member of Howlett's immediate family.

[5] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

[6] "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

[7] See, e.g., Commission Advisory No. 11. Nepotism, page 2. "Personal and substantial participation involves any significant involvement in the hiring process. For example, interviewing or creating a test for applicants, one of whom is a family member, would violate the law."

[8] On November 29, 1996, McDonald resigned from the senior clerk's position.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 563

IN THE MATTER
OF
MARK P. REED

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Mark P. Reed ("Reed") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On August 8, 1996, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Reed. The Commission has concluded its inquiry and, on June 11, 1997, found reasonable cause to believe that Reed violated G.L. c. 268A.

The Commission and Reed now agree to the following findings of fact and conclusions of law:

1. Reed was, during the time relevant, a member of the Southampton Conservation Commission ("Conservation Commission"). As such, Reed was a municipal employee as that term is defined in G.L. c. 268A, §1.

2. At all times relevant hereto, Reed was a surveyor employed by Heritage Surveys, Inc. ("Heritage") as a salaried full-time employee.

3. Reed appeared as a surveyor before the Conservation Commision on behalf of the following Heritage clients on the following occasions:

(a) On April 11, June 13, June 27 and June 29, 1994, on behalf of Jeffrey Swanson ("Swanson") in relation to a new house to be

built on Glendale Road in connection with a notice of intent dated June 5, 1994, and an order of conditions dated July 11, 1994 for the aforementioned house.[1/]

(b) On August 15 and November 14, 1994, on behalf of Henry Hochman ("Hochman") in relation to a barn to be built at 14 Russellville Road in connection with a request for a determination of applicability[2/] dated August 9, 1994, and a negative determination granted by the Conservation Commission on August 18, 1994, in connection with the aforementioned barn.

(c) On June 13, June 27, June 29, July 25 and August 15, 1994 on behalf of Paul Lussier ("Lussier") in relation to a proposed subdivision known as Pomeroy Meadows in connection with a notice of intent dated June 7, 1994.

(d) On July 31, 1995 on behalf of Mark W. and Carolyn A. Blackmer ("the Blackmers") in relation to the proposed construction of a single family home on Brickyard Road Extension in connection with a notice of intent dated July 20, 1995 and an order of conditions dated August 14, 1995, for the aforementioned house.

4. Reed received compensation from Heritage for appearing on behalf of Swanson, Hochman, Lussier and the Blackmers before the Conservation Commission. The compensation paid to Reed by Heritage was his normal salary. Reed did not receive additional compensation from Heritage for his appearances before the Conservation Commission.

5. General Laws, c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which his town has a direct and substantial interest.

6. The decisions to grant determinations of applicability and orders of conditions were particular matters. The town had an obvious direct and substantial interest in those particular matters.

7. By acting as agent for Swanson, Hochman, Lussier and the Blackmers before the Conservation Commission concerning their notices of intent, determinations of applicability and/or orders of conditions as set out in the foregoing paragraphs, Reed violated G.L. c. 268A, §17(c).

8. Reed did not participate as a Conservation Commission member in any of the above matters concerning Swanson, Hochman, Lussier or the Blackmers.

9. When Reed was appointed to the Conservation Commission, he discussed his employment with Heritage with the Selectmen and the other Conservation Commission members. As a result of these discussions, Reed incorrectly believed that it was permissible to represent Heritage and its clients before the Conservation Commission. His understanding was that, as a Conservation Commission member, he would abstain from voting, discussing or acting on any matter in which Heritage had any involvement. His understanding was incorrect.[3/]

10. Reed cooperated fully with the Commission's investigation.

In view of the foregoing violations of G.L. c. 268A by Reed, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Reed:

(1) that he, in the future, refrain from acting as agent for private parties in connection with particular matters in which the Town of Southampton has a direct and substantial interest, prohibited by G.L. c. 268A, §17(c);

(2) that he pay to the Commission the sum of one thousand five hundred dollars ($1,500) as a civil penalty for the violations of G.L. c. 268A, §§17(c); and

(3) that he waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: June 16, 1997

[1/] A notice of intent informs a Conservation Commission of a developer's plan to do work in a wetlands or in the 100 foot wetlands buffer. In turn, the Conservation Commission regulates how and where the work is done by issuing an "order of conditions."

[2/] A determination of applicability indicates whether the proposed project is within the jurisdiction of the Conservation Commission.

1/ Reed's reliance on incorrect advice is not a defense. While such reliance can be a mitigating factor, little weight is given when the advice is oral and not from town counsel. The only advice which can be relied on as a defense is written advice from the State Ethics Commission, or the Commission's written concurrence with town counsel advice. See 930 CMR 1.03. Reed neither contacted town counsel nor the State Ethics Commission concerning representing clients before the Conservation Commission.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 564

IN THE MATTER
OF
GOLDMAN, SACHS & Co.

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Goldman, Sachs & Co. ("Goldman Sachs") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On April 11, 1995, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Goldman Sachs had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded the inquiry and, on January 15, 1997, voted to find reasonable cause to believe that Goldman Sachs violated G.L. c. 268A, §3(a).

The Commission and Goldman Sachs now agree to the following facts and conclusions of law:

1. Goldman Sachs, a New York limited partnership, is an investment banking and securities firm with headquarters in New York City. According to the firm's *1995 Annual Review*, Goldman Sachs' activities and sources of revenue include securities underwriting, sales and trading and asset management. Goldman Sachs conducts its business through five operating divisions: Investment Banking, Fixed Income, Equities, Currency and Commodities, and Asset Management. At the end of 1995, Goldman Sachs' assets totaled slightly over $1 billion.

I. Steven Kaseta

2. During the relevant time, Steven Kaseta ("Kaseta") was a Massachusetts deputy treasurer. As deputy treasurer, Kaseta was responsible for overseeing the day-to-day administrative activities of the Massachusetts Teachers and Employees Retirement Systems Trust ("MASTERS Trust").1/

3. During the relevant time, Daniel J. McCarthy ("McCarthy") was employed as a vice president at Goldman Sachs' Boston Institutional Department, which functions within the Equities Division.

4. During the relevant time, Larry Kohn ("Kohn") was employed as a vice president with Goldman Sachs Asset Management ("GSAM"), a division of Goldman Sachs.

5. In May 1991, the Massachusetts Treasurer's Office issued a Request for Proposals ("RFP") for investment managers for $595 million in the MASTERS Trust domestic equity pension funds. On May 23, 1991, GSAM submitted a proposal in response to the RFP. In August 1991, the Treasurer's office awarded GSAM a contract to manage $100 million of these funds. This contract had an effective annual fee of $400,000 to GSAM.

6. As deputy treasurer, Kaseta was a member of the selection committee which recommended to the Treasurer the award of the foregoing contract to GSAM. Furthermore, as a deputy treasurer, Kaseta was one of the officials responsible for evaluating Goldman Sachs' performance under the contract from the time the contract was awarded in August 1991 to September 1993.2/ Finally, as a deputy treasurer, Kaseta was in a position along with the Treasurer's other staff to recommend that the Treasurer award similar contracts in the future.

7. On two occasions between April 1991 and May 1993, McCarthy entertained Kaseta with meals and theater tickets where Kaseta's pro rata share was worth $50 or more. On March 12, 1992, McCarthy provided Kaseta with two tickets to "Man of La Mancha" at the Colonial Theater in Boston, MA. On this same date, McCarthy also provided Kaseta and his guest with dinner at Locke-Ober Restaurant. The total cost of this March 12, 1992 entertainment for Kaseta and his guest was approximately $130. On December 10, 1992, McCarthy provided Kaseta with drinks and dinner at the Post House Restaurant in New York City. Kaseta's pro

rata share of the cost of this December 10, 1992 entertainment was approximately $95.

8. Additionally, on December 5, 1991, and June 26, 1992, Kohn provided Kaseta with theater tickets for shows in New York City. The cost of these tickets was approximately $290.

9. Goldman Sachs reimbursed McCarthy and Kohn or paid for all of the expenses they incurred in entertaining Kaseta. Goldman Sachs viewed the expenses as business expenses warranting reimbursement. In total, Goldman Sachs, through McCarthy and Kohn, provided Kaseta with items with a cost of approximately $500.

10. Section 3(a) of G.L. c. 268A, prohibits anyone from, directly or indirectly, giving a state employee anything of substantial value for or because of any official act performed or to be performed by the state employee.

11. As a deputy state treasurer, Kaseta was a state employee.

12. Anything with a value of $50 or more is of substantial value for §3 purposes.[3/]

13. The decisions and actions by Kaseta regarding the awarding and monitoring of contracts to manage MASTERS Trust assets were official acts performed or to be performed by him as a deputy treasurer.[4/]

14. As a business, Goldman Sachs acts through and is responsible for the conduct of its employees acting within the scope of their employment.[5/] Therefore, in that Goldman Sachs through McCarthy and Kohn provided Kaseta with free meals and tickets of substantial value for or because of official acts performed or to be performed by Kaseta, Goldman Sachs violated G.L. c. 268A, §3(a).

15. The Commission is aware of no evidence that any of the foregoing gifts were given to Kaseta with the intent to influence any specific official act by him as a deputy treasurer. The Commission is also aware of no evidence that Kaseta, in return for gifts, took any official action which would have affected Goldman Sachs. In other words, the Commission is aware of no evidence that there was any quid pro quo.[6/] The Commission is aware of no evidence that Goldman Sachs at any time acted in a manner inconsistent with the best interests of the MASTERS Trust when providing investment services. However, even if the conduct of Goldman Sachs' employees was only intended to create goodwill, it was still impermissible.

II. Edward M. Murphy

16. From May 1989 to June 1995, Edward M. Murphy ("Murphy") was the executive director of the Massachusetts Health and Educational Finance Authority ("HEFA").[7/]

17. During the relevant time, Benjamin Wolfe ("Wolfe") was a Goldman Sachs vice president within the firm's Municipal Bond Department.[8/]

18. For a number of years, including the years in which Murphy served as HEFA executive director, Goldman Sachs has been a leading underwriter of bonds for non-profit institutions in Massachusetts. As an underwriter, Goldman Sachs would test the market for a bond, establish a price for the bond, and then agree to sell all or part of the bond issuance at that price.

19. During Murphy's tenure at HEFA, Wolfe was one of Goldman Sachs' senior investment bankers for non-profit institutions in Massachusetts.

20. Between 1989 and 1995, HEFA issued approximately $6 to $8 billion in new tax-exempt bonds. HEFA would normally receive the proceeds of the sale of the bonds, oversee the payment of the costs of the issuance, such as attorneys' and underwriters' fees, and remit the balance to the borrowing institution. HEFA would also monitor the borrowing institution's repayment to the bondholders.

21. Goldman Sachs was the lead underwriter for approximately 25 percent of all of the bonds issued by HEFA between 1989 and 1995.

22. As executive director, Murphy assigned the HEFA staff who would work with a borrowing institution in developing a bond proposal. Once the proposal was developed, it had to be presented to and approved by the HEFA Board of Directors. Murphy assigned who from the HEFA staff would make the presentation to the board pertaining to the bond. More generally, all agenda items for board meetings had to be approved by Murphy, otherwise, the items would not be placed on the agenda.

23. The HEFA board reserves the right not to enter into a bond transaction with a particular underwriter if it does not wish to do so.[9]

24. Goldman Sachs' profits from HEFA bonds, referred to as its "take down," was $8 per thousand during Murphy's early tenure, but later changed to $5 per thousand. (The take down is based on the bond prices. For example, in a $100 million dollar transaction, if Goldman Sachs' take down was $6 per thousand, its fees would amount to approximately $600,000.)

25. In addition to tax-exempt bond financing, HEFA also agrees to support "pools." A "pool" is typically a transaction where one or more borrowers finance more than one project or need by one umbrella bond issuance. During Murphy's tenure at HEFA, one such pool was entered into by HEFA with a hospital in 1991. That hospital was a Goldman Sachs client and was in the process of building a medical research facility. A pool was organized to make the management of funding easier. HEFA chose Goldman Sachs to manage the pool.

26. In 1991 or 1992, HEFA issued an RFP for a short-term investment manager for its bond proceeds. Goldman Sachs submitted a bid on the RFP. Goldman Sachs was not chosen. In 1994, HEFA was re-marketing a pool for a firm which went out of business. HEFA issued an RFP, on which Goldman Sachs put in a bid. Again, Goldman Sachs was not chosen.

27. As executive director, Murphy participated in each of the foregoing decisions regarding which firm would be HEFA's short-term investment manager and which firm would manage a given pool.

28. On the following three occasions Wolfe provided Murphy and his wife with entertainment where Murphy's pro rata share cost $50 or more:

(a) a July 19, 1990 dinner at Cafe Budapest in Boston, attended by Murphy, Mrs. Murphy, Wolfe and Mrs. Wolfe. The total cost for the dinner was $284.30; Murphy's pro rata share was $142.16;

(b) a November 20, 1992 dinner at Le Bernadin Restaurant in New York City, NY, and theater tickets to "Phantom of the Opera," for Murphy, Mrs. Murphy, Wolfe and Mrs. Wolfe. The total cost was $735; Murphy's pro rata share was $367.50; and

(c) a October 23, 1993 dinner at Christopher's Restaurant in Phoenix, AZ, attended by Murphy, Mrs. Murphy, Wolfe and Mrs. Wolfe and two other couples. The total cost for the entertainment was $482.86; Murphy's pro rata share was $120.72.

29. Goldman Sachs reimbursed Wolfe for the above expenses incurred in entertaining Murphy. Goldman Sachs viewed the expenses as business expenses warranting reimbursement. In total, Goldman Sachs, through Wolfe, provided Murphy with items with a cost of approximately $630.

30. As the HEFA executive director, Murphy was a state employee.

31. The decisions and actions by Murphy regarding what items would go on the board's agenda, which staff would be assigned to a bond proposal, the choice of a manager for a pool or a short-term investment manager for bond proceeds were official acts performed or to be performed.

32. As stated above, Goldman Sachs acts through and is responsible for the conduct of its employees acting within the scope of their employment. Therefore, Goldman Sachs violated §3(a) by through Wolfe providing Murphy with free meals and tickets, for or because of official acts performed or to be performed by Murphy as HEFA executive director.

33. The Commission is aware of no evidence that any of the foregoing gifts were given to Murphy with the intent to influence any specific official act by him as HEFA executive director. The Commission is also aware of no evidence that Murphy in return for gifts took any official action which would have affected Goldman Sachs. In other words, the Commission is aware of no evidence that there was any quid pro quo.[10] The Commission is aware of no evidence that Goldman Sachs at any time acted in a manner inconsistent with the best interests of HEFA when providing underwriter services. However, even if the conduct of Goldman Sachs' employees was only intended to create goodwill, it was still impermissible.

34. Goldman Sachs fully cooperated with the Commission's investigation.

Remedy

In view of the foregoing violations of G.L. c. 268A, §3(a), the Commission has determined that the public interest would be served by the disposition of this inquiry without further proceedings, on the basis of the following terms and conditions agreed to by Goldman Sachs:

(1) that Goldman Sachs pay to the Commission the sum of $3,500 as a civil fine for violating G.L. c. 268A, §3(a);

(2) that Goldman Sachs waive all rights to contest the findings of fact, conclusions of law in terms and conditions contained in this agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: June 19, 1997

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[1] The MASTERS Trust is the combined investment fund for state employees and state teachers retirement annuities. G.L. c. 32, §23 establishes a non-paid Pension Investment Committee ("PIC") to oversee the MASTERS Trust. The day-to-day administrative activities of the trust are carried out by the Massachusetts Treasurer's Office. The MASTERS trust is a broadly diversified portfolio which stood at $5.532 billion at the end of February 1991.

[2] Kaseta resigned from the Treasurer's office in September 1993.

[3] See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

[4] "Official act" is defined as any decision or action in a particular matter or in the enactment of legislation.

[5] See *John Hancock*, 1994 SEC 646; *Mass Medical Society*, 1995 SEC 751.

[6] Indeed, any such *quid pro quo* understanding would raise extremely serious concerns under the bribery section of the conflict of interest law, G.L. c. 268A, §2. Section 2 is not applicable in this case, however, as there was no evidence of such a *quid pro quo* between the donors and Kaseta.

[7] HEFA, an independent authority, was created by special legislation in 1968. Mass. St. 1968, c. 614. HEFA provides capital financing to public and non-profit institutions for higher education, non-profit hospitals, nursing homes, and their affiliates as well as non-profit research and cultural institutions and schools for the handicapped. This financing is accomplished primarily through HEFA issuing the tax exempt bonds. The monies raised are used for project acquisitions, construction, renovation, refinancing, and equipment financing.

[8] Wolfe left Goldman Sachs in May 1995.

[9] According to Murphy, this policy has never been applied.

[10] As discussed in fn. 6 above, any such *quid pro quo* would raise c. 268A, §2 issues.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 565

IN THE MATTER
OF
STEVEN J. KASETA

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Steven J. Kaseta ("Kaseta") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final Commission order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On April 11, 1995, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into allegations that Kaseta had violated the conflict of interest law, G.L. c. 268A. The Commission has concluded the inquiry and, on January 15, 1997, voted to find reasonable cause to believe that Kaseta violated G.L. c. 268A, §3(b).

The Commission and Kaseta now agree to the following facts and conclusions of law:

1. During the relevant time, Kaseta was a Massachusetts deputy treasurer. As deputy treasurer, Kaseta was responsible for overseeing the day-to-day administrative activities of the Massachusetts Teachers and Employees Retirement Systems Trust ("The MASTERS Trust").[1]

2. Goldman, Sachs & Company ("Goldman Sachs"), a Delaware limited partnership, is an investment banking and securities firm with headquarters in New York City. According to the firm's *1995 Annual Review*, Goldman Sachs' activities and sources of revenue include securities underwriting and distribution; trading of corporate debt and equity securities, United States government and agency securities, non-U.S. sovereign debt and mortgage and

municipal securities; execution of swaps and other derivative financial instruments; mergers and acquisitions; financial advisory services for restructuring; private placements, and lease and project financing; real estate brokerage and finance; merchant banking; stock brokerage and research; asset management; and the trading of currency and commodities. Goldman Sachs conducts its business through five operating divisions: Investment Banking, Fixed Income, Equities, Currency and Commodities, and Asset Management. At the end of 1995, Goldman Sachs' assets totaled slightly over $1 billion.

3. During the relevant time, Daniel J. McCarthy ("McCarthy") was employed as a vice-president at Goldman Sachs' Boston Institutional Department, which functions within the Equities Division.

4. During the relevant time, Larry Kohn ("Kohn") was employed as a vice-president with Goldman Sachs Asset Management ("GSAM"), a division of Goldman Sachs.

5. In May 1991, the Massachusetts Treasurer's Office issued a Request for Proposals ("RFP") for investment managers for $595 million in the MASTERS Trust domestic equity pension funds. On May 23, 1991, GSAM submitted a proposal in response to the RFP. In July 1991, the Treasurer's office awarded GSAM a contract to manage $100 million of these funds. This contract had an effective annual fee of $400,000 to GSAM.

6. As deputy treasurer, Kaseta was a member of the selection committee which recommended the award of the foregoing contract to GSAM. Furthermore, as a deputy treasurer, Kaseta was responsible for evaluating Goldman Sachs' performance under the contract from the time the contract was awarded in July 1991 to September 1993.[2/] Finally, as deputy a treasurer, Kaseta was in a position along with the Treasurer's other staff to award similar contracts in the future.

7. On two occasions between April 1991 and May 1993, McCarthy entertained Kaseta with meals and theater tickets, Kaseta's pro rata share of which cost $50 or more. On March 12, 1992, McCarthy provided Kaseta with two tickets to "Man of La Mancha" at the Colonial Theater in Boston. On this same date, McCarthy also provided Kaseta and his guest with dinner at Locke-Ober Restaurant. The total cost of this March 12, 1992, entertainment for Kaseta and his guest was approximately $130. On December 10, 1992, McCarthy provided Kaseta with drinks and dinner at the Post House Restaurant in New York City. Kaseta's pro rata share of the cost of this December 10, 1992, meal was approximately $95.

8. Additionally, on December 5, 1991 and June 26, 1992, Kohn provided Kaseta with theater tickets for shows in New York City. The cost of these tickets was approximately $290.

9. Goldman Sachs reimbursed McCarthy and Kohn for all of the expenses they incurred in entertaining Kaseta. Goldman Sachs viewed the expenses as business expenses warranting reimbursement. In total, Goldman Sachs, through McCarthy and Kohn, provided Kaseta with items of substantial value with an aggregate cost of approximately $500.

10. Section 3(b) of G.L. c. 268A, the conflict of interest law, prohibits a state employee from, directly or indirectly, receiving anything of substantial value for or because of any official act or act within his official responsibility performed or to be performed by him.

11. As a deputy state treasurer, Kaseta was a state employee.

12. Anything with a value of $50 or more is of substantial value for §3 purposes.[3/]

13. The decisions and actions by Kaseta regarding the recommending and monitoring of contracts to manage Masters Trust assets were official acts performed or to be performed by him as a deputy treasurer.[4/]

14. Kaseta accepted the above free meals and tickets of substantial value for or because of official acts or acts within his official responsibility performed or to be performed by him. In doing so, Kaseta violated §3(b).[5/]

15. The Commission is aware of no evidence that any of the foregoing entertainment and meals were given to Kaseta with the intent to influence any specific official act by him as a deputy treasurer. The Commission is also aware of no evidence that Kaseta, in return for entertainment and meals, took any official action which would have affected Goldman Sachs. In other words, the Commission is aware of no evidence that there was any *quid pro quo*. The Commission is aware of no evidence that Kaseta at any time acted in a manner inconsistent with the best interests of the

Masters Trust. However, even if Kaseta understood that Goldman Sachs' employees were only intending to create goodwill, Kaseta's receipt of these gratuities was still impermissible.

16. Kaseta fully cooperated with the Commission's investigation.

In view of the foregoing violations of G.L. c. 268A, §3(b), the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Kaseta:

(1) that Kaseta pay to the Commission the sum of $1,500 as a civil fine for violating G.L. c. 268A, §3(b);

(2) that Kaseta waive all rights to contest the findings of fact, conclusions of law in terms and conditions contained in this agreement in any related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: June 19, 1997

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[1] The MASTERS Trust is the combined investment fund for state employees and state teachers retirement annuities. G.L. c. 32, §23 establishes a non-paid Pension Investment Committee ("PIC") to oversee the MASTERS Trust. The day-to-day administrative activities of the trust are carried out by the Massachusetts Treasurer's Office. The MASTERS Trust is a broadly diversified portfolio which stood at $5.532 billion at the end of February 1991.

[2] Kaseta resigned from the Treasurer's office in September 1993.

[3] See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

[4] "Official act," any decision or action in a particular matter or in the enactment of legislation.

[5] In determining whether the items of substantial value have been given for or because of official acts or acts within one's official responsibility, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. As the Commission explained in *Advisory No. 8* (issued May 14, 1985):

> Even in the absence of any specifically identifiable matter that was, is or soon will be pending before the official, §3 may apply. Thus, where there is no prior social or business relationship between the giver and the recipient, and the recipient is a public official who is in a position to use [his] authority in a manner which could affect the giver, an inference can be drawn that the giver was seeking the goodwill of the official because of a perception by the giver that the public official's influence could benefit the giver. In such a case, the gratuity is given for his yet unidentifiable "acts to be performed."

Edward M. Murphy
c/o Thomas R. Kiley, Esquire
Cosgrove, Eisenberg & Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110

PUBLIC ENFORCEMENT LETTER 97-3

Dear Mr. Murphy:

As you know, the State Ethics Commission has conducted a preliminary inquiry into allegations that as executive director of the Massachusetts Health and Education Facilities Authority ("HEFA"), you violated G.L. c. 268A by accepting items of substantial value from Goldman, Sachs & Co. ("Goldman Sachs"). Based on the staff's investigation (discussed below), the Commission voted on January 15, 1997, to find that there is reasonable cause to believe that you violated G.L. c. 268A, §§3(b) and 23(b)(3). In view of certain mitigating circumstances (also discussed below), the Commission, however, has determined that further proceedings are not warranted. Rather, the Commission has concluded that the public interest would be better served by disclosing the facts revealed during our inquiry and explaining applicable provisions of the law, with the expectation that this will insure both your and other state employees' future understanding of and compliance with the conflict law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you, and that you have chosen not to exercise your right to a hearing before the Commission.

A. Facts

1. HEFA, an independent state authority, was created by special legislation in 1968. *St. 1968, c. 614.* HEFA provides an alternative market mechanism through which hospitals, schools, and other institutions serving the public's health, educational and cultural needs can borrow money. Thus, HEFA provides capital financing to public and non-profit institutions for higher education, non-profit hospitals, nursing homes and their

affiliates, non-profit research and cultural institutions, and schools for the handicapped. This financing is accomplished primarily through HEFA issuing tax-exempt bonds. The monies raised are used for project acquisitions, construction, renovation, refinancing and equipment financing.

HEFA is not state funded. Instead, HEFA derives its operating funds from fees generated from the financial services it provides to participating institutions. In this regard, it competes in the marketplace with other tax exempt bond-issuing sources such as the Massachusetts Industrial Finance Authority ("MIFA") and local industrial finance authorities; with federal agencies, most notably the Federal Housing Administration of the United States Department of Housing and Urban Development;[1/] with non-exempt sources and other traditional means of financing for clients. HEFA is different from bonding issuers like the Massachusetts Treasurer in that it is a "conduit" issuer; the revenues behind its bonds are the revenues of the borrowing institution, not HEFA's or the Commonwealth's revenues.[2/]

2. From May 1989 to June 1995, you were HEFA's executive director. As executive director, you had official responsibility for all of HEFA's actions. For example, you assigned the HEFA staff who would work with a borrowing institution in developing a bond proposal. Once the proposal was developed, it was presented to the HEFA board of directors for approval. You assigned HEFA staff to make the bond presentation to the HEFA board of directors. You also approved all agenda items for board meetings. After the HEFA board acted, you typically participated in pricing the bond.[3/]

3. Goldman Sachs, a New York limited partnership, is an investment banking and securities firm with headquarters in New York City. At the end of 1995, Goldman Sachs' assets totaled slightly over $1 billion.

4. For a number of years, including the years in which you served as HEFA's executive director, Goldman Sachs has been a leading underwriter of bonds for non-profit institutions in Massachusetts. As an underwriter, Goldman Sachs tests the market for a bond, establishes a price for the bond, and then agrees to sell all or part of the bond issue at that price.

5. During your tenure at HEFA, Benjamin Wolfe ("Wolfe") was a Goldman Sachs vice-president within the firm's Municipal Bond Department and was one of Goldman Sachs' senior investment bankers for non-profit institutions in Massachusetts.[4/]

6. Between 1989 and 1995, HEFA issued approximately $6.4 billion in tax-exempt bonds. Some bonds are issued for new construction, in which case HEFA would receive the proceeds of the sale of the bonds, provide for the payment of the costs of the issue, such as attorneys' fees pursuant to a pre-approved schedule, and remit funds to the institution upon the receipt of a requisition and pursuant to a pre-approved project description. On refinancing issuances, HEFA might receive funds constructively, through a bank trustee, for instance, which would hold funds in escrow, and make the payment contemplated by the pre-approved schedule.

7. Goldman Sachs was the lead underwriter for approximately 25 percent of the $6.4 billion in bonds issued by HEFA between 1989 and 1995. Goldman Sachs earned commissions of several million dollars on these bonds.

8. HEFA reserves the right not to enter into a bond transaction with a particular underwriter if it does not wish to do so. This power was not exercised during your tenure, however.

9. In addition to tax-exempt bond financing, HEFA also agrees to support "pools," transactions where one or more borrowers finance two or more projects or needs through a single umbrella bond issue. In 1991, HEFA entered into a pool with a Massachusetts hospital which was a Goldman Sachs client. Goldman Sachs was chosen to manage the pool, a bonding of approximately $30 million.

10. In 1991 or 1992, HEFA issued a Request For Proposals ("RFP") for a short-term investment manager for its bond proceeds. Goldman Sachs submitted a bid, but was not chosen. In 1994, HEFA was choosing a re-marketing agent to replace a pool for a firm that was no longer involved in that type of business. HEFA issued an RFP for a manager for the pool. Goldman Sachs submitted a bid, but again was not selected.

11. As HEFA executive director, you participated in each of the foregoing decisions regarding which firm would be selected as HEFA's short-term investment and pool managers.

12. On the following three occasions Wolfe provided you with entertainment where your pro rata share cost $50 or more:

(a) a July 19, 1990 dinner at Cafe Budapest in Boston, attended by you, Mrs. Murphy, Wolfe and Mrs. Wolfe. The total cost for the dinner was $284.30; your pro rata share for you and your wife was $142.15;

(b) a November 20, 1992 dinner at Le Bernadin Restaurant in New York City, NY, and theater tickets to "Phantom of the Opera," for you, Mrs. Murphy, Wolfe and Mrs. Wolfe. The total cost was $735; your pro rata share for you and your wife was $367.50; and

(c) an October 23, 1993 dinner at Christopher's Restaurant in Phoenix, AZ, attended by you, Mrs. Murphy, Wolfe and Mrs. Wolfe and two other couples. The total cost for the entertainment was $482.86; Your pro rata share for you and your wife was $120.72.

13. Goldman Sachs reimbursed Wolfe for the above expenses incurred in entertaining you. Goldman Sachs viewed the expenses as business expenses warranting reimbursement. As described above, Goldman Sachs, through Wolfe, provided you with a total of approximately $630 in gratuities based on you and your wife's pro rata share.

14. According to your testimony, you met Wolfe in1989 shortly after you became HEFA's executive director. Your first conversation with Wolfe took place by telephone regarding a controversy involving a number of HEFA clients leaving HEFA to obtain their funding through MIFA, which at that time was competing with HEFA in financing bonds for schools and hospitals. You wanted to understand Wolfe's perspective, as his company was lead underwriter on a number of deals and had been blamed by many at HEFA for the loss of business to MIFA. You also wanted to repair relations with Wolfe, if possible, because HEFA wanted to regain many of the Goldman Sachs clients it had lost to MIFA.

Your first opportunity to work with Wolfe on a bond issue took place in the summer of 1989 on a hospital transaction. Goldman Sachs was the lead underwriter on the bond issue. Because it was your first opportunity to rectify HEFA's problems (created by its competition with MIFA), you took a more active role in this bond issue. You and Wolfe came to know each other as you worked together on this transaction. You began to develop a great deal of respect for Wolfe's professionalism. Wolfe was helpful in offering advice to you because Wolfe had held a similar executive director position in Illinois and had a number of insightful tips for you. Goldman Sachs, through Wolfe, could have been involved in as many as a dozen HEFA transactions during a peak year in your tenure. HEFA typically was involved in 25 to 35 transactions per year during that period.

You saw Wolfe approximately twice a week between 1989 and 1995. Wolfe frequently ate lunch at HEFA's office, paid for by HEFA. At least once a month, you and Wolfe would leave the office and go out to lunch together and you would often charge the expense to HEFA. These occasions were related to work being done on bond issuances.

In about 1990, you and Wolfe began to socialize in a non-business atmosphere and develop a personal relationship. You and Wolfe had a number of things in common, such as past job experiences and children of common ages. In 1990, Wolfe's wife, whom you had previously met, had an opportunity to be in Boston to visit their daughter, a Boston University student, and the Wolfes got together with you and your wife for dinner at Cafe Budapest as described above. This sort of gathering did not take place often because Wolfe's wife was rarely in Boston, and you and your wife were not in New York very often. Whenever the occasion presented itself, the two couples would try to get together.

You and Wolfe took turns creating social opportunities, and would try to include your spouses or members of your families.[5] A typical gathering of the two families took place during a Goldman Sachs health care conference in Orlando, Florida in 1992. You rented a boat using personal funds and invited Wolfe, his wife and daughter. Two of your four children were also present. (You could not recall any such outing in a non-conference related setting.) You thought of these occasions as separate from routine business contacts with Wolfe. In your view, they were social and personal gatherings at which either Wolfe or you would pay. In the instances where you paid, you used your personal credit card, not HEFA funds. In the instances where Wolfe paid, you had no knowledge as to how Wolfe paid. To the extent you thought about it, your assumption would have been that Wolfe paid personally, not through Goldman Sachs. As to those occasions

where Wolfe paid, you never reflected on whether the cost was greater than $50 for you and your spouse, but you assumed that it was. Regardless of who paid, there was no business discussed; on these occasions topics included family life and personal interests. While your main motivation for the gatherings was personal, you also saw these dinners with Wolfe as a way to help HEFA form a relationship with Goldman Sachs.

You pointed out that in addition to the boat outing, there were other occasions where you paid with your own personal credit card to entertain Wolfe. For example, on October 18, 1990, you and your spouse treated the Wolfes to dinner in New York City at Orso Restaurant. You personally paid $177.80 for the meal. On July 27, 1994, you treated Wolfe to dinner at Toscano Restaurant in Boston. You paid $121.05 for the meal, during which you sought Wolfe's advice pertaining to your leaving HEFA. These were all occasions which you felt were personal in nature, and therefore you paid personally.

In contrast, on those occasions where you entertained Wolfe for business purposes, you paid using HEFA funds. For example, in 1991, during a conference in Mystic, Connecticut, you through HEFA hosted a dinner for a number of HEFA individuals and others, including Wolfe. This was a *business-related* social gathering because HEFA board members and other staff were present and the function provided a networking atmosphere for HEFA. You differentiate this type of event from the dinners which included only Wolfe, you and your spouses, which were of a social/personal nature.

You would not call Wolfe a "best friend." You encounter a number of people in your line of work. You tend to keep boundaries for business contacts. You considered Wolfe somewhat of a close friend because you felt that you could call on Wolfe for personal matters, if the opportunity arose.

B. Discussion

Section 3(b):

As the HEFA executive director, you were a state employee.[6/] As such, you were subject to the conflict of interest law, G.L. c. 268A.

Your receiving approximately $630 in entertainment from Wolfe raises issues under G.L. c. 268A, §3(b). Section 3(b) prohibits a state employee, otherwise than as provided by law for the proper discharge of official duty, from directly or indirectly, receiving anything of substantial value for himself for or because of any official act or act within his official responsibility[7/] performed or to be performed by him. Anything with a value of $50 or more is of substantial value for §3 purposes.[8/] You made decisions and took actions regarding what items would go on the HEFA board's agenda, which staff would be assigned to a bond proposal, the negotiation of bond pricing, and the choice of a manager for a pool or a short-term investment manager for bond proceeds. Each of those decisions and actions were official acts or acts within your official responsibility performed or to be performed by you. Moreover, you had the authority to intervene at any time in the acts of your staff which involved the evaluation, presentation and/or consideration of various bonding, underwriting and contractual issues either at the staff or board level. This authority, when exercised, involved official acts or acts within your official responsibility performed or to be performed by you. Goldman Sachs had a significant financial interest in how you performed or would perform these official acts because the acts did or could impact on its business interests. There is no compelling evidence of friendship or a private business relationship to justify the gratuities that you received from Wolfe.[9/] Therefore, while there is no evidence of a *quid pro quo*,[10/] there is reasonable cause to believe that your acceptance of the above free meals and tickets of substantial value was for or because of official acts or acts within your official responsibility performed or to be performed by you, and that you thereby violated §3(b).

Section 23(b)(3)

The above conduct also raises an appearance issue under G.L. c. 268A, §23(b)(3). Section 23(b)(3) prohibits a state employee from knowingly or with reason to know acting in a manner which would cause a reasonable person knowing all of the facts to conclude that anyone can...unduly enjoy his favor in the performance of his official duties.[11/]

When you accepted the $630 in entertainment from Wolfe, you knew (1) that he was an employee of Goldman Sachs, and (2) that Goldman Sachs, as a leading underwriter of HEFA bonds, had an interest in business dealings with HEFA. Thus, in the Commission's view, your acceptance of such gratuities while you were acting as HEFA's executive director on matters of interest to Goldman Sachs constitutes acting

in a manner which would cause a reasonable person to conclude that Goldman Sachs could unduly enjoy your favor in the performance of your official duties.[12] This is so even though you and Wolfe appear not to have discussed business during the events in question, and even though there is no evidence to indicate that you were ever unduly influenced in the performance of your official duties to favor Goldman Sachs' interest. Ultimately, accepting such entertainment under these circumstances creates an appearance of undue influence. Therefore, there is reasonable cause to believe that you violated §23(b)(3).[13]

Mitigating Circumstances

The Commission recognizes that its long line of §3 precedent has primarily dealt with employees of regulatory, policy-making or adjudicative agencies, such as legislators, municipal treasurers and inspectors. In those contexts, the Commission's precedent is clear that the receipt of gratuities by a regulator from a regulatee with whom he has official dealings violates chapter 268A.

Certain state agencies, however, such as HEFA, are different from state regulatory bodies in that they operate more like private businesses than government agencies. In effect, they have to compete for clients in order to exist. For example, HEFA must compete with MIFA for many clients, as well as possible private funding sources. Additionally, HEFA bonds must compete for buyers in the financial marketplace with a host of other offerings. Also, as discussed above, all of HEFA's funding is derived from the fees it charges its clients like a private business. And it is run by a board of directors, much like a private corporation. Because it is financed and run more like a private business than a state agency, we describe it here as "quasi-private".

The Commission has not clearly addressed the application of chapter 268A, §3 to employees of "quasi-private" independent authorities such as HEFA. Consequently, employees of these agencies may have misperceived how the Commission's §3 precedent applies to them. The Commission takes this opportunity to make clear that even though the employees of these agencies operate almost continually in a business environment, they are nevertheless state employees and, therefore, must abide by chapter 268A. As with all public employees, employees of "quasi-private" agencies are prohibited from accepting gratuities of substantial value from persons or entities with whom they have official dealings, even if these are not traditional regulatory dealings, absent a legitimate motive unrelated to their official duties such as a private business or friendship relationship.

Although there is evidence of a friendly relationship between you and Wolfe, your receipt of these gratuities appears to have been motivated at least in part by your business relationship and, more particularly, acts which you were authorized to take as HEFA's executive director. Thus, this is a case of mixed motive which, although not a defense, provides some mitigation when compared to a situation where the *sole* reason the gratuity is accepted is for or because of official acts or acts within one's official responsibility.

Your reciprocating by personally paying for certain dinners and events is further justification for this mixed motive conclusion. In other words, your reciprocating is additional evidence of friendship. It further distinguishes your situation from one in which no reciprocation occurs. Here, however, even when the degree of reciprocation is considered with the other evidence, friendship does not appear to be *the* motive for these gratuities.

More importantly, even if you did reciprocate dollar for dollar, c. 268A, §3(b) does not permit public officials to accept items of substantial value so long as they later reciprocate, although again it is arguably somewhat of a mitigating factor when compared to a situation without reciprocation.

C. Disposition

Based on its review of this matter, the Commission has determined that the sending of this letter should be sufficient to ensure your understanding of, and your future compliance with, the conflict of interest law.

The Commission is authorized to impose a civil penalty of up to $2,000 for each violation of c. 268A. Arguably, your substantive violations may be viewed in the context of the quasi-private business nature of HEFA's activities and the fact that a friendship developed between you and Wolfe in which you reciprocated for some of the gratuities received. For these reasons the Commission has decided to resolve your situation with a public enforcement letter and not by authorizing an adjudicatory proceeding in which it could impose a civil penalty. Another reason for the Commission to address your situation with a public enforcement letter is that it gives the Commission an

opportunity to make clear that reciprocation, under these circumstances, is not a defense to a §3 violation.

In resolving your situation with a public enforcement letter the Commission does not mean to suggest that public employees of a so-called quasi-private agency such as HEFA who have accepted illegal gratuities prior to the date of this letter would also receive such a resolution if they came before the Commission. The resolution of this case was a function of *all* the factors enumerated above. Obviously, as to conduct occurring after the date of this letter, the fact that the subject is an employee of such an agency would have no bearing on the resolution.

This matter is now closed.

DATE: June 19, 1997

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[1] Boston City and Winthrop Hospitals received federal HUD financing during or shortly before your tenure.

[2] See *Opinion of the Justices*, 354 Mass. 779, 784-785 (1968) (Senate No. 689, a bill leading to St. 1968, c. 614, constitutional because it involves no public money and no loan of public credit).

[3] Negotiating the bond pricing would typically involve a series of conference calls with the underwriter(s) and others to try to arrive at the lowest interest rate at which the bond issue could be reliably sold in the marketplace.

[4] Wolfe left Goldman Sachs in May 1995.

[5] According to you, by July 1990 you had developed a sufficiently close relationship with Wolfe that you and he would regularly go out for a social drink after a business meeting; his daughter would frequently appear at your office to see her father socially; and you and Wolfe would often arrange to meet at bond conferences or other bond industry meetings.

[6] G.L. c. 268A, §1(q) defines "state employee" as "a person performing services for or holding an office, position, employment, or membership in a state agency...."

G.L. c. 268A, §1(p) defines "state agency" as "any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and *any independent state authority* [emphasis added], district, commission, instrumentality or agency, but not an agency of a county, city or town."

[7] G.L. c. 268A, §1(p) defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action."

[8] See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *EC-COI-93-14*.

[9] Friendship is not a defense to a §3 violation unless it is *the* motivating factor. *Scaccia*, 1996 SEC 838, 850, n. 27. Here that was not the case.

[10] In determining whether the items of substantial value have been given for or because of official acts within one's official responsibility, it is unnecessary to prove that the gratuities given were generated by some specific identifiable act performed or to be performed. *United States v. Sawyer*, 85 F. 3d 713, 730 (1st Cir. 1996); *Scaccia*, 1996 SEC 838, 844.

[11] Section 23(b)(3) goes on to provide, "It shall be unreasonable to so conclude 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 conclusion."

[12] This conclusion would apply even if, in fact, the motive for the entertainment was friendship because a concern would always remain that you might have been influenced by the gratuities to favor Goldman Sachs. Indeed, the Commission has stated that friendship only serves to enhance the appearance of favoritism that arises when a public official accepts items of substantial value from a member of the private sector over which the public official can have official impact. *Keverian*, 1990 SEC 460.

[13] You could have dispelled any such appearance of conflict by making a written disclosure pursuant to §23(b)(3).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 566

IN THE MATTER OF CASPER CHARLES SANZONE

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and Casper Charles Sanzone ("Sanzone") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On April 9, 1997, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Sanzone. The Commission has concluded its inquiry and, on June 11, 1997, found reasonable cause to believe that Sanzone violated G.L. c. 268A.

The Commission and Sanzone now agree to the following findings of fact and conclusions of law:

1. Sanzone was, during the time here relevant, a guidance counselor at Monument Mountain Regional High School ("High School"). As such, Sanzone was a municipal employee as that term is defined in G.L. c. 268A, §1(g).

2. As part of his official High School guidance counselor responsibilities, Sanzone assisted in inputting course grades into the computer. Sanzone had access to course grades maintained in the school computer and could make authorized grade changes.

3. Sanzone has a daughter ("Sanzone's daughter"[1]) who attends the High School. Sanzone's daughter is a member of the class of 1998. In the summer of 1996, Sanzone's daughter was in a competitive position for valedictorian.[2]

4. In 1996, Sanzone anticipated that in the future he would contribute financially toward the cost of his daughter's college education.

5. In the summer of 1996, an out-of-state student transferred to the High School junior class (class of 1998) beginning in the fall of 1996 ("the transfer student").[3] The transfer student's grades and other transfer materials were sent to Sanzone for processing in his capacity as a High School guidance counselor.

6. As part of processing the transfer student's records, Sanzone read the transfer student's grades to the guidance counselor secretary for input into the computer.[4] Instead of reading the correct numeric grades, however, Sanzone intentionally lowered several of the grades of the transfer student, thereby effectively lowering the transfer student's cumulative average and class rank.[5]

7. Immediately thereafter, Sanzone went to his guidance department private office. Sanzone logged onto the computer using his official access code and then raised some of his daughter's grades.[6]

8. Had Sanzone accurately read the transfer student's grades to the guidance secretary who recorded them and not raised his daughter's grades, the transfer student would have been ranked first in the class and his daughter would have ranked third in the class of 1998. As a result of Sanzone's lowering the transfer student's grades and raising his daughter's grades, his daughter advanced to first place and the transfer student was lowered to third place in class rank.

9. The High School valedictorian automatically becomes eligible for certain scholarships,[7] is eligible to apply for certain other scholarships reserved for high ranking graduates[8] and is in a more advantageous position than other graduates to receive additional scholarships and admission to competitive colleges and universities. Additionally, the valedictorian status has intangible value due to the prestige accompanying the honor and the distinction of being the High School graduation speaker.

10. The grades of both the transfer student and Sanzone's daughter have since been corrected and the class rank of the class of 1998 recalculated.

11. On April 3, 1997, Sanzone resigned from his High School guidance counselor position.

12. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from knowingly or with reason to know using or attempting to use his position to obtain for himself or others an unwarranted privilege of substantial value which is not properly available to similarly situated individuals.

13. Sanzone used his position as guidance counselor to incorrectly enter the transfer student's grades and to gain access to his daughter's computerized grades, which he then raised.

14. This use of position gained for his daughter the unwarranted privilege of having a class rank which she had not earned.

15. As indicated above, her class rank was of substantial tangible and intangible value in that it enhanced his daughter's chances for scholarships, acceptance into certain colleges and universities, and position for valedictorian.

16. The privilege which Sanzone obtained for his daughter was not available to "similarly situated individuals."

17. Thus, by lowering the transfer student's grades and raising his daughter's grades, Sanzone knowingly used his guidance counselor position to obtain an unwarranted privilege of substantial value not properly available to other similarly situated individuals in violation of §23(b)(2).[9] [10]

In view of the foregoing violations of G.L. c. 268A by Sanzone, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Sanzone:

(1) that Sanzone pay to the Commission the sum of two thousand dollars ($2,000)[11] as a civil penalty for the violations of G.L. c. 268A, §23(b)(2); and

(2) that Sanzone waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: June 24, 1997

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[1] Sanzone's daughter is not identified by name because she is a minor.

[2] The valedictorian is the first student by class rank.

[3] The transfer student is not identified by name because she is a minor.

[4] The transfer student's courses and grades were comparable to those at the High School, therefore, no mathematical adjustments were necessary.

[5] The exact grades remain confidential to protect the privacy of the transfer student.

[6] There is no evidence that the daughter was aware of the grade changes.

[7] Certain local scholarships are awarded by community groups based solely on a graduate's class rank.

[8] For example, the University of Massachusetts offers the "University Scholars Program" which allows the top two ranking students at every high school in the state to receive an $8,000 scholarship if they choose to attend the state university. This scholarship is renewable annually for four years as long as the student maintains a 3.0 grade point average and takes at least 12 credits per semester.

[9] There were additional grade changing allegations made against Sanzone. The Commission has investigated these matters. Due to the statute of limitations restrictions imposed by 930 CMR 1.02(10), the Commission is unable to pursue these charges. Sanzone does not admit changing grades other than those mentioned above.

[10] Sanzone's actions with respect to his daughter's grades also raise concerns under §§19 and 23(b)(3) of G.L c. 268A. Section 19 of G.L. c. 268A prohibits a municipal employee from participating as such an employee in a particular matter in which to his knowledge he or an immediate family member has a financial interest. General Laws, c. 268A, §23(b)(3) prohibits a municipal employee from acting 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 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.

The Commission decided to resolve this matter solely as a §23(b)(2) violation in order to emphasize that abuse of public position for private gain is an unwarranted privilege and is prohibited by the conflict of interest law.

[11] The Commission is empowered to impose a fine of up to $2,000 for each violation of the conflict of interest law. The size of the fine in this disposition agreement reflects the seriousness of the conduct and that the action was intentional and adversely affected innocent third parties.

Walter Hewitson
45 Crescent Drive
Bridgewater, MA 02324

PUBLIC ENFORCEMENT LETTER 98-1

Dear Mr. Hewitson:

As you know, the State Ethics Commission ("Commission") has conducted a preliminary inquiry into allegations that you violated the state conflict of interest law, G.L. c. 268A, by receiving compensation from or acting as an agent for private parties in relation to Bridgewater Conservation Commission matters. Based on the staff's inquiry (discussed below), the Commission voted on January 15, 1997, that there is reasonable cause to believe that you violated the state conflict of interest law, G.L. c. 268A, §17(a) and (c). The Commission, however, does not believe that further proceedings are warranted. Instead, the Commission has determined that the public interest would be better served by bringing to your attention, and to the attention of the general public, the facts revealed by the preliminary inquiry and by explaining the application of the law to such facts, with the expectation that this advice will ensure your understanding of and future

compliance with the conflict of interest law. By agreeing to this public letter as a final resolution of this matter, you do not admit to the facts and law discussed below. The Commission and you have agreed that there will be no formal action against you in this matter and that you have chosen not to exercise your right to a hearing before the Commission.

A. Facts

1. You were, during the time relevant, a member of the Bridgewater Conservation Commission ("Conservation Commission").

2. You were, during the time relevant, a wetlands botanist who performed wetlands delineations for individuals and businesses for a fee.

3. Between August 1991 and April 1995, as a consultant to engineering firms and to individual property owners, you prepared approximately 38 wetland delineation reports, most of which you knew would be submitted to the Conservation Commission in connection with various applications to the Conservation Commission.[1/] Your signature on your reports identifies you as a "Ph.D. in Botany." You were a member of the Conservation Commission at the time you prepared these reports.

4. On February 25, 1995, the Conservation Commission held an on-site review regarding a six-house subdivision known as Four Leaf Circle. Certain abutters and other nearby property owners had complained that the wetlands boundaries were too narrow in scope, and should be broadened to exclude two additional buildable lots.[2/] You were at the site review at the request of the engineer who hired you to delineate the wetlands. You made a presentation to those in attendance at the site review, defending why you flagged the wetlands in the manner you did. (You had done the wetlands delineation for this subdivision on September 7, 1994.)

5. You were compensated for performing the wetlands delineation for the Four Leaf Circle subdivision.

6. You abstained as a Conservation Commission member whenever a matter came before the Conservation Commission which involved a delineation you had done.

B. Discussion

As a Conservation Commissioner you were a municipal employee as that term is defined in G.L. c. 268A, §1. General Laws c. 268A, §17(a) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from receiving compensation from any one other than the town in relation to any particular matter in which the town is a party or has a direct and substantial interest. General Laws c. 268A, §17(c) prohibits a municipal employee, otherwise than in the proper discharge of his official duties, from acting as agent for a private party in connection with any particular matter in which the town is a party or has a direct and substantial interest.

Determinations of and decisions regarding orders of conditions are particular matters in which the town has a direct and substantial interest. Most of the 38 wetlands delineation reports prepared by you were submitted to the Conservation Commission in connection with the Conservation Commission making determinations of non-applicability and issuing orders of conditions. Therefore, the reports submitted were "in relation to" those particular matters. In addition, the Four Leaf Circle site visit on February 25, 1995, was obviously in relation to the determination of non-applicability that was pending before the Conservation Commission regarding that development. You received compensation for submitting these reports.[3/] In submitting these reports you were acting as an agent for your clients.

By preparing for compensation wetlands delineations reports that you knew would likely be submitted to the Conservation Commission and which, in fact, were submitted to that Conservation Commission, you received compensation from someone other than the Town of Bridgewater in relation to particular matters in which the town had a direct and substantial interest.[4/] Therefore, there is reasonable cause to believe you violated §17(a).[5/] See, e.g., *Townsend, Jr.*, 1986 SEC 276 (disposition agreement in which Conservation Commission member pays $1,000 fine for violating §17(a) and (c) by acting as a paid engineer on behalf of private client in relation to Conservation Commission matters).

In addition, by preparing wetlands delineation reports which you knew would likely be submitted to the Conservation Commission with your name appearing as the author, and by appearing on behalf of your client at the February 25, 1995 site review, you acted as agent

for someone other than the Town of Bridgewater in relation to particular matters in which the town had a direct and substantial interest. Therefore, there is reasonable cause to believe you violated §17(c).

By way of defense, you note that before doing wetlands delineations in Bridgewater, you asked the Conservation Commission chairman and agent, respectively, how the conflict of interest law would apply to your doing wetland delineations for private clients. From these conversations it was your understanding that you could submit your reports to the Conservation Commission for their review, however, you could not participate as a Conservation Commission member in any matters that came before it where you had done the wetlands delineation for the applicant. Further, you also understood that you could not represent clients before the Conservation Commission or use your position to obtain a favorable result for a client.

The advice you received regarding your submitting reports was incorrect. As the State Ethics Commission has observed on several occasions, reliance on incorrect advice is not a defense unless the advice is given by town counsel and approved by the Commission. Good faith reliance on incorrect advice can, however be a mitigating factor. See *Lavoie*, 1987 SEC 286, 289. You should have been advised that even if you abstained from participating as a Conservation Commission member, and even if you did not appear before the Conservation Commission in person on behalf of a private client, your doing the delineations and your submitting your reports would, nevertheless, violate §17(a).

C. Disposition

The Commission is authorized to resolve violations of G.L. c. 268A with civil penalties of up to $2,000 for each violation. The Commission chose to resolve this case with a public enforcement letter, rather than pursuing a formal order which might have resulted in a civil penalty, because the vast majority of your conduct--doing the 38 delineations and submitting the reports--involved an issue the Commission has not previously publicly addressed and which is subtle; namely, whether delineations and reports of delineations are in relation to a Conservation Commission particular matter even though the delineator does not necessarily know that the report will be submitted to the Conservation Commission. (As discussed above, with the publication of this letter we are making clear that we will conclude that the delineation and report are "in relation to" a particular matter in which the town has a direct and substantial interest if the delineator knew it was likely that the report would be so submitted unless the report is not filed with the Conservation Commission or the delineator obtained an assurance from the client that no such filing was contemplated.)

Based upon its review of this matter, the Commission has determined that your receipt of this public enforcement letter should be sufficient to ensure your understanding of an future compliance with the conflict of interest law.

This matter is now closed.

DATE: August 13, 1997

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[1] More than half of the above 38 wetlands delineation reports were submitted to the Conservation Commission. They were submitted either for the purpose of a determination of non-applicability (i.e., a decision that the project did not involve wetlands or any area within 100 feet of wetlands) or to obtain an order of conditions (a decision as to the conditions under which construction may occur in wetlands or in the 100 foot buffer zone). From your attendance at Conservation Commission meetings, you had knowledge that the majority of your reports were being filed with the Commission.

[2] The loss of these additional lots might have made the project commercially unfeasible for the developer.

[3] The evidence is unclear as to whether your original fee for doing the Four Leaf Circle wetlands delineation included any defense of that delineation which might later become necessary, such as at a site review. You stated that in the case of a single lot homeowner, any such subsequent defense typically is part of the original fee, whereas you generally charge an additional fee if a subdivision is involved. As to the Four Leaf Circle delineation, you stated that because it involved a subdivision as opposed to a single lot, you would have ordinarily charged a separate fee for your site review appearance. Nevertheless, in this instance, you did not submit an additional bill because you were satisfied in simply proving that your critics were in error. Obviously, if you had charged an additional fee for this site review, that too would be compensation in relation to the particular matter in which the town had a direct and substantial interest.

[4] In order to act as an agent it is not necessary to personally appear before a board. It is sufficient to correspond with a board on behalf of a third party or sign a report or stamp a plan on behalf of a third party knowing that the report or plan will be filed with the board.

[5] Where a public official is privately employed as a professional, such as a botanist, engineer, or surveyor, and is asked as such a professional to prepare a report which he knows or reasonably should know is likely to be submitted to a board, agency or commission in his own town, the public official has a duty to inquire as to whether the report will be so submitted.

If the answer to the inquiry is yes, as discussed above, the public

official will generally be barred by §17 from accepting the job. (There are some exceptions for special municipal employees.) If the public official fails to make the inquiry, he will be deemed to violate §17 if the report is, in fact, so submitted.

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 567

IN THE MATTER OF BRIAN MAIN

DISPOSITION AGREEMENT

The State Ethics Commission ("Commission") and Brian Main ("Main") enter into this Disposition Agreement ("Agreement") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On October 15, 1996, the Commission initiated, pursuant to G.L. c. 268B, 4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Main. The Commission has concluded its inquiry and, on October 16, 1997, found reasonable cause to believe that Main violated G.L. c. 268A, §19.

The Commission and Main now agree to the following findings of fact and conclusions of law:

1. Main was, during the time relevant, the Town of Hopedale part-time building commissioner. As such, he was a municipal employee as that term is defined in G.L. c. 268A, §1. As building commissioner Main was responsible for reviewing all building permit applications and issuing building permits and occupancy permits. Main was also responsible for reviewing plans to ensure they complied with the zoning bylaw.

2. At all times relevant, Main was the owner of Bri-Con Associates, an architectural firm doing business in the Hopedale area.

3. Joseph Gorby, at all times relevant, was a developer in the Hopedale area.

4. At some point in 1993 or 1994, Gorby hired Bri-Con to draft preliminary plans for a 16 unit subdivision to be located on Boyd Street in Hopedale ("Subdivision"). Main prepared these plans.[1/]

5. In May 1994, the selectmen accepted G.L. c. 143, §3Z, which allows part-time building inspectors to perform private construction work in a town provided the work is inspected by another qualified inspector. On May 5, 1994, Main filed a letter of disclosure with the town clerk disclosing he would be providing architectural and consulting services to Gorby, and that if the project proceeded, inspections would be conducted by the building commissioner from the Town of Mendon.

6. On September 9, 1994, Gorby applied to the Hopedale ZBA for a comprehensive permit to construct the Subdivision under a so-called Local Initiative Program ("LIP").[2/] This submission consisted of an application and supporting house and site plans. Main's name appeared on the application as the architect/engineer of record and as the contractor/builder. In addition, the house plans attached to the application were those drafted by Main, however, the plans were certified by Main's partner at Bri-Con, architect Brian Judge. (The site plans were drawn by an engineering firm, not by Main or Bri-Con.)

This was the first time in Hopedale a developer had sought such a comprehensive permit under the LIP. Consequently, there was no clear procedure in place for processing Gorby's application. Nevertheless, the consensus was that each town board having an interest in the matter would be provided with an opportunity to comment on the application. The Building Department was one of those agencies.

7. On September 12, 1994, Main, as the building commissioner, reviewed the drawings and site plans that accompanied the Gorby application and certified that the development was in a certain zoning district and that the plans and application were accurate.

8. On October 20, 1994, Main, as the building commissioner, wrote to the ZBA chair stating that the house plans appeared to be in conformance with the state code[3/] and that there were no conditions that would adversely affect the Building Department's ability to issue permits. (In so stating, Main was reviewing his

own plans.) In addition, Main stated that the Building Department would assure conformance with all applicable codes.[4] (If the special permit had issued, supervision of the construction would have been handled by an inspector from another town.)

9. When Main reviewed the original applications and plans on September 12, 1994, and when he wrote his letter to the ZBA chair on October 20, 1994, regarding the plans' and the project's compliance with the state code, Main knew that he had the following financial expectations regarding this project: First, he knew that it was reasonably foreseeable that Gorby would hire him to be the architect who would draft the detailed home construction plans.[5] (It is traditional, according to Main, that the architect who does the preliminary drawings is hired to do the detailed drawings.) Second, Main also knew that if the permit were approved and the construction went forward, Main planned to bid to become the construction manager for the project.[6] Third, Main knew that if there were problems with the preliminary drawings, any need for revisions would be directed back to Bri-Con Associates.

10. Except as otherwise permitted by that section,[7] General Law c. 268A, §19 prohibits a municipal employee from participating as such in a particular matter in which to his knowledge he has a financial interest.

11. The determination by the Town of Hopedale as to whether to approve the comprehensive permit was a particular matter.[8] In addition, the individual decisions by Main as to whether the plans were accurate and complied with State Building Code and his decision to offer assurances that his department (though, not Main personally) would ensure that the actual construction complied with the code were also particular matters.

12. Main participated[9] in those particular matters by deciding that the plans were accurate and complied with the code, and by communicating that his department would ensure that these units would comply with the code.

13. At the time he so acted, he expected to do the detailed plans for the project, expected to seek other work on the subdivision which was dependent on the permit being approved, and knew that if the plans were determined to be inadequate, that would affect him financially. Consequently, he knew that he had a financial interest in these particular matters.

14. Therefore, by approving the plans on September 12, 1994, by recommending in an October 20, 1994 letter to the ZBA chair that the plan be approved, and by stating that his department would ensure that the actual construction would comply with the state code, Main participated as a municipal employee in particular matters in which to his knowledge he had a financial interest, thereby violating §19.

In view of the foregoing violations of G.L.c. 268A by Main, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Main:

(1) that Main pay to the Commission the sum of one thousand dollars ($1,000) as a civil penalty for violating G.L. c. 268A, §19; and

(2) that Main waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: November 10, 1997

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[1] Main received approximately $2,000 for the work he did on the preliminary plans.

[2] Under the LIP a developer is allowed to construct a multi-unit housing development under less stringent zoning guidelines than would otherwise apply, provided that a certain percentage of the homes constructed are priced to sell to low-income homebuyers.

[3] The Commission is not aware of any evidence indicating the plans did not conform with the code.

[4] This assurance was important. The application had generated significant controversy including a concern that the construction would be substandard. Consequently, Main's assurance that the construction would comply with all codes helped allay those concerns.

[5] Main expected to receive approximately $5,000 for the detailed plan work.

[6] Main also hoped to act as the developer's liaison with the realtors in getting units ready by picking out colors for carpets, and matters of that sort. The cost for this service would be about $1,000 per house.

[7] None of the exceptions applies.

[8] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision,

determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

2/ "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

COMMONWEALTH OF MASSACHUSETTS
STATE ETHICS COMMISSION

SUFFOLK, ss. COMMISSION ADJUDICATORY DOCKET NO. 528

IN THE MATTER
OF
LIFE INSURANCE ASSOCIATION OF MASSACHUSETTS, INC.

Appearances: David A. Wilson, Esq.
Counsel for Petitioner

John J. Curtin, Jr., Esq.
Steven W. Hansen, Esq.
Janice W. Howe, Esq.
Counsel for Respondent

Commissioners: Brown, Ch., McDonough, Larkin and Rapacki

Presiding Officer: Commissioner George D. Brown, Esq.

DECISION AND ORDER

I. Procedural History

On June 20, 1995, the Petitioner initiated these proceedings by issuing an Order To Show Cause ("OTSC") pursuant to the Commission's Rules of Practice and Procedure. 930 C.M.R. §§ 1.01(1)(a) *et seq.* The OTSC alleged that from July 21, 1989 through March 12, 1993, the Life Insurance Association of Massachusetts, Inc. ("LIAM") violated G.L. c. 268A, § 3(a) on nine occasions by providing free meals and, on one occasion, a set of golf clubs, to Massachusetts state employees, including several current and one former state legislator, one legislative staff member and the Commissioner of Insurance. On July 26, 1995, LIAM filed an Amended Answer.1/

Pre-hearing conferences were held on July 26, 1995, October 18, 1995, April 18, 1996, October 17, 1996 and April 30, 1997. At those conferences, issues surrounding discovery were discussed and Commissioner George Brown, as the presiding officer, addressed scheduling and management of the hearing.

To protect information subject to the confidentiality provisions of G.L. c. 268B, §4 from disclosure at the hearing, the parties drafted a confidentiality agreement. On October 20, 1995, Commissioner Brown incorporated that agreement into a Protective Order.

Evidentiary hearings were held on three days: May 5, 6 and 7, 1997. At the conclusion of the Petitioner's case, LIAM filed a Motion to Dismiss which was not ruled on by the Presiding Officer at that time. LIAM renewed its Motion to Dismiss at the conclusion of the hearing.

After the conclusion of the evidentiary portion of the hearing, on May 7, 1997, the parties submitted legal briefs. 930 C.M.R. §1.01(9)(k). The parties also presented their closing arguments before the full Commission on September 9, 1997. 930 C.M.R. §1.01(9)(e)(5). Deliberations began in executive session on that date. G.L. c. 268B, §4(i); 930 Code Mass. Regs. §1.01(9)(m)(1).

In rendering this Decision and Order, each undersigned member of the Commission has considered the transcript testimony, evidence and legal argument of the parties.

II. Findings of Fact

The parties, through their counsel, have stipulated and agreed that the following facts are true and established for purposes of the adjudicatory proceedings. We adopt their following joint stipulations as findings of the Commission.

1. LIAM's members' insurance business activities are taxed and regulated by the Commonwealth of Massachusetts.

2. On average, about six bills affecting the insurance business are enacted into law each year in the Commonwealth of Massachusetts.

3. LIAM professional staffers, Frank O'Brien, Steven Tringale and Elizabeth Rothberg, were

Massachusetts registered legislative agents for LIAM in certain parts of the years 1989 through 1993.

4. On July 21-23, 1989, the National Conference of Insurance Legislators ("NCOIL") held a conference in Boston, Massachusetts. The 1989 NCOIL Boston conference was attended by, among others, many insurance industry representatives and state legislators from around the United States.

5. On July 21, 1989, Massachusetts State Representative Francis Woodward ("Woodward") and his wife, and William Carroll ("Carroll") and his wife had dinner together at the Marriott in Boston. The total cost for the July 21, 1989 dinner was $302.53, inclusive of tax of $12.03 and tip of $50. Mr. Carroll paid the July 21, 1989 dinner bill with his LIAM American Express card. LIAM subsequently paid the American Express card charge for the cost of the July 21, 1989 dinner. Woodward did not pay anything toward the July 21, 1989 dinner.

6. On or about July 21, 1989, Woodward as a State Representative and Joint Committee on Insurance House Chairman, had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members.

7. The July 21, 1989 Marriott dinner was not an official part of the 1989 NCOIL Boston conference.

8. On December 20, 1989, Massachusetts State Representative Francis G. Mara ("Mara"), Joint Committee on Insurance staffer Robert Smith ("Smith") and Luke Dillon ("Dillon") had dinner together at Locke-Ober Restaurant in Boston. The total cost of the December 8, 1989 dinner was $150.53 inclusive of tax in the amount of $6.03 and a tip of $24. Dillon paid the December 20, 1989 dinner bill with his American Express card. LIAM subsequently reimbursed Dillon by check for the December 20, 1989 dinner expense. Mara and Smith did not pay anything toward the December 20, 1989 dinner.

9. On or about December 20, 1989, Mara, as a State Representative and House Vice Chairman of the Joint Committee on Insurance, had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members.

10. On March 23-25, 1990, NCOIL held a conference in Tulsa, Oklahoma. The 1990 NCOIL conference was attended by, among others, many insurance industry representatives and state legislators from around the United States.

11. On March 22, 1990, Woodward and his wife, John Hancock legislative agent F. William Sawyer ("Sawyer") and his wife, and Carroll had dinner together at the Fountains Restaurant in Tulsa. The total cost of the March 22, 1990 dinner was $171.42, inclusive of tax in the amount of $9.25 and a tip in the amount of $30. Carroll paid the March 22, 1990 dinner bill with his LIAM American Express card. LIAM subsequently paid the American Express card charge for the cost of the March 22, 1990 dinner as a business expense. Woodward did not pay anything toward the March 22, 1990 dinner.

12. On March 23, 1990, Woodward and his wife, Sawyer and his wife, and Liberty Mutual Insurance Co. legislative agent Thomas Driscoll ("Driscoll") had dinner together at the Fountains Restaurant in Tulsa. The total cost for the March 23, 1990 dinner was $199.28, inclusive of tax in the amount of $10.75 and a tip in the amount of $35. Carroll paid the March 23, 1990 dinner bill with his LIAM American Express card. LIAM subsequently paid the American Express card charge for the cost of the March 23, 1990 dinner as a business expense. Woodward did not pay anything toward the March 23, 1990 dinner.

13. On or about March 22 and 23, 1990, Woodward, as State Representative and House Chairman of the Joint Committee on Insurance, had the authority to take official action on legislative matters which would affect the financial interests of, among others, LIAM's members.

14. Neither the March 22, 1990 Fountains Restaurant dinner nor the March 23, 1990 Fountains Restaurant dinner was an official part of the 1990 NCOIL Tulsa conference.

15. On November 25-28, 1990, NCOIL held a conference in Lake Buena Vista, Florida. The 1990 NCOIL Lake Buena Vista conference was attended by many insurance industry representatives and state legislators from around the United States.

16. On November 24, 1990, about twenty people, including Massachusetts State Representatives Frank Emilio ("Emilio") and his wife, Carroll, Sawyer, Driscoll, insurance industry consultant Michael Sabbagh ("Sabbagh"), Sabbagh's client William Henne, Daniel

Foley and Thomas Crowley had dinner together at the Stouffer Restaurant in Orlando, Florida. The total cost of the November 24, 1990 dinner was $2,243.97, inclusive of tax in the amount of $109.50 and a tip in the amount of $309.52. Carroll paid the November 24, 1990 dinner bill with his LIAM credit card. LIAM subsequently paid the credit card charge for the cost of the November 24, 1990 dinner. Emilio did not pay anything toward the November 24, 1990 dinner.

17. On or about November 24, 1990, Emilio, as a State Representative and a member of the Joint Committee on Insurance, had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members.

18. The November 24, 1990 Stouffer Restaurant dinner was not an official part of the 1990 NCOIL Lake Buena Vista conference.

19. Emilio, while a State Representative, on three occasions in 1988 and 1989 filed proposed legislation for LIAM. During his tenure as a State Representative, Emilio filed proposed legislation on a number of occasions for other individuals or entities. Prior to his election as a State Representative, Emilio had worked as an insurance agent.

20. In January, 1991, LIAM contributed $127.62 toward the cost of a dinner held on January 8, 1991 for former Representative Emilio and a set of golf clubs given to former Representative Emilio. The total cost of the dinner was $541.24, inclusive of $90 for a tip and $21 for taxes. Nine persons attended the dinner, including former Representative Emilio and a former aide. The total cost of the golf clubs was $404.25 of which $19.25 was sales tax.

21. On November 17-20, 1991, NCOIL held a conference in Scottsdale, Arizona. The 1991 NCOIL Scottsdale conference was attended by, among others, many insurance industry representatives and state legislators from around the United States.

22. On November 16, 1991, about twenty persons, including Carroll and his wife, Sawyer and his wife, Woodward and his wife, Massachusetts State Senator Robert Havern ("Havern") and his wife, Massachusetts State Representative Marc Pacheco ("Pacheco"), Massachusetts State Representative Daniel Ranieri ("Ranieri") and his wife, Sabbagh, John Hancock lobbyist Ralph Scott and Daniel Foley had dinner together at the Avanti of Scottsdale Restaurant in Scottsdale, Arizona. The total cost of the November 16, 1991 dinner was $1,170, inclusive of tax in the amount of $62.79 and a tip in the amount of $170. Carroll paid the November 16, 1991 dinner bill with his LIAM American Express card. LIAM subsequently paid the American Express card charge for the November 16, 1991 dinner. None of the Massachusetts state legislators present at the November 16, 1991 Avanti dinner paid anything toward the dinner.

23. On or about November 16, 1991, the Massachusetts legislators present at the November 16, 1991 Avanti dinner had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM members.

24. The November 16, 1991 Avanti dinner was not an official part of the 1991 NCOIL Scottsdale conference.

25. On May 13, 1992, Massachusetts Insurance Commissioner Katherine Doughty ("Commissioner Doughty"), Carroll and Dillon had dinner together at the Four Seasons Restaurant in Boston. The total cost of the May 13, 1992 dinner was $337.46, inclusive of tax in the amount of $13.21 and a tip in the amount of $60. Carroll paid the May 13, 1992 dinner bill with his LIAM credit card. LIAM subsequently paid the May 13, 1992 credit card bill charge for the cost of the May 13, 1992 dinner. Commissioner Doughty did not pay anything toward the May 13, 1992 Four Seasons dinner.

26. On or about May 13, 1992, Doughty, as State Insurance Commissioner, had the authority to take official action on regulatory matters which could affect the financial interests of, among others, LIAM's members.

27. On March 12-14, 1993, NCOIL held a conference at Amelia Island Plantation on Amelia Island, Florida. The 1993 NCOIL Amelia Island conference was attended by, among others, many insurance industry representatives and state legislators from around the United States.

28. On March 12, 1993, Carroll had dinner at The Grill Restaurant at the Ritz Carlton Hotel ("Ritz") on Amelia Island, Florida with about 24 other people, including Massachusetts state legislators and registered legislative agents and their spouses or guests. Those present with Carroll at the March 12, 1993 dinner included Dillon, Sawyer and his wife, registered

legislative agent Arthur Lewis and his wife, Massachusetts Medical Society registered insurance industry legislative agent Andrew Hunt, Blue Cross and Blue Shield registered legislative agent Marcy McManus, Health Insurance Association of America and Massachusetts Association of Life Underwriters registered legislative agent Donald Flanagan, Francis Carroll of the Small Business Service Bureau, Inc., Joint Committee on Insurance House Chairman Representative Mara and his wife, Joint Committee on Insurance House Vice Chairman Representative Thomas Walsh and his wife, Joint Committee on Insurance and Joint Health Care Committee member Representative William Cass ("Cass"), Joint Government Regulations House Chairman Representative Michael Walsh ("Walsh") and his wife, Joint Government Regulations House Vice Chairman and Joint Health Care Committee member Representative Kevin Honan ("Honan") and his guest, Joint Committee on Taxation House Chairman Representative Angelo Scaccia ("Scaccia"), House Committee on Bills in Third Reading Chairman Representative John Cox ("Cox") and his wife, and House Ways and Means Committee member Representative Kevin Poirier ("Poirier").

29. The total cost of the Ritz dinner on March 12, 1993 was $3,089.16, inclusive of tax in the amount of $146.94 and a tip in the amount of $493.22. Carroll paid the March 12, 1993 dinner bill with his LIAM credit card. LIAM subsequently paid the credit card charge for the cost of the March 12, 1993 dinner. LIAM subsequently in April, 1993, received contributions towards this expenditure in the amount of $1,100. None of the Massachusetts legislators present at the March 12, 1993 Ritz dinner paid anything toward the dinner.

30. On or about March 12, 1993, the state legislators present at the March 12, 1993 Ritz dinner, as state representatives, had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members.

31. The March 12, 1993 Ritz dinner was not an official part of the 1993 NCOIL Amelia Island conference.

32. None of the expenditures referenced in the Order to Show Cause were paid by LIAM because of personal friendship.

33. In 1993, House 53 (H.53), An Act Further Regulating Insurance, was a Weld administration bill to bring Massachusetts insurance laws into conformity with the National Association of Insurance Commissioners ("NAIC") accreditation standards program and was regarded by the Weld administration, insurance regulators and the insurance industry, as important. H.53 was introduced and supported by the Governor. The Joint Committee on Insurance held a public hearing on H.53 on March 22, 1993. Several witnesses testified in favor of H.53, among them were representatives of the Weld administration, including the Massachusetts Commissioner of Insurance, a New Hampshire insurance regulator representing NAIC, and insurance industry representatives, including Carroll on behalf of LIAM. No witnesses testified in opposition to H.53. LIAM and others unrelated to LIAM sought changes to H.53 before its passage. In the Joint Committee on Insurance, LIAM sought revision of the extraordinary dividends language in H.53 in order to allow the legislation to comply with NAIC standards. On June 16, 1993, the Joint Committee on Insurance reported out favorably an amended version of H.53 (H.5220). In the Senate, LIAM sought a change to the extraordinary dividends language when the bill was being debated on the Senate floor at the third reading stage to correct an error in the language. The Senate subsequently voted to approve H.5220.

34. In 1992 and 1993, LIAM supported increased funding for the Division of Insurance.

35. Prior to and during 1993, LIAM, through its legislative agents, engaged in legislative activity in connection with certain insurance and taxation issues.

36. On March 6, 1991, Carroll testified before the Joint Committee on Taxation. Scaccia then served as House Chairman.

37. In a letter dated March 31, 1992, addressed to Senator Keating and Representative Scaccia, as Joint Committee on Taxation Co-Chairmen, Carroll submitted written testimony on behalf of LIAM supporting H.3466, An Act Reforming the Taxation of Domestic Life Insurance Companies, a 1992 bill to repeal the state net investment income tax. The bill was sent to "study" and did not pass. Keating and Scaccia did not support LIAM's position.

38. In a letter dated March 31, 1992, addressed to Keating and Scaccia, as Joint Committee on Taxation Co-Chairmen, Carroll filed written testimony on behalf of LIAM opposing H.2378 and 2568, Acts Relative to Bank Taxation and Competitive Equality, and H.2912, An Act Relative to the Taxation of Banks and Bank-like Entities.

39. By letter dated March 30, 1993, addressed to Keating and Scaccia, as Joint Committee on Taxation Co-Chairmen, Carroll filed written testimony on behalf of LIAM supporting H.4434, An Act Reforming the Taxation of Domestic Life Insurance Companies, which, if passed, would have repealed the Commonwealth's net investment income tax on domestic life insurance companies. This bill was heard by the Joint Committee on Taxation on March 24, 1993. Subsequent to the hearing, the bill was sent to "study" and did not pass. Keating and Scaccia did not support LIAM's position.

40. In addition to LIAM's $127.62 contribution to the cost of the January 8, 1991 dinner and golf clubs for former Representative Emilio, the American Insurance Association paid $127.62, John Hancock paid $187.66, The New England paid $187.66 and two other LIAM member companies paid a total of $195 either directly to Sawyer or by reimbursing their respective legislative agents who had paid Sawyer.

41. At times, during the years 1989 to 1991, Woodward took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

42. At times, during 1989 and 1990, Emilio took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

43. At times, during the years 1989 to 1993, Mara took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

44. At times, during the years 1989 to 1993, Smith took actions as Insurance Committee staffer relating to pending legislation, including legislation affecting the financial interests of LIAM's members.

45. At times, during the years 1990 to 1993, Havern took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

46. At times, during the years 1990 to 1993, Scaccia took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

47. At times, during the years 1991 to 1993, Representative and Senator Pacheco took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

48. At times, during the years 1990 to 1992, Ranieri took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

49. At times, during the years 1991 to 1993, T. Walsh took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

50. At times, during the years 1991 to 1993, M. Walsh took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

51. At times, during the years 1991 to 1993, Honan took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

52. At times, during the years 1991 to 1993, Poirier took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

53. At times, during the years 1991 to 1993, Cox took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

54. At times, during the years 1991 to 1993, Cass took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

55. At times, during the years 1992 and 1993, Commissioner Doughty took official actions concerning pending legislation, including legislation affecting the financial interests of LIAM's members.

In addition to the foregoing, based on the credible testimony, exhibits and record, we find the following facts:

56. LIAM is a trade association of Massachusetts-based commercial life, health and disability insurers. Among LIAM's members during the years mid-1989 to mid-1993 were John Hancock Mutual Life Insurance Company ("John Hancock"), Massachusetts Mutual Life Insurance Company ("Mass Mutual"), New England Life

Insurance Company ("New England"), State Mutual Life Insurance Company ("State Mutual"), Paul Revere Life Insurance Company ("Paul Revere"), Boston Mutual Life Insurance Company ("Boston Mutual"), Berkshire Life Insurance Company ("Berkshire") and Liberty Life ("Liberty").

57. LIAM's primary purpose is to represent its members collectively on matters related to insurance legislation and regulatory matters. LIAM's members use the association to monitor proposed laws and regulatory matters affecting the insurance business and to advocate their position as group in order to modify, pass or defeat proposed laws or to affect regulatory matters.

58. On average, more than 100 bills filed in the Massachusetts legislature each year affect the insurance business.

59. At all times during 1989 to 1993, bills proposing new laws, or changes to existing laws, affecting the interests of LIAM's members were pending in the Massachusetts legislature and regulatory matters affecting those same interests were under consideration by Massachusetts insurance regulators.

60. At all times during 1989 to 1993, Carroll was employed by LIAM as its President and as a Massachusetts registered legislative agent. During this same time period, LIAM retained the services of Dillon, an outside lobbyist.

61. On March 6, 1989, the Joint Committee on Insurance ("Insurance Committee") held a hearing on H.4901 (regulating HIV testing in determining eligibility for health care insurance). Carroll provided testimony at that hearing opposing H.4901 and supporting H.609, a pending LIAM-sponsored bill.

62. On June 22, 1989, S.715, which sought to reduce health insurance rates for non-smokers, was reported out by the Insurance Committee as "ought not to pass."

63. In mid-July, Woodward proposed, and the House of Representatives ("House") approved, an amendment to the universal health care law (St. 1988, c. 23), which would delay full implementation of the law by two years.

64. On July 21, 1989, among the bills of interest to LIAM pending before the Insurance Committee were: H.609, the LIAM-sponsored Privacy Bill (establishing standards for the collection, use and disclosure of privacy information concerning insurance transactions); H.4901 (regulating HIV testing in determining eligibility for health care insurance); and S.2099 (freezing rates for individual and small group products).

65. On or about October 10, 1989, the House debated S.715, a bill opposed by LIAM, at which time, Woodward was among a group of legislators who argued against the bill.

66. On November 28, 1989, the Insurance Committee held a hearing on S.2099. LIAM employee Steven Tringale provided testimony in opposition to the bill.

67. On November 9, 1989, the Insurance Committee reported out both H.609 and H.4901 with a study order.

68. On December 28, 1989, the Insurance Committee reported out S.2099 with a new draft.

69. During 1990, at least 11 bills of interest to LIAM were pending before the Insurance Committee, for which Mara continued to serve as Vice-Chairperson Those bills included: H.553, the LIAM- sponsored Privacy Bill; H.734, permitting insurers to value real estate at assessed value; H.1349, permitting life insurance companies to exchange policies with their affiliates; H.2157, concerning valuation of capital stock of insurers and subsidiaries; H.5649, concerning investments of insurance companies; H.3343, regulating access to health care; H.2493, H.2496, H.3560, concerning gender neutral insurance; H.3559, concerning reduced insurance rates for non-smokers; and H.79, concerning discrimination against the handicapped.

70. In 1990, H.553 was sponsored for LIAM by Emilio.

71. In 1990, H.5649, concerning investments of insurance companies, was sponsored for LIAM by Mara.

72. In 1989 and 1990 Smith provided summaries and explanations of proposed insurance legislation to the Insurance Committee members. He also participated in or assisted in the drafting of proposed legislation and/or amendments to proposed legislation pending before the Insurance Committee. Additionally, Smith provided

information to LIAM regarding matters pending before the Insurance Committee.

73. On March 14, 1990, the Insurance Committee held a hearing on H.734, a LIAM-sponsored bill (permitting insurers to value real estate at an assessed value).

74. On March 28, 1990, LIAM submitted testimony to the Insurance Committee regarding H.3343.

75. On April 2, 1990, LIAM submitted testimony to the Insurance Committee with regard to H.2493, H.2496, H.3559, H.3560, H.73, H.553 and H.79.

76. On May 21, 1990, the Insurance Committee reported out H.553, the LIAM-sponsored privacy bill, with a new draft. The Insurance Committee reported out favorably H.734 and H.1349 on May 31, 1990 and H.5469 on June 6, 1990, all of which had been sponsored by LIAM. No report issued from the Insurance Committee in 1990 with regard to the other above-identified bills in which LIAM had an interest during that year.

77. The January 8, 1991 dinner and gift of golf clubs to Emilio was organized by Sawyer. In advance of the dinner, Carroll had agreed to contribute to the event and the gift. Carroll did not, however, attend the dinner. Of the seven guests, other than Emilio and his former legislative aide, in attendance at the January 8, 1991 dinner, one was a representative of LIAM, one represented the American Insurance Association, and all of the others were from three of LIAM's member insurance companies (John Hancock, The New England and Mass Mutual).

78. On February 14, 1991, the Insurance Committee held a hearing on S.597 establishing a Medex study committee of which LIAM would be a member. Dillon was scheduled to testify in support of that legislation.

79. On February 14, 1991, the Insurance Committee held a hearing in relation to H.1346 (increasing mental illness mandated benefits), H.1343 (allowing the substitution of outpatient mental illness treatment for inpatient mental illness treatment) and H.391 (LIAM-sponsored bill allowing exchange of policies between affiliated companies). Dillon was scheduled to testify in opposition to H.1346 and in favor of H.1343 and H.391.

80. LIAM representatives, including Dillon, submitted testimony on March 20, 1991 in relation to: H.390 (allowing domestic insurance companies to convert to stock form of ownership); H.3973 (allowing certain investments in insurance policies and annuity contracts); H.4165 (concerning valuation of capital stock of subsidiaries of insurers); and S.568 (establishing lower insurance rates for non-smokers).

81. On March 6, 1991, the Joint Taxation Committee ("Taxation Committee") held a hearing on H.4076 (relating to the taxation of domestic life insurance companies). At that hearing, Carroll provided testimony in support of the legislation.

82. On April 3, 1991, the Insurance Committee held a hearing on S.569 (establishing lower insurance rates for non-drinkers). LIAM lobbyist Francis O'Brien provided a statement opposing that legislation.

83. On April 22, 1991, the Insurance Committee held a hearing on H.2342 (promoting insurance company competition by repealing the anti-trust exemption). LIAM through its legislative agents, submitted a statement in opposition to that legislation.

84. On November 16, 1991, H.6206 (health care benefits for small employers), sponsored by LIAM, was pending before the Insurance Committee. Also on that date, the following bills of interest to LIAM were among those pending in the legislature and ready to be acted upon by both branches: H.6280 and H.6307 (both relating to health care access and financing).

85. On November 21, 1991, Ranieri, Pacheco and Woodward voted, at least twice, as members of the House on H.6280.

86. On December 21, 1991, Ranieri, Pacheco and Woodward voted as members of the House on H.6307.

87. On December 12, 1991 Havern voted on H.6307.

88. On December 4, 1991, the Insurance Committee held a hearing on H.6206, a LIAM-sponsored bill which, on December 5, 1991, was reported out by that Committee with a study order.

89. By the end of the 1991 legislative year, several bills affecting the financial interests of LIAM's members had been put to a floor vote of the full House and certain of those bills had also been acted upon by the full

Senate. These included H.6307 (an amended version of H.6280), signed into law, St.1991, c. 495; H.1667, signed into law, St.1991, c. 516; H.391, returned by Governor; H.6015 (an amended version of H.390), signed into law, St.1991, c. 339; H.3973, signed into law, St.1991, c. 347; and H.4165, approved and engrossed by House, but died in Senate Third Reading Committee.

90. As the Commissioner of Insurance in 1992, Doughty headed the Massachusetts Division of Insurance.

91. Beginning in January, 1992, LIAM representatives met with Division of Insurance employees regarding obtaining NAIC accreditation. By the standards of the NAIC, a state division of insurance is deemed qualified to regulate the industry in its state. NAIC accreditation in substantial part depends on the state division of insurance being properly funded, staffed, organized and managed, as well as the passage of certain legislation.

92. In 1992, LIAM supported NAIC accreditation of the Insurance Division. Without such accreditation, LIAM took the position that Massachusetts insurance companies would suffer substantial competitive disadvantages when doing business in other states.

93. In early 1992, LIAM representatives believed that Doughty was "not paying careful attention" to the management aspects of NAIC accreditation.

94. On April 29, 1992, Carroll contacted Insurance Division staff member Cynthia Martin seeking to meet with her and Doughty on that part of the accreditation process relating to "restructuring the Insurance Division, including funding, staffing, etc."

95. Prior to May 13, 1992, Carroll attempted to discuss accreditation issues with Doughty in her office, but he had not been successful. Carroll, therefore, desired to meet with Doughty in an "informal" or "easier setting" to discuss issues relating to the management of the Insurance Division in anticipation of an NAIC accreditation examination visit expected to occur in 1993.

96. In May, 1992, issues relating to the NAIC accreditation, including the filing of necessary legislation and securing an appropriation to allow for increased staffing, were pending at the Division of Insurance.

97. In July, 1992, while LIAM and the Insurance Division were reviewing drafts of legislation needed for NAIC accreditation, LIAM lobbyist O'Brien was in frequent contact with the Insurance Division.

98. By July 29, 1992, the Insurance Division filed the legislative packet necessary for NAIC accreditation.

99. As of January 25, 1993, H.53 was pending in the Insurance Committee.

100. As of January 25, 1993, LIAM was engaged in drafting certain language (relating to an extraordinary dividends provision in H.53) which it intended to present to the Insurance Committee.

101. In January, 1993, LIAM was engaged in an effort to have H.53 heard by the Insurance Committee at the earliest possible opportunity. As of February 4, 1993, Dillon had met with members of the Insurance Committee concerning a hearing date for H. 53, which by February 25, 1993, had been scheduled for March 22, 1993.

102. By March of 1993, LIAM and the Division of Insurance had devised a joint strategy for seeking legislative approval of the legislation necessary for NAIC accreditation (H.53). That strategy involved Doughty's meeting individually with each member of the Insurance Committee and insurance industry representatives.

103. Prior to March 12, 1993, both Carroll and Dillon had spoken to T. Walsh regarding H.53.

104. On March 8, 1993, the Insurance Committee held hearings on eight bills which sought to mandate that insurers provide new health insurance benefits. Those bills were S.615 (insurance coverage for mental illness), S.624 (access to educational psychologists services), S.626 (access to mental health services), S.658 (mandating insurance coverage for bone densitometry), H.313 (requiring insurance payments for the toxin Botulinum), H.716 (providing for home care services for certain children), H.1320 (improving mental health services), and H.2039 (reimbursement by health insurers for bone marrow transplants for breast cancer patients). LIAM submitted a statement in opposition to all of these bills.

105. As of February 19, 1993, Cox had been identified by William Sawyer to LIAM as a "key

legislator" in relation to the legislature's consideration of H.53.

106. As of February 4, 1993, Dillon had met with the staff of the House Ways and Means Committee concerning NAIC-related funding for the Division of Insurance.

107. On March 9, 1993, the Joint Health Care Committee ("Health Care Committee") held a hearing on H.1818 (relating to coverage by certain health care insurance plans and policies of costs arising from speech and language disorders). At that hearing, LIAM submitted a statement in opposition to the legislation.

108. On March 9, 1993, the Health Care Committee held hearings in relation to H.506, H.1812, H.2571 and S.487 (regulating entities performing utilization review). At that hearing, a statement in opposition to all four bills was jointly submitted by LIAM and the Health Insurance Association of America.

109. On March 12, 1993, at least 17 bills, in addition to those listed in Finding No. 104 , were pending in the Insurance Committee and of interest to LIAM.

110. On March 12, 1993, H.4434, which concerned the taxation of domestic life insurance companies, was pending in the Taxation Committee and of interest to LIAM.

111. On March 12, 1993, several bills of interest to LIAM were pending before the Health Care Committee which, in addition to those discussed in Finding Nos. 54 and 55, included a series of bills relating to a single payer insurance system (S.478, H.1082, H.2796, H.3555), health care financing (S.489, H.505, H.2018), determination of need (S.455, H.504, H.2210), uncompensated care pool (H.1660, H.1652, H. 2205), and competition (H.1656).

112. On March 22, 1993, the Insurance Committee held a hearing on H.1846 (exempting life, health and accident insurance benefits from seizure under process). In connection therewith, LIAM provided a statement in support of H.1846.

113. On March 22, 1993, the Insurance Committee held a hearing on H.1110 and H.2821 (both entitled an Act Creating an Insurance Community Reinvestment Act). During the hearing Carroll provided a statement in opposition to the bills.

114. On April 5, 7 and 12, 1993, the Insurance Committee held hearings in relation to 14 bills which mandated additional insurance benefits. LIAM submitted a statement opposing all 14 bills.

115. On June 16, 1993, the Insurance Committee reported out H.53, with a new draft, and H.5220, which was reported out favorably. Thereafter, H.5220 was referred to the House Ways and Means Committee which reported out the bill on September 20, 1993 with a recommendation that the bill "ought to pass with certain amendments." Also on September 20, 1993, H.5220 was reported out by the House Committee on Bills in Third Reading "to be correctly drawn." A third reading of the H.5220 followed and the bill was passed to be engrossed. Following action by the Senate and concurrence by the House in Senate proposed Amendments, on November 6, 1993, H.5220 was enacted and presented to the Governor, who signed the bill into law on November 9, 1993.

116. On March 25, 1993, LIAM submitted its recommendation on 14 bills for which the Health Care Committee held hearings on March 24, 1993 (listed in Finding No. 111).

117. On March 24, 1993, the Taxation Committee conducted a hearing regarding H.4434.

III. Decision

A. Statute of Limitations

As a preliminary matter, we must decide whether the charges against LIAM with respect to all of the alleged gratuities, except the meal paid for by LIAM on March 12, 1993, are time-barred. We conclude, for the reasons discussed below, that none of the charges is time-barred.

The Commission applies to its proceedings a three-year statute of limitations, including tolling provisions, in accordance with the principles established by *Town of Nantucket v. Beinecke*, 379 Mass. 345 (1979). The Supreme Judicial Court stated in that case:

> We conclude that the essence of an action under the [conflict of interest] statute is breach of official duty . . . The [trial] judge properly applied the . . . tort statute of limitations contained in G.L. c. 260, § 2A.[2/] . . . The judge correctly stated that . . . "the statute commences to run when the plaintiff knew or should have known of the wrong." [citations omitted] . . .

> [A]s a general proposition . . . only when those disinterested persons who are capable of acting on behalf of the town knew or should have known of the wrong should the town be charged with knowledge.

Id., 379 Mass. at 349-351 (emphasis added). The Commission's regulation, 930 C.M.R. §1.02(10), implements the *Beinecke* standard by requiring, among other things, that the Petitioner demonstrate by a preponderance of the evidence that a disinterested person capable of enforcing the conflict law[3] learned of the violation no more than three years before the OTSC was issued.

The Respondent first argues that the statute of limitations is not subject to tolling where punitive rather than remedial relief is sought. We reject this argument for the reasons discussed below.

The Respondent fails to cite any Massachusetts or First Circuit Court of Appeals authority in support of its position. Instead, it relies on a case from the District of Columbia Court of Appeals, *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), which is inapposite. In that case, the federal court interpreted a particular federal statute of limitations, 28 U.S.C. §2462, governing federal actions for the enforcement of a civil fine or penalty. The Supreme Judicial Court has expressly rejected the argument that Commission proceedings are governed by a similar Massachusetts statute of limitations, G.L. c. 260, §5, applicable to actions brought by the Commonwealth to recover fines and penalties under penal statutes. *Zora v. State Ethics Commission*, 415 Mass. at 647 (1993).

Additionally, the Supreme Judicial Court has "rejected the notion that the remedy at issue is the primary factor which determines the applicable limitation period" for a conflict law violation. *Zora*, 415 Mass. at 647 (citing *Beineke*, 379 Mass. at 349). Rather, the Court looked to the nature of the underlying action to determine the applicable limitations period. It follows, therefore, that the type of remedy which the Commission might impose if it finds a violation would not determine when the cause of action accrues for purposes of commencing the limitations period in an action under G. L. c. 268A.[4]

Second, the Respondent argues that, even if tolling principles were applicable, the Petitioner has not demonstrated that the alleged violations were "inherently unknowable" or that it had exercised "reasonable diligence" in ascertaining the facts which give rise to such violations. We reject this argument also.

In *Beineke* the Court upheld the tolling of the statute of limitations in an action brought by the Town of Nantucket under G. L. c. 268A, §21 to void a deed tainted by Town employees' violations of G. L. c. 268A, §§19 and 20(a). In doing so, the Court, in effect, applied a "discovery rule," which tolls the running of the statute of limitations until plaintiff knows or reasonably should have known of the violation.[5] See, e.g., *Hendrickson v. Sears*, 365 Mass. 830 (1974). Massachusetts courts apply the rule to avoid the harsh alternative of barring a plaintiff from being able to bring an action when he or she is unaware of the injury or violation until the entire or a significant portion of the limitations period has elapsed. See *Franklin v. Albert*, 381 Mass. 611, 619 (1980). As the Court noted in *Beineke*, "[w]e feel that a realistic notice concept is appropriate under the Conflict of Interest Law . . . in order to further the [protective] purposes of the legislation." *Beineke*, 379 Mass. at 350.

Pursuant to 930 C.M.R. §1.02 (10) (c),[6] the Petitioner submitted an affidavit of its investigator then responsible for the case attesting that no complaints relating to the violation had been received more than three years before the OTSC was issued.[7] Moreover, it submitted affidavits from the Attorney General and the Suffolk County District Attorney attesting that their respective offices had not received any complaints relating to the violations more than three years before the OTSC issued. We conclude that the affidavit of the Enforcement Division's investigator establishes by a preponderance of the evidence that the Petitioner, a disinterested person capable of enforcing G. L. c. 268A, did not have actual knowledge of the gratuities more than three years before the OTSC issued. We further conclude that all the affidavits, taken together, establish by a preponderance of the evidence that Petitioner reasonably should not have known of the gratuities more than three years before the OTSC issued.[8] Accordingly, the statute of limitations was properly tolled.[9]

Finally, Respondent argues that the two affidavits filed by the Petitioner with respect to the Office of the District Attorney for Suffolk County (one from current District Attorney, Ralph C. Martin, II and one from his predecessor, Newman Flanagan), do not satisfy the requirements of 930 C.M.R. §1.02(10)(c). District Attorney Martin's affidavit reads, in relevant part:

> On September 2, 1992, I became Suffolk County District Attorney.
>
> In March 1997, I received a request from Special Investigator Juan A. DeLeon of the Massachusetts State Ethics Commission to conduct a search of relevant files and records of the Suffolk County District Attorney's Office for evidence of any complaint made to this office regarding the Life Insurance Association of Massachusetts, Inc., unlawfully providing gratuities to Massachusetts public officials.
>
> I caused a diligent search to be made as requested. That search, which included all complaint files opened during my tenure as Suffolk District Attorney, uncovered no records reflecting receipt of such a complaint by this office at any time more than three years prior to June 20, 1995, or at any time since. On information and belief, complaint files for the period proceeding [sic] my tenure as Suffolk District Attorney are in the possession of former Suffolk District Attorney Newman Flanagan.

The affidavit of former Suffolk County District Attorney Newman Flanagan reads in pertinent part:

> I was the Suffolk County District Attorney until September 2, 1992.
>
> I have caused to be made a diligent search of the records of the office of the Suffolk District Attorney in my possession and found no record of any complaint dated before June 20, 1992, regarding the Life Insurance Association of Massachusetts, Inc. unlawfully providing gratuities to Massachusetts public officials.

Respondent asserts that, "Mr. Martin does not purport to have reviewed any records for complaint files opened *prior* to September 2, 1992 and thus his affidavit, standing alone, would not satisfy Rule 1.02(10)(c), which is intended to require Petitioner to show that 'a disinterested person learned of the violation no more than three years before the order [to show cause] was issued.'" Post-Hearing Memorandum of Life Insurance Association of Massachusetts, Inc., p. 13 (emphasis included). Respondent further argues that Mr. Flanagan's affidavit is inconsistent with the regulation because it is from a former incumbent, and it is inadequate by failing to state that the records in his possession include records of all complaints filed prior to September 2, 1992. Thus, Respondent concludes that the Petitioner has failed to meet its burden under the regulation.

We do not find these arguments persuasive. We read Mr. Martin's affidavit as establishing that, as requested by the Petitioner, he searched all relevant files and records of his office including, but not limited to, complaint files opened during his tenure as District Attorney. Thus, to the extent, if any, that complaint files opened prior to September 2, 1992 remain in the office of the Suffolk County District Attorney, Mr. Martin caused a search of those records to be made. To the extent, if any, that complaint files opened prior to Mr. Martin's tenure are in Newman Flanagan's possession, Mr. Flanagan attested that he searched those records. Thus, we conclude that the Petitioner established by a preponderance of the evidence that the Office of the Suffolk County District Attorney received no complaint relating to the Respondent's alleged violations more than three years before the OTSC issued.

For all the reasons stated herein, we conclude that Petitioner has demonstrated by a preponderance of the evidence that it satisfied the common law tolling principles and the requirements of 930 C.M.R. §1.02(c). Thus, none of the Petitioner's claims is time-barred.

B. Section 3(a)

Pursuant to §3(a) of G.L. c. 268A:

> Whoever otherwise than as provided by law for the proper discharge of official duty, directly or indirectly, gives, offers or promises anything of substantial value to any present or former state, county or municipal employee . . . for or because of any official act performed or to be performed by such an employee . . . shall be punished . . . .

As we have previously stated, §3(a) establishes a gratuity offense, the essence of which is the giving of an item of "substantial value" to a public official "for or because of any official act performed or to be performed" by him. We have interpreted the §3 language to require the Petitioner to establish the existence of a relationship or nexus between the gratuity and the performance of a public employee's official acts. See, e.g., *In re Antonelli*, 1982 SEC 101, 108; *Scaccia* 1996 at 844. See also

United States v. Sawyer, 85 F.3d 713, 729, 735-736 (1st Cir. 1996).

It is unnecessary to demonstrate that, by providing the gratuity, the giver succeeded in influencing the recipient's performance of his or her official acts. *In re Antonelli, supra.* Moreover, the Petitioner need not establish corrupt intent to influence official decision-making. *Id.* See also, *Commonwealth v. Dutney*, 4 Mass. App. Ct. 363, 375 (1976). Rather, as the Commission recently discussed in *Scaccia*, 1996 at 844, there can be a § 3 violation even if the gratuity is intended only to "reward" the public official for actions he has already taken or which he may take in the future. Expressing a similar sentiment, the United States Court of Appeals for the First Circuit stated recently:

> As the word gratuity implies, the intent most often associated with the offense is the intent to "reward" an official for an act taken in the past or to be taken in the future. . . The official act might otherwise be properly motivated and the gratuity, though unlawful, might not be intended to influence the official's mindset with regard to that particular action.

United States v. Sawyer, 85 F.3d at 730. Additionally, we have not required that a gratuity be tied to specifically identified official action to be unlawful. *Scaccia*, 1996 at 844; *In re United States Trust Company*, 1988 SEC 356, 358 ("For purposes of § 3, it is unnecessary to prove that the gratuities were generated by some specific identifiable act performed or to be performed."); *United States v. Sawyer*, 85 F.3d at 738.

Thus, in determining if a gratuity is given for or because of any official act performed or to be performed, we will evaluate whether, at the time the donor gives the gratuity, the recipient has already taken any official act and/or reasonably can be expected to take any future official act concerning matters of interest to the donor. See *In re Hebert*, 1995 SEC 800 at 806. See also *United States v. Sawyer*, 85 F.3d at 735-736. Especially given the prophylactic nature of the conflict of interest law, to interpret § 3 otherwise could subject public employees to a host of temptations which would undermine the impartial performance of their public duties.

In addition, for at least the past 15 years, we have interpreted the term "substantial value" to mean meals, golf or other gifts valued at $50 or more. See *Commonwealth v. Famigletti*, 4 Mass. App. 584 (1976); *Commission Advisory No. 8 (Free Passes)* (1985).[10] In *EC-COI-93-14*, the Commission re-considered whether $50 should serve as the threshold for substantial value for purposes of § 3. The Commission concluded, "[w]e believe that the $50 threshold serves the public interest in maintaining the integrity of the government decision-making process, and provides a realistic and workable measure which public officials may use to guide their conduct." *Id.*[11]

Background Relevant to All Gratuities

LIAM is a trade association of Massachusetts-based commercial life, health and disability insurers. The insurance business in Massachusetts is subject to many state laws and regulations. LIAM's primary purpose is to represent its members collectively on matters related to insurance legislation and regulatory matters. On average, more than 100 bills filed in the Massachusetts legislature each year affect the insurance business. LIAM's members use the association to monitor proposed laws and regulatory matters affecting the insurance business and to advocate their position as a group in order to modify, pass or defeat proposed laws or to affect regulatory matters. At all times here relevant, bills proposing new laws, or changes to existing laws, affecting the interests of LIAM's members were pending in the Massachusetts legislature and regulatory matters affecting those same interests were under consideration by Massachusetts insurance regulators.

From 1989 through 1993, Carroll was employed by LIAM as President and as a Massachusetts registered legislative agent. Additionally, during the relevant time period, LIAM retained the services of Dillon, an outside lobbyist.

1. July 21, 1989 Dinner (Marriott Hotel, Boston, MA)

The Petitioner alleges that LIAM violated § 3(a) when it bought dinner for Woodward and his spouse on July 21, 1989, at a cost of $50 or more per person, for or because of official acts performed or to be performed by him.

As the parties have stipulated, Woodward and his wife had dinner with Carroll and his wife at the Marriott Hotel in Boston, Massachusetts on July 21, 1989 during the time period of the NCOIL conference in Boston. The July 21 dinner was not an official part of the 1989 NCOIL Boston conference. The total cost of the July 21 dinner was $302.53, inclusive of tax of

$12.03 and a tip of $50. Carroll paid the July 21 dinner bill with his LIAM American Express Card, and LIAM subsequently paid the American Express card charge for the cost of the dinner. Woodward did not pay anything toward the July 21 dinner.

On July 21, 1989, Woodward was a state representative and House Chairperson of the Joint Insurance Committee. As a state representative, Woodward was a state employee within the meaning of G.L. c. 268A.[12] He had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, Woodward exercised that authority numerous times during the years 1989 through 1991, taking official actions concerning legislation affecting the interests of LIAM's members.

For example, prior to the July 21 dinner, on March 6, 1989, the Insurance Committee, which was at that time co-chaired by Woodward, held a hearing on H.4901 (regulating HIV testing in determining eligibility for health care insurance). Carroll provided testimony at that hearing opposing H.4901 and supporting of H.609, a pending LIAM-sponsored bill. On June 22, 1989, S.715, which sought to reduce health insurance rates for non-smokers, was reported out by the Insurance Committee as "ought not to pass." In mid-July, 1989, within days of the July 21 dinner, Woodward proposed, and the House approved, an amendment to the universal health care law (St. 1988, c. 23), which would delay full implementation of the law by two years.

At the time Carroll bought dinner for Woodward on July 21, at least three bills of interest to LIAM were pending in the Insurance Committee.[13] Given this fact, Woodward's role as Chairman of that Committee during 1989, and his duties and responsibilities in that role, Carroll and LIAM should reasonably have expected that subsequent to the dinner, Woodward would take official acts of interest to the organization and its members.

The record confirms that Woodward, in fact, did perform such official acts after July 21, 1989. On or about October 10, 1989, the House of Representatives debated S.715, a bill opposed by LIAM, at which time Woodward was among a group of legislators who argued against the bill. On November 28, 1989, the Insurance Committee held a hearing on S.2099. LIAM employee Steven Tringale provided testimony in opposition to the bill. Moreover, the record indicates that on November 9, 1989, the Insurance Committee reported out both H.609 and H.4901 with a study order and that on December 28, 1989, the Insurance Committee reported out S.2099 with a new draft.

The July 21 dinner for Woodward and his spouse cost $50 or more per person[14] and, thus, was "of substantial value" for purposes of § 3(a).[15]

LIAM's payment for the July 21 dinner for Woodward was not provided for by law for the proper discharge of official duties.[16] Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the July 21 dinner, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that, at the time of the July 21 dinner, Woodward had taken numerous official acts and reasonably could be expected to take future official acts of interest to LIAM, we conclude that LIAM bought Woodward's (and his wife's[17]) dinner for or because of any official act performed or to be performed by him. In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for the July 21 dinner for or because of any official act performed or to be performed by Woodward.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on July 21, 1989, LIAM violated § 3(a) by giving a gratuity of substantial value to Woodward, for or because of any official act performed or to be performed by him.

2. December 20, 1989 Dinner (Locke-Ober Restaurant, Boston, MA)

The Petitioner alleges that LIAM violated § 3(a) when it bought dinner for Mara and Smith on December 20, 1989.

As the parties have stipulated, Mara and Smith had dinner with Dillon at Locke-Ober Restaurant in Boston, Massachusetts on December 20, 1989. The total cost of that dinner was $150.53, inclusive of tax of $6.03 and a tip of $24. Dillon paid the December 20 dinner bill with his American Express Card and LIAM subsequently reimbursed Dillon by check for the

December 20 dinner expense. Mara and Smith did not pay anything toward the December 20 dinner.

On December 20, 1989, Mara was a state representative and Vice-Chairperson of the Insurance Committee. As a state representative, Mara was a state employee within the meaning of G.L. c. 268A. At that same time, Smith was a staff member for the Insurance Committee. Because he performed services for the Massachusetts Legislature, Smith also was a state employee within the meaning of G.L. c. 268A. Mara had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, he exercised that authority on numerous times during the years 1989 through 1993, taking official actions concerning legislation affecting the interests of LIAM's members. In addition, during the years, 1989 through 1993, Smith also took actions relating to pending legislation, including legislation affecting the interests of LIAM's members.

For example, prior to the December 20 dinner, on March 6, 1989, the Insurance Committee, which was at that time vice-chaired by Mara, held a hearing on H.4901 (regulating HIV testing in determining eligibility for health care insurance). Carroll provided testimony at that hearing opposing H.4901 and in support of H.609, a pending LIAM-sponsored bill. On June 22, 1989, S.715, which sought to reduce health insurance rates for non-smokers, was reported out by the Insurance Committee as "ought not to pass." On or about October 10, 1989, the House of Representatives debated S.715, which was opposed by LIAM. On November 28, 1989, the Insurance Committee held a hearing on S.2099 in relation to which LIAM employee Steven Tringale provided testimony in opposition to the bill. Moreover, the record indicates that on November 9, 1989, the Insurance Committee reported out both H.609 (a LIAM-sponsored bill establishing standards for the collection, use and disclosure of privacy information concerning insurance transactions) and H.4901 (bill opposed by LIAM regulating HIV testing in determining eligibility for health care insurance) with a study order.

At the time Dillon bought dinner for Mara, at least one bill of interest to LIAM was still pending in the Insurance Committee.[18] Given that fact, Mara's role as Vice-Chairman of that Committee during 1989, and his duties and responsibilities in that role, Dillon and LIAM should reasonably have expected that Mara would take official acts of interest to LIAM and its members subsequent to the dinner.

The record confirms that Mara, in fact, did perform such official acts after the December 20 dinner. For example, on December 28, 1989, the Insurance Committee reported out S.2099 with a new draft. Furthermore, during 1990, at least eleven bills of interest to LIAM were pending in the Insurance Committee.[19] Included among those bills was H.5649, relating to investments of insurance companies, sponsored for LIAM by Mara.

The record also establishes that in 1989 and 1990, Smith, as a staff member for the Insurance Committee, provided summaries and explanations of proposed insurance legislation to Committee members. He also participated in, or assisted in the drafting of proposed legislation and/or amendments to proposed legislation pending before the Insurance Committee. Finally, the record indicates that Smith provided information to LIAM regarding matters involving the Insurance Committee. We, therefore, find that at the time of Smith's acceptance of the December 20 dinner from Dillon, Smith had taken official actions and LIAM should reasonably have expected that he would in the future take official actions affecting its interests.

The December 20 dinner for Mara and Smith cost $50 or more per person and, thus, was "of substantial value" for purposes of § 3(a).[20]

LIAM's payment for the December 20 dinner for Mara and Smith was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the December 20 dinner, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that Mara and Smith had taken official acts and reasonably could be expected to take future official acts of interest to LIAM, we find that LIAM bought Mara's and Smith's dinners on December 20, 1989 for or because of any official act performed or to be performed by them. In light of the above-described evidence, we do not find credible Dillon's testimony that he did not pay for the December 20 dinner for or because of any official act performed or to be performed by Mara or Smith.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence

that on December 20, 1989, LIAM violated § 3(a) by giving a gratuity of substantial value to Mara and Smith, for or because of official acts performed or to be performed by them.

3. March 22 and 23, 1990 Dinners (Fountains Restaurant, Tulsa, OK)

The Petitioner also alleges that LIAM violated § 3(a) when it bought dinner for Woodward and his spouse on both March 22, 1990 and March 23, 1990.

As the parties have stipulated, Woodward and his wife had dinner with Carroll and John Hancock legislative agent Sawyer and his wife, at the Fountains Restaurant in Tulsa, Oklahoma on March 22, 1990 during the time period of the NCOIL conference in Tulsa, Oklahoma. On March 23, 1990, Woodward and his wife had dinner with Carroll, Sawyer and his wife, and Liberty Mutual Company legislative agent Thomas Driscoll at the Fountains Restaurant in Tulsa, Oklahoma. The March 22 and March 23 dinners were not an official part of the 1990 NCOIL Tulsa conference. The total cost of the March 22 dinner was $171.42, inclusive of tax of $9.25 and a tip of $30. The total cost of the March 23 dinner was $199.28, inclusive of tax of $10.75 and a tip of $35. In the case of both dinners, Carroll paid the dinner bill with his LIAM American Express Card, and LIAM subsequently paid the American Express card charge for the cost of the dinners. Woodward did not pay anything toward either the March 22 or the March 23 dinner.

On March 22 and 23, 1990, Woodward was a state representative and House Chairperson of the Insurance Committee. As a state representative, Woodward was a state employee within the meaning of G.L. c. 268A. He had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, he exercised that authority numerous times during the years 1989 through 1991, taking official actions concerning legislation affecting the interests of LIAM's members.

For example, approximately one week before the March 22 and 23 dinners, on
March 14, 1990, the Insurance Committee, co- chaired by Woodward, held a hearing on H.734 (LIAM-sponsored bill permitting insurers to value real estate at an assessed value). At the time Carroll bought dinner for Woodward on March 22 and 23, at least 11 bills of interest to LIAM were pending in the Insurance Committee.[21/] Given that fact, Woodward's role as Chairman of that Committee during 1990, and his duties and responsibilities in that role, Carroll and LIAM should reasonably have expected that Woodward would take official acts of interest to the organization and its members subsequent to the dinners.

The record confirms that Woodward, in fact, did perform such official acts after March 23, 1990. On March 28, 1990, LIAM submitted testimony to the Insurance Committee regarding H.3343.[22/] In addition with regard to H.2493, H.2496, H.3559, H.3560, H.73, H.553 and H.79, LIAM submitted testimony to the Insurance Committee on April 2, 1990. Moreover, the record indicates that the Insurance Committee reported out favorably H.734 and H.1349 on May 31, 1990 and H.5469 on June 6, 1990, all of which had been sponsored by LIAM. Furthermore, on May 21, 1990, the Insurance Committee reported out H.553, the LIAM-sponsored privacy bill, with a new draft. The record indicates that no report issued from the Insurance Committee with regard to the other above-identified bills in which LIAM had an interest in 1990.

The March 22 and 23 dinners cost $50 or more for Woodward and his spouse and thus, were "of substantial value" for purposes of § 3(a).[23/]

LIAM's payment for the March 22 and 23 dinners for Woodward was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the March 22 and 23 dinners, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that Woodward had taken numerous official acts and reasonably could be expected to take future official acts of interest to LIAM, we find that LIAM bought Woodward's (and his wife's) dinners on March 22 and 23, 1990 for or because of any official act performed or to be performed by him. In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for the March 22 and 23 dinners for or because of any official act performed or to be performed by Woodward.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on March 22 and 23, 1990, LIAM violated § 3(a)

by giving a gratuity of substantial value to Woodward, for or because of official acts performed or to be performed by him.

4. November 24, 1990 Dinner (Stouffer Restaurant, Orlando, FL)

The Petitioner alleges that LIAM violated § 3(a) when it bought dinner for Emilio and his spouse on November 24, 1990.

As, the parties have stipulated, Emilio and his wife had dinner with Carroll and approximately seventeen other individuals at the Stouffer Restaurant in Orlando, Florida on November 24, 1990 during the time period of the NCOIL conference in Lake Buena Vista, Florida. The November 24 dinner was not an official part of the 1990 NCOIL Lake Buena Vista conference. The total cost of that dinner was $2243.97, inclusive of tax of $109.50 and a tip of $309.52. Carroll paid the November 24 dinner bill with his LIAM credit card, and LIAM subsequently paid the credit card charge for the cost of the dinner. Emilio did not pay anything toward the November 24 dinner.

On November 24, 1990, Emilio was a state representative and member of the Insurance Committee. As a state representative, Emilio was a state employee within the meaning of G.L. c. 268A. He had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, he exercised that authority numerous times during the years 1989 and 1990, taking official actions concerning legislation affecting the interests of LIAM's members.

For example, prior to the November 24 dinner, on three occasions in 1988 and 1989, Emilio filed proposed legislation for LIAM. Specifically, H.553, the LIAM-sponsored privacy bill pending before the Insurance Committee in 1990 had been filed by Emilio. Furthermore, as described above in relation to the March 22 and 23, 1990 dinner, there were numerous other bills of interest to LIAM pending in the Insurance Committee during 1990.[24/]

The November 24 dinner for Emilio and his spouse cost $50 or more per person and thus, was "of substantial value" for purposes of § 3(a).[25/]

LIAM's payment for the November 24 dinner for Emilio was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the November 24 dinner, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that, at the time of the dinner, Emilio had taken numerous official acts of interest to LIAM, we find that LIAM bought Emilio's (and his wife's) dinner on November 24, 1990 for or because of any official act performed by him. In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for the November 24 dinner for or because of any official act performed by Emilio.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on November 24, 1990, LIAM violated § 3(a) by giving a gratuity of substantial value to Emilio, for or because of official acts performed by him.

5. January 8, 1991 Retirement Dinner (Joe Tecce's Restaurant, Boston, MA)

The Petitioner alleges that LIAM violated § 3(a) when it contributed $127.62 towards the cost of a testimonial dinner and a gift set of golf clubs given to Emilio on January 5, 1991.

As the parties have stipulated, Emilio, a former aide and seven other people attended a dinner on January 8, 1991, at which time, Emilio was given a set of golf clubs. The total cost of the January 8 dinner was $541.24, inclusive of tax of $21.00 and a tip of $90.00. The total cost of the golf clubs was $404.25, inclusive of $19.25 of sales tax.

The record indicates that the January 8 dinner (and gift of golf clubs) was organized by Sawyer. In advance of the dinner, Carroll had agreed to contribute to the event and the gift. Carroll did not attend the January 8 dinner. However, the record indicates that of the seven people, other than Emilio and his former aide, who attended the January 8 dinner, one was a representative of LIAM, one represented the American Insurance Association, and all of the others were from three of LIAM's member insurance companies.[26/] Subsequent to the dinner, Carroll received a memorandum from Sawyer dated January 11, 1991, detailing LIAM's share of the cost of the dinner and gift of golf clubs. Carroll paid Sawyer LIAM's share of $127.62 by check dated January 21, 1991. In addition

to LIAM, by paying Sawyer or reimbursing their legislative agents who had paid Sawyer, four LIAM member insurance companies and one insurance association contributed to the cost of either the January 8 dinner and/or the gift to Emilio.

As of January 8, 1991, Emilio no longer was a state representative. However, during 1990, Emilio was a state representative and member of the Insurance Committee. As a state representative, Emilio was a state employee within the meaning of G.L. c. 268A and on January 8, 1991, he was a "former state employee" as that term is used in G.L. c. 268A, § 3(a). He, while a state representative, had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, he exercised that authority numerous times during the years 1989 and 1990, taking official actions concerning legislation affecting the interests of LIAM's members.

For example, as discussed in relation to the November 24 dinner, on three occasions in 1988 and 1989, Emilio filed proposed legislation for LIAM. Furthermore, as described above in relation to the March 22 and 23, 1990 Dinner, there were numerous other bills of interest to LIAM pending in the Insurance Committee during 1990.

LIAM's share of the January 8 dinner for Emilio and gift of golf clubs cost $50 or more and thus, was "of substantial value" for purposes of § 3(a).[27/]

LIAM's payment of a share of the January 8 dinner for Emilio and gift of golf clubs was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the January 8 dinner and gift of golf clubs, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that Emilio had taken numerous official acts of interest to LIAM, we find that LIAM bought a portion of Emilio's dinner and paid a portion of the cost of the golf clubs given to him on January 8, 1991 for or because of any official act performed by him.[28/] In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for a portion of the cost of the January 8 dinner and gift of golf clubs for or because of any official act performed by Emilio.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on January 8, 1991, LIAM violated § 3(a) by giving a gratuity of substantial value to Emilio, for or because of official acts performed or to be performed by him.

6. November 16, 1991 Dinner (Avanti Restaurant, Scottsdale, AZ)

The Petitioner alleges that LIAM violated § 3(a) when it bought dinner for at least four Massachusetts state representatives, including Woodward, and their respective spouses/guests on November 16, 1991.

As the parties have stipulated, about 20 persons, including Massachusetts legislators Woodward and his wife, Havern and his wife, Pacheco, Ranieri and his wife and John Hancock lobbyists Sawyer and his wife and Ralph Scott had dinner with Carroll and his wife at the Avanti of Scottsdale Restaurant, in Scottsdale, Arizona on November 16, 1991 during the time period of the NCOIL conference in Scottsdale, Arizona. The November 16 dinner was not an official part of the 1991 NCOIL Scottsdale conference. The total cost of the November 16 dinner was $1170.00, inclusive of tax of $62.79 and a tip of $170. Carroll paid the November 16 dinner bill with his LIAM American Express Card, and LIAM subsequently paid the American Express card charge for the cost of the dinner. None of the Massachusetts legislators present paid anything toward the November 16 dinner.

On November 16, 1991, Woodward was a state representative, Havern was state senator, a member of the Taxation Committee, and Senate Chairperson of the Public Service Committee, Pacheco was a state representative and member of both the Government Regulations Committee and the Insurance Committee, and Ranieri was a state representative and member of the Government Regulations Committee. As members of the Massachusetts Legislature, Woodward, Havern, Pacheco and Ranieri were each state employees within the meaning of G.L. c. 268A. The Massachusetts legislators present at the November 16 dinner had the authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, the legislators attending the November 16 dinner exercised that authority numerous times during 1991, taking official actions concerning legislation affecting the interests of LIAM's members.

For example, prior to the November 16 dinner, on February 13, 1991, the Insurance Committee, of which Pacheco was a member, held a hearing in relation to S.597 (establishing a Medex study committee of which LIAM would be a member). Dillon was scheduled to testify in support of the legislation. On February 14, 1991, the Insurance Committee held hearings in relation to H.1346 (increasing mental illness mandated benefits), H.1343 (allowing the substitution of outpatient mental illness treatment for inpatient mental illness treatment) and H.391 (LIAM-sponsored bill allowing exchange of policies between affiliated companies. Dillon was scheduled to testify in opposition to H.1346 and in favor of H.1343 and H.391. In addition, on March 20, 1991, LIAM representatives, including Dillon, submitted testimony in relation to: H.390 (allowing domestic insurance companies to convert to stock form of ownership); H.3973 (allowing certain investments in insurance policies and annuity contracts); H.4165 (concerning valuation of capital stock of subsidiaries of insurers); and S.568 (establishing lower insurance rates for non-smokers). On April 3, 1991, the Insurance Committee held a hearing on S.569 (establishing lower insurance rates for non-drinkers) and LIAM lobbyist Francis O'Brien provided a statement against the legislation. On April 22, 1991, during a hearing on H.2342 (promoting insurance company competition by repealing the anti-trust exemption), LIAM through its legislative agents, submitted a statement in opposition to the legislation.

Furthermore, on March 6, 1991, the Taxation Committee, of which Havern was a member, held a hearing in relation to H.4076 (relating to the taxation of domestic life insurance companies). At that hearing Carroll provided testimony in support of the legislation.

At the time Carroll bought dinner for Woodward, Havern, Pacheco and Ranieri, on November 16, several bills of interest to LIAM were pending in the legislature and poised to be acted upon both branches.[29/] Furthermore, H. 6206 (health care benefits for small employers), which was sponsored by LIAM was pending before the Insurance Committee. Given these facts and the various duties and responsibilities of the legislators who attended the November 16 dinner, Carroll and LIAM should reasonably have expected that the legislators attending the November 16 dinner would take official actions of interest to the organization and its members subsequent to the dinner.

The record confirms that each of the legislators who attended the November 16 dinner, in fact, did perform such official acts after November 16, 1991. On November 21, 1991, Ranieri, Pacheco and Woodward all voted at least twice on H.6280, and all voted on H.6307 on December 21, 1991. On December 12, 1991 Havern voted on H.6307. Moreover, on December 4, 1991, the Insurance Committee held a hearing on H.6206, a LIAM-sponsored bill which was on December 5, 1991 reported out with a study order. Finally, by the end of the 1991 legislative year, several bills affecting the financial interests of LIAM's members had been put to a floor vote of the full House and certain of those bills had also been acted upon by the full Senate.[30/]

The November 16 dinner for Woodward and his wife, Havern and his wife, Pacheco, and Ranieri and his wife cost $50 or more per person and thus, was "of substantial value" for purposes of § 3(a).[31/]

LIAM's payment for the November 16 dinner for Woodward, Havern, Pacheco and Ranieri was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the November 16 dinner, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that Woodward, Havern, Pacheco and Ranieri had taken official acts and reasonably could be expected to take future official acts of interest to LIAM, we find that LIAM bought Woodward (and his wife), Havern (and his wife), Pacheco and Ranieri (and his wife) dinner on November 16, 1991 for or because of any official act performed or to be performed by each legislator. In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for the November 16 dinner for or because of any official act performed or to be performed by Woodward, Havern, Pacheco or Ranieri.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on November 16, 1991, LIAM violated § 3(a) by giving gratuities of substantial value to Woodward, Havern, Pacheco and Ranieri, for or because of official acts performed or to be performed by each of them.

7. May 13, 1992 Dinner (Four Seasons Restaurant, Boston, MA)

The Petitioner alleges that LIAM violated § 3(a) when it bought dinner for Massachusetts Commissioner of Insurance Doughty on May 13, 1992.

As the parties have stipulated, Doughty had dinner with Carroll and Dillon at the Four Seasons Restaurant in Boston, Massachusetts on May 13, 1992. The total cost of the May 13 dinner was $337.46, inclusive of tax of $13.21 and a tip of $60. Carroll paid the May 13 dinner bill with his LIAM credit card, and LIAM subsequently paid the credit card bill charge for the cost of the dinner. Doughty did not pay anything toward the May 13 dinner.

On May 13, 1992, as Commissioner of Insurance, Doughty headed the Massachusetts Division of Insurance. Because she held an office in a state agency, Doughty was a state employee within the meaning of G.L. c. 268A. She had the authority to take official action on regulatory matters which could affect the financial interests of, among others, LIAM's members. Moreover, she exercised that authority numerous times during the years 1992 and 1993, taking official actions on regulatory matters affecting the interests of LIAM's members.

For example, prior to the May 13 dinner, beginning in January, 1992, LIAM representatives met with Division of Insurance employees regarding NAIC accreditation.[32] The record demonstrates that in 1992, LIAM supported NAIC accreditation of the Insurance Division. Without such accreditation, LIAM took the position that Massachusetts insurance companies would suffer substantial competitive disadvantages when doing business in other states. In early 1992, LIAM representatives believed that Doughty was "not paying careful attention" to the management aspects of NAIC accreditation. On April 29, 1992, Carroll contacted Insurance Division staff member Cindy Martin seeking to meet with her and Doughty on that part of the accreditation process relating to "restructuring the Insurance Division, including funding, staffing, etc." The record demonstrates that prior to May 13 dinner, Carroll's attempts to discuss accreditation issues with Doughty in an office setting had not been successful. Carroll therefore desired to meet with Doughty in an "informal" or "easier setting" to discuss issues relating to the management of the Insurance Division in anticipation of an NAIC accreditation examination visit expected to occur in 1993.

At the time Carroll bought dinner for Doughty on May 13, several issues relating to the NAIC accreditation were pending at the Division of Insurance.[33] Given that fact, Doughty's role as Insurance Commissioner during 1992, and her duties and responsibilities in that role, Carroll and LIAM should reasonably have expected that Doughty would take official acts of interest to the organization and its members subsequent to the May 13 dinner.

The record confirms that Doughty, in fact, did perform such official acts after May 13, 1992. In July, 1992, while LIAM and the Insurance Division were reviewing drafts of legislation needed for NAIC accreditation, LIAM lobbyist O'Brien was in frequent contact with the Insurance Division. By July 29, 1992, the Insurance Division filed the legislative packet necessary for NAIC accreditation. By March of 1993, LIAM and the Division of Insurance had devised a joint strategy for seeking legislative approval of the legislation necessary for NAIC accreditation (H.53). That strategy involved Doughty meeting individually with each member of the Insurance Committee and insurance industry representatives.

The May 13 dinner for Doughty cost $50 or more and, thus, was "of substantial value" for purposes of § 3(a).[34]

LIAM's payment for the May 13 dinner for Doughty was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the May 13 dinner, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that at the time of the May 13 dinner, Doughty had taken official acts and reasonably could be expected to take future official acts of interest to LIAM, we find that LIAM bought Doughty's dinner on May 13, 1992 for or because of any official act performed or to be performed by her. In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for the May 13 dinner for or because of any official act performed or to be performed by Doughty.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on May 13, 1992, LIAM violated § 3(a) by giving a gratuity of substantial value to Doughty, for or

because of official acts performed or to be performed by her.

8. March 12, 1993 Dinner (Ritz Carlton/The Grill Restaurant, Amelia Island, FL)

The Petitioner alleges that LIAM violated § 3(a) when it bought dinner for at least seven Massachusetts state representatives, at least six of whom were accompanied by guests, on March 12, 1993.

As the parties have stipulated, about 24 persons, including Mara and his wife, T. Walsh and his wife, Cass, M. Walsh and his wife, Honan and his guest, Scaccia, Cox and his wife and Poirier had dinner with Carroll at The Grill Restaurant, Ritz Carlson Hotel, on Amelia Island, Florida on March 12, 1993 during the time period of the NCOIL conference at Amelia Island Plantation, Amelia Island, Florida. Also present at the March 12 dinner were Dillon, Sawyer and his wife, registered legislative agent Arthur Lewis and his wife, Massachusetts Medical Society registered legislative agent Andrew Hunt, BlueCross and BlueShield registered legislative agent Marcy McManus, Health Association of America and Massachusetts Association of Life Underwriters registered legislative agent Donald Flanagan, and Francis Carroll of the Small Business Service Bureau, Inc. The March 12 dinner was not an official part of the 1993 NCOIL Amelia Island conference. The total cost of the March 12 dinner was $3089.16, inclusive of tax of $146.94 and a tip of $493.22. Carroll paid the March 12 dinner bill with his LIAM credit card, and LIAM subsequently paid the credit card charge for the cost of the dinner. None of the Massachusetts legislators present paid anything toward the March 12 dinner.

On March 12, 1993, Mara was a state representative and the House Chairperson of the Insurance Committee; T. Walsh was a state representative and the House Vice-Chairperson of the Insurance Committee; Cass was a state representative and a member of both the Insurance Committee and the Health Care Committee; M. Walsh was a state representative and the House Chairperson of the Joint Government Regulations Committee (Government Regulations Committee); Honan was a state representative and the House Vice-Chairperson of the Government Regulations Committee and a member of the Taxation Committee; Scaccia was a state representative and the House Chairperson of the Taxation Committee; Cox was a state representative and the Chairperson of the House Committee on Bills in Third Reading and Poirier was a state representative an a member of the House Ways and Means Committee. As members of the Massachusetts Legislature, Mara, T. Walsh, Cass, M. Walsh, Honan, Scaccia, Cox and Poirier were state employees within the meaning of G.L. c. 268A. The Massachusetts legislators present at the March 12 dinner had authority to take official action on legislative matters which could affect the financial interests of, among others, LIAM's members. Moreover, the legislators attending the March 12 dinner exercised that authority numerous times during the years 1992 and 1993, taking official actions concerning legislation affecting the interests of LIAM's members.

The parties have also stipulated that prior to and during 1993, LIAM, through its legislative agents, engaged in legislative activity in connection with certain insurance and taxation issues. Specifically, as early as March 6, 1991, Carroll testified before the Taxation Committee, of which, at that time, Scaccia served as House Chairperson. Subsequently, in a letter dated March 31, 1992, and addressed to Scaccia as Co-Chairman of the Taxation Committee, Carroll submitted written testimony on behalf of LIAM supporting H.3466 (reforming the taxation of domestic life insurance companies). In a second letter to Scaccia as Co-Chairman of the Taxation Committee, also dated March 31, 1992, Carroll filed written testimony on behalf of LIAM opposing H.2378 and H.2568 (both relative to bank taxation and competitive equality) and H. 2912 (relating to the taxation of banks and bank-like entities).

For example, as of January 25, 1993, H.53 (relating to NAIC accreditation of the Division of Insurance) was pending in the Insurance Committee, of which Mara served as House Chairperson, T. Walsh served as House Vice-Chairperson and of which Cass was a member. At that time, LIAM was engaged in drafting certain language (relating to an extraordinary dividends provision in H.53) which it intended to present to the Insurance Committee. In January, 1993, LIAM was also engaged in an effort to have H.53 heard by the Insurance Committee at the earliest possible opportunity. As of February 4, 1993, Dillon had met with members of the Insurance Committee concerning a hearing date for H. 53, which by February 25, 1993 had been scheduled for March 22, 1993. The record also demonstrates that, prior to the March 12 dinner, both Carroll and Dillon had spoken to T. Walsh regarding H.53. By March 8, 1993, LIAM and the Insurance Division had developed a joint strategy for the March 22, 1993 Insurance Committee hearing, which in

part, involved Doughty meeting individually with each member of the Insurance Committee.

On March 8, 1993, four days prior to the March 12 dinner, the Insurance Committee held hearings in relation to eight bills which sought to mandate that insurers provide new health insurance benefits.[35] LIAM submitted a statement in opposition to all of these bills.

The record also demonstrates that, as of February 19, 1993, Cox, who then served as Chairperson of the House Committee on Bills in Third Reading, had been identified to LIAM as a "key legislator" in relation to the legislature's consideration of H.53. Also, as of February 4, 1993, Dillon had met with the staff of the House Ways and Means Committee, of which Poirier was a member, concerning NAIC-related funding for the Division of Insurance.[36]

Furthermore, on March 9, 1993, the Health Care Committee, of which Honan was the House Chairperson and Cass was a member, held a hearing in relation to H.1818 (relating to coverage by certain health care insurance plans and policies of costs arising from speech and language disorders). At that hearing LIAM submitted a statement in opposition to the legislation. Additionally, on March 9, 1993, the Health Care Committee held hearings in relation to H.506, H.1812, H.2571 and S.487 (regulating entities performing utilization review) at which time a statement in opposition to all four bills was jointly submitted by LIAM and the Health Insurance Association of America.

At the time Carroll paid for the March 12 dinner, several bills of interest to LIAM were pending in the Insurance Committee,[37] the Taxation Committee,[38] the Health Care Committee[39] and the legislature as a whole. Given that fact and the various duties and responsibilities of the legislators who attended the March 12 dinner, Carroll and LIAM should reasonably have expected that the legislators attending the March 12 dinner would take official actions of interest to the organization and its members subsequent to the dinner.

The record confirms that each of the legislators who attended the March 12 dinner, in fact, did perform such official acts after March 12, 1993. For example, on March 22, 1993, the Insurance Committee held a hearing on H.1846 (exempting life, health and accident insurance benefits from seizure under process). In connection therewith, LIAM provided a statement in support of H.1846.[40] On April 5, 7 and 12, 1993, the Insurance Committee held hearings in relation to 14 bills which mandated additional insurance benefits. In connection with those hearings, LIAM submitted a statement opposing all 14 bills.

Moreover, the record demonstrates that subsequent to the March 12 dinner, on March 25, 1993, LIAM submitted its recommendation on 14 bills[41] for which the Health Care Committee held hearings on March 24, 1993. Additionally, by letter dated March 30, 1993, addressed to Scaccia as Co-Chairperson of the Taxation Committee, Carroll filed written testimony on behalf of LIAM supporting H.4434. The Taxation Committee conducted a hearing regarding H.4434 on March 24, 1993.

Finally, on March 22, 1993, the Insurance Committee held a hearing in relation to H.53 (NAIC accreditation bill), discussed above. At that hearing Carroll testified in support of the bill. On June 16, 1993, the Insurance Committee reported out H.53, with a new draft and H.5220, which was reported out favorably. Thereafter, H.5220 was referred to the House Ways and Means Committee which reported out the bill on September 20, 1993 with a recommendation that the bill "ought to pass with certain amendments." Also on September 20, 1993, H.5220 was reported out by the House Committee on Bills in Third Reading "to be correctly drawn." A third reading of the H.5220 followed and the bill was passed to be engrossed. Following action by the Senate and concurrence by the House in Senate proposed amendments, on November 6, 1993, H.5220 was enacted and presented to the Governor, who signed the bill into law on November 9, 1993.

The March 12 dinner for Mara and his wife, T. Walsh and his wife, Cass, M. Walsh and his wife, Honan and his guest, Scaccia, Cox and his wife and Poirier cost $50 or more per person and thus, was "of substantial value" for purposes of § 3(a).[42]

LIAM's payment for the March 12 dinner for Mara, T. Walsh, Cass, M. Walsh, Honan, Scaccia, Cox and Poirier was not provided for by law for the proper discharge of official duties. Moreover, the parties stipulated that none of the expenditures referenced in the OTSC, including the March 12 dinner, was paid by LIAM because of personal friendship.

Given that LIAM's sole purpose for existing is to lobby on behalf of its member companies on matters related to insurance legislation and regulation and that

Mara, T. Walsh, Cass, M. Walsh, Honan, Scaccia, Cox and Poirier had taken official acts and reasonably could be expected to take future official acts of interest to LIAM, we find that LIAM bought Mara's (and his wife's), T. Walsh's (and his wife's), Cass', M. Walsh's (and his wife's), Honan's (and his guest's), Scaccia's, Cox's (and his wife's) and Poirier's dinners on March 12, 1993 for or because of any official act performed or to be performed by them. In light of the above-described evidence, we do not find credible Carroll's testimony that he did not pay for the March 12 dinner for or because of any official act performed or to be performed by Mara, T. Walsh, Cass, M. Walsh, Honan, Scaccia, Cox and Poirier.

Consequently, we conclude that the Petitioner has demonstrated by a preponderance of the evidence that on March 12, 1993, LIAM violated § 3(a) by giving gratuities of substantial value to Mara, T. Walsh, Cass, M. Walsh, Honan, Scaccia, Cox and Poirier, for or because of official acts performed or to be performed by each of them.[43/]

V. Order

Pursuant to the authority granted it by G.L. c. 268B, § 4(j), the State Ethics Commission hereby orders the Life Insurance Association of Massachusetts to pay the following civil penalty for violating G.L. c. 268A, § 3(a). We order the Life Insurance Association of Massachusetts to pay $13,500.00 (thirteen thousand five hundred dollars) to the State Ethics Commission within 30 days of its receipt of this Decision and Order.

DATE: December 16, 1997

1/ LIAM's original Answer was filed on July 11, 1995.

2/ That statute provides:

> [A]ctions of tort . . . shall be commenced only within three years next after the cause of action accrues.

G.L. c. 260, § 2A (emphasis added).

3/ Such a disinterested person may be the Petitioner, the Attorney General or the appropriate District Attorney. The latter two offices are the law enforcement agencies authorized to enforce G.L. c. 268A criminally.

4/ The Respondent appears to assume mistakenly that Commission proceedings necessarily result in punitive relief and that the Petitioner sought only the imposition of civil fines. However, the remedies available to the Commission include issuing an order requiring the violator to (i) cease and desist the violation; (ii) file any report, statement or other information required by law; or (iii) pay a civil penalty of not more than two thousand dollars for each violation. G. L. c. 268B, § 4(j). The Petitioner requested in its OTSC that the Commission "levy such fines, issue such orders and grant such other relief as it deems appropriate." OTSC, p. 8. It is impossible to determine which remedy, if any, the Commission will apply before it determines whether and what type of a violation has occurred.

5/ Since at least 1974, the Supreme Judicial Court has "interpreted accrual language in c. 260 to incorporate the discovery rule." *Pobieglo v. Monsanto Co.*, 402 Mass. 112, 116 (1988).

6/ That subsection of the regulation reads, in relevant part:

> When a statute of limitations defense has been asserted, the petitioner will have the burden of showing that a disinterested person learned of the violation no more than three (3) years before the order was issued. The burden will be satisfied by:
>
> 1. an affidavit from the investigator currently responsible for the case that the Enforcement Division's complaint files have been reviewed and no complaint relating to the violation was received more than three (3) years before the order was issued; and
> 2. with respect to any violation of M.G.L. c. 268A other than § 23, affidavits from the Department of the Attorney General and the appropriate Office of the District Attorney that, respectively, each office has reviewed its files and no complaint relating to the violation was received more than three (3) years before the order was issued; . . .

930 C.M.R. § 1.02(c)

7/ The OTSC in this case issued on June 20, 1995.

8/ The Attorney General and the District Attorneys may refer possible violations to the Commission for civil enforcement. We note that five of the nine gratuities were given by the Respondent to state officials outside Massachusetts, thus making the Petitioner's discovery of those violations all the more difficult.

9/ This case is distinguishable from the situation in *In re Saccone and Delprete*, 1982 SEC 82, cited by Respondent. In that decision, issued prior to the promulgation of 930 C.M.R. § 1.02 , the Commission concluded that the Petitioner had failed to demonstrate that it was unable to discover the violations earlier. Accordingly, the running of the statute of limitations was not tolled.

10/ In ascertaining value, the Commission applies an objective test of substantial value, rather than the subjective consideration of the personal value placed on an item or event by the individual receiving the gratuity, at least where the gratuity is an item of tangible value. *EC-COI-92-32;* See *In re Flanagan*, 1996 SEC 757 (no reliable or objective evidence from which Commission could ascertain value of car). Beyond cash gifts, the Commission has determined various types of gratuities to be of substantial value, including: entertainment (See e.g., *In re Mara*, 1994 SEC 673); meals and golf (See e.g., *In re United States Trust Company*, 1988 SEC 356; *In re Scaccia*, 1996 SEC 838).

[11] Prior to issuing *EC-COI-93-14*, the Commission invited legal arguments from interested parties, including the Office of the Governor's Legal Counsel, Counsels for the Massachusetts House of Representatives and Senate, Common Cause and the Massachusetts Municipal Association. The Commission received no responses to its invitation.

[12] "State employee," a person performing services for or holding an office, position, employment, or membership in a state 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, including members of the general court and executive council. G.L. c. 268A, § 1(q).

[13] Those bills included: H.609, the LIAM-sponsored Privacy Bill (establishing standards for the collection, use and disclosure and privacy of information concerning insurance transactions); H.4901, opposed by LIAM (regulating HIV testing in determining eligibility for health care insurance); S.2099 Health Emergency Alleviation (freezing rates for individual and small group products).

[14] Based on the testimony of Dr. Allen Michel, a professor at Boston University, and relying on the Consumer Price Index for Urban Consumers, the Respondent urges the Commission to value the meals provided to the state employees identified in the OTSC (and the golf clubs given to Emilio) in "1972 dollars" (the year in which the events which are the subject of the *Famigletti* decision occurred). As explained earlier, in determining whether the $50 "substantial value" threshold has been met, we seek to employ a workable and consistent measure which public employees and private parties may use to guide their conduct. Consequently, we will continue to determine the value of a gratuity based on the actual dollars at the time the gratuity was given. See also *EC-COI-93-14* and footnote 10.

[15] We reach this conclusion based on Woodward's and his spouse's pro rata shares of the total cost of the July 21 dinner. We have calculated the pro rata share by dividing the total cost of the dinner ($302.53) by the number of participants (four people) to reach a per person cost of $75.63. See *In re Scaccia,* 1996 SEC 838, 840 (Findings of Fact No. 23, 30, 43, 54, using same methodology); *In re United States Trust Company*, 1988 at 360, n. 5. We note that the Respondent views the pro rata methodology as an inappropriate means of allocating an expenditure to a public official. In particular, the Respondent argues that the Petitioner's approach is flawed because it includes amounts attributable to tax and tip. We, however, do not find this argument persuasive where applicable taxes are an unavoidable cost associated with a restaurant meal and where the tip may be viewed as payment for the quality of the service associated with the meal and therefore may reasonably be included as a benefit provided to those consuming the meal.

[16] Members of the Massachusetts Legislature receive compensation pursuant to G.L. c. 3, §9, which does not provide that members are entitled to gifts of free meals as part of their compensation package.

[17] The Commission attributes the value of the donor's payment for the spouse's/guest's expenses to the public official. See *In re United States Trust Company*, 1988 SEC at 360, n. 5. This is because the public official indirectly receives something of value for himself, including the financial benefit of not paying for his companion.

[18] S.2099 Health Emergency Alleviation (freezing rates for individual and small group products).

[19] Those bills included: H.553, the LIAM- sponsored Privacy bill; H.734, permitting insurers to value real estate at assessed value; H.1349, permitting life insurance companies to exchange policies with their affiliates; H.2157, concerning valuation of capital stock of insurers and subsidiaries; H.5649, concerning investments of insurance companies; H.3343, regulating access to health care; H.2493, H.2496, H.3560, concerning gender neutral insurance; H.3559, concerning reduced insurance rates for non-smokers; H.79, concerning discrimination against the handicapped.

[20] We reach this conclusion by calculating Mara's and Smith's pro rata shares of the total cost of the December 20 dinner. We have calculated the pro rata share by dividing the total cost of the dinner ($150.53) by the number of participants (three people) to reach a per person cost of $50.18.

[21] In addition to H.734 described above, those bills included: H.553, the LIAM-sponsored Privacy bill; H.1349, permitting life insurance companies to exchange policies with their affiliates; H.2157, concerning valuation of capital stock of insurers and subsidiaries; H.5649, concerning investments of insurance companies; H.3343, regulating access to health care; H.2493, H.2496, H.3560, concerning gender neutral insurance; H.3559, concerning reduced insurance rates for non-smokers; H.79, concerning discrimination against the handicapped.

[22] The record indicates that because this bill had been previously considered by the Insurance Committee, no oral arguments were heard. However, interested parties were permitted to file written statements.

[23] We reach this conclusion based on Woodward's and his spouse's pro rata shares of the total cost of the March 22 and 23 dinners. In each case, we have calculated the pro rata share by dividing the total cost of the dinners ($171.42 for March 22) ($199.28 for March 23) by the number of participants (five people on March 22) (six people on March 23) to reach a per person cost of $34.29 for March 22 and $33.21 for March 23.

[24] Indeed, the Insurance Committee reported out favorably H.734 and H.1349 on May 31, 1990 and H.5469 on June 6, 1990, all of which had been sponsored by LIAM. Furthermore, on May 21, 1990, the Insurance Committee reported out H.553, the LIAM-sponsored privacy bill, with a new draft.

[25] We reach this conclusion based on Emilio's and his spouse's pro rata shares of the total cost of the November 24 dinner. We have calculated the pro rata share by dividing the total cost of the dinner ($2243.97) by the number of participants (20 people) to reach a per person cost of $112.20.

[26] The companies were John Hancock, The New England and Mass Mutual.

[27] We reach this conclusion based on LIAM's share of the cost of the January 8 dinner and its contribution towards the gift of golf clubs. LIAM contributed $77.32 towards the dinner and $67.38 for the golf clubs which were given to Emilio.

[28] Carroll's testimony that people at the State House genuinely liked Emilio and that he was a former insurance agent does not alter our conclusion on this point.

[29] Those bills included: H.6280 and H.6307 (both relating to health care access and financing).

[30] These included H.6307 (an amended version of H.6280), signed into law, St.1991,c. 495; H.1667, signed into law, St.1991, c. 516; H.391, returned by Governor; H.6015 (an amended version of H.390), signed into law, St.1991, c. 339; H.3973, signed into law, St.1991, c. 347; and H.4165, approved and engrossed by House, but died in Senate Third Reading Committee.

[31] We reach this conclusion based on each legislator's and his spouse's pro rata shares of the total cost of the November 16 dinner. We have calculated the pro rata share by dividing the total cost of the dinner ($1170.00) by the number of participants (20 people) to reach a per person cost of $58.50.

[32] By the standards of the NAIC, a state division of insurance is deemed qualified to regulate the industry in its state. NAIC accreditation in substantial part depends on the state division of insurance being properly funded, staffed, organized and managed, as well as the passage of certain legislation.

[33] Including the filing of necessary legislation and securing an appropriation to allow for increased staffing at the Division of Insurance.

[34] We reach this conclusion based on Doughty's pro rata share of the total cost of the May 13 dinner. We have calculated the pro rata share by dividing the total cost of the dinner ($337.46) by the number of participants (three people) to reach a per person cost of $112.49.

[35] S.615 (insurance coverage for mental illness), S.624 (access to educational psychologists services), S.626 (access to mental health services), S.658 (mandating insurance coverage for bone densitometry), H.313 (requiring insurance payments for the toxin Botulinum), H.716 (providing for home care services for certain children), H.1320 (improving mental health services), H.2039 (reimbursement by health insurers for bone marrow transplants for breast cancer patients).

[36] The parties have stipulated that in 1992 and 1993, LIAM supported increased funding for the Division of Insurance.

[37] In addition to those bills listed in footnote 35, at least 17 other bills of interest to LIAM were pending in the Insurance Committee.

[38] Including H.4434 which concerned the taxation of domestic life insurance companies.

[39] In addition to H.1818, H.506, H.1812, H.2571 and S.487, discussed above, pending before the Committee were a series of bills relating to a single payor system (S.478, H.1082, H.2796, H.3555), health care financing (S.489, H.505, H.2018), determination of need (S.455, H.504, H.2210), uncompensated care pool (H.1660, H.1652, H. 2205), and competition (H.1656).

[40] On March 22, 1993, Carroll provided a statement in opposition to H.1110 and H.2821 (both entitled an Act Creating an Insurance Community Reinvestment Act), during a hearing before the Insurance Committee on those bills.

[41] See Footnote 39.

[42] We reach this conclusion based on each legislator's and his spouse's/guest's pro rata shares of the total cost of the March 12 dinner. We have calculated the pro rata share by dividing the total cost of the dinner ($3089.16) by the number of participants (25 people) to reach a per person cost of $123.57. The fact that in April 1993, LIAM received contributions in the amount of $1100 towards its expenditure for the March 12 dinner does not alter our conclusion that the meals paid for by LIAM on March 12, 1993 were of substantial value. This is especially the case where, even if we were to subtract the post-event contributions from LIAM's expenditure, the pro rata share of the March 12 dinner would be $79.57. Moreover, we are not persuaded by the Respondent's argument that the cost of cognac, which it did not specifically authorize, should be excluded from the cost of the March 12 dinner. We find no basis for excluding the cost of the cognac where LIAM paid for that expense and the record contains no evidence that LIAM made any arrangement to limit the ordering of alcoholic beverages before or during the March 12 event. In addition, the record reflects that LIAM neither sought, nor received, reimbursement for the cost of the cognac from the state legislator recipients.

[43] The OTSC also contained an allegation that LIAM provided Red Sox tickets to Representative Woodward on July 21, 1989. In its post-hearing Brief, the Petitioner notes that it is not pursuing this allegation "due to lack of evidence." Consequently, with regard to this charge, we find that the Petitioner has not met its burden.

State Ethics Commission

Advisory Opinions

1997

Summaries of Advisory Opinions
Calendar Year 1997

• **EC-COI-96-4** - An employee of a state agency who is assigned to work for the Department of Housing and Community Development will violate §7 of the conflict law by receiving, as landlord, Massachusetts Rental Voucher Program and Section 8 Program rent subsidies under contracts with a municipal housing authority and a regional non-profit corporation, respectively, each of which receives those funds under contract with the Department of Housing and Community Development.

• **EC-COI-97-1** - Section 23(b)(1) will not prohibit a part-time intermittent police officer from working privately as a security guard within the city in which he serves as such a police officer, as long as he does so when not on active police duty. Intermittent officers in the city are not "on duty" at all times and, when they are not on active duty, have neither the authority nor the obligation to act as police officers. Thus, the position of private security guard is not inherently incompatible under §23(b)(1). An intermittent officer's private work will, however, be subject to §§17, 19 and 23 of the conflict law.

• **EC-COI-97-2** - A state official who is an attorney in private practice may represent clients who are not state employees in workers' compensation proceedings before the Division of Industrial Accidents. The Commission ruled that the Commonwealth's interests in a benefits claim under G.L. c. 152, made by a private claimant against a private insurer or employer before the DIA, are not sufficiently direct and substantial to implicate §4 because the real parties in interest are the injured worker, the insurer and the employer and the Commonwealth does not have a stake in its determination whether or not the claimant receives benefits.

• **EC-COI-97-3** - A charter school is a public rather than a private entity and a state rather than a municipal agency for purposes of the conflict of interest law. The Commission determined that a charter school trustee who serves as a trustee without election or appointment does not appear to have an appointing authority for purposes of the conflict of interest law and thus cannot obtain an exemption under §6. A charter school trustee may serve on an elected school committee subject to certain restrictions under §§4, 6, 17 and 23.

• **EC-COI-97-4** - Section 23(b)(2) does not prohibit elected or appointed officials from accurately identifying their current or past official titles in privately-funded advertisements of their services. A member of a Board of Selectmen who was also a private attorney wished to list membership on the Board as part of qualifications for providing municipal legal services.

• **EC-FD-97-1** - An individual who is required to file a statement of financial interest (SFI) under G.L. c. 268B, §5, who also practices law privately, is advised that, because two loans from an institutional lender to his law firm are "debts incurred in the ordinary course of business," he is not required by G.L. c. 268B, §5(g)(3) to report them in his SFI.

CONFLICT OF INTEREST OPINION
EC-COI-96-4

FACTS:

A. Background

You were hired by the one state agency ("Hiring State Agency") and were assigned to work full-time for another state agency, the Massachusetts Executive Office of Communities and Development ("EOCD"), which in a recent governmental reorganization has become the Department of Housing and Community Development ("DHCD"). Although you are on the Hiring State Agency's payroll and receive benefits through that agency, you report to DHCD personnel, who supervise you, assign you work and evaluate your job performance.

You recently purchased a residential rental property ("Building") containing three apartment units ("Units"). Two Units are occupied by rent-subsidized tenants, one subsidized through the Massachusetts Rental Voucher Program ("MRVP Program") and the other subsidized through the Section 8 Program.

B. MRVP Program and Section 8 Program

We will generally describe the MRVP Program and the Section 8 Program (collectively, "Programs").[1]

1. MRVP Program

In 1992, the Massachusetts Legislature replaced the former so-called Chapter 707 Rental Assistance Program ("Chapter 707 Program") with the MRVP Program. Under the Chapter 707 Program and its replacement MRVP Program, qualifying, low-income tenants' rents in privately owned housing accommodations were and are subsidized with monies that originate at the state level. DHCD, succeeding EOCD, now administers the MRVP Program; EOCD and/or the former Massachusetts Department of Community Affairs ("DCA") administered the Chapter 707 Program.

Under the MRVP Program, there are two types of rent subsidies: (i) so-called tenant-based subsidies that follow a specific tenant, rather than being "attached to" particular residential units or developments and (ii) so-called "project-based" subsidies for certain tenants in particular residential units or developments, such as those financed by the Massachusetts Housing Finance Agency, provided through project-based housing vouchers.[2]

a. State MRVP ACC Contract

In implementing the MRVP Program, DHCD enters into annual contributions contracts ("State MRVP ACC Contracts") with various "local housing agencies" ("LHAs")[3] pursuant to which DHCD agrees to fund the LHA for MRVP Program rent subsidies administered and disbursed by the LHA. DHCD is currently a party to such State MRVP ACC Contracts with the following LHAs: 159 Massachusetts city or town housing authorities, including the Housing Authority, as defined below; the Franklin County Regional Housing Authority; and nine Massachusetts regional, non-profit corporations.

b. MRVP Voucher Payment Contract

When a subsidized MRVP Program tenant has located a qualifying residential unit, the LHA contracts with the unit's landlord ("MRVP Voucher Payment Contract") to subsidize the tenant's rent by paying the subsidized portion thereof directly to the landlord. DHCD is not a party to the MRVP Voucher Payment Contract.[4]

c. Lease

The tenant pays the balance of the rent to the landlord pursuant to the tenant's separate leasing contract ("lease") with the landlord. Neither DHCD nor the LHA is a party to such leases.[5]

2. Section 8 Program

Under the Section 8 Rental Certificate Program and Rental Voucher Program ("Section 8 Program"),[6] qualifying, very low-income tenants' rents in privately owned housing accommodations are subsidized with monies that originate at the federal level and are regulated initially by the United States Department of Housing and Urban Development ("HUD").

a. Federal §8 ACC Contract

In implementing the §8 Program, HUD enters into annual contributions contracts ("Federal §8 ACC Contracts") for the administration and disbursal of its Section 8 Program rent subsidies only with "public housing agencies" ("PHAs")[7] as described below.

(i) HUD enters into Federal §8 ACC Contracts directly with Massachusetts city, town or county/regional public housing authorities (collectively, "Non-State PHAs"). DHCD is not a

party to and plays no substantive role in such Federal §8 ACC Contracts or in the administration or disbursal of the associated Section 8 Program rent subsidies;[8] or

(ii) HUD enters into Federal §8 ACC Contracts directly with DHCD ("State PHA").[9]

We shall describe in parts b., c. and d. below only that component of the Section 8 Program described in clause (ii) above in which DHCD serves as HUD's State PHA ("State-Managed §8 Program") through which you receive Section 8 Program rent subsidies, not that component in which Non-State PHAs contract directly with HUD.

b. State §8 ACC Subcontracts - State-Managed §8 Program

As permitted (but not required) by HUD, DHCD enters into annual contributions subcontracts with other entities ("State §8 ACC Subcontracts") to administer and disburse the Section 8 Program rent subsidies.[10] DHCD is currently a party to State §8 ACC Subcontracts with ten entities: eight Massachusetts regional, non-profit corporations; the City of Lynn Housing Authority; and the Franklin County Regional Housing Authority (collectively, "Subcontractors").[11] Pursuant to each State §8 ACC Subcontract, DHCD agrees to fund the Subcontractor for Section 8 Program rent subsidies administered and disbursed by it.

Even though, DHCD has the Subcontractors undertake administration and disbursal obligations, DHCD retains ultimate responsibility for assuring that HUD's Section 8 Program requirements are satisfied. To that end, DHCD establishes policies and procedures for Subcontractors' administration and disbursal of Section 8 Program rent subsidies, disburses monies to the Subcontractors and monitors each Subcontractors' performance.

c. HAP Contracts - State-Managed §8 Program

When a subsidized Section 8 Program tenant has located a qualifying residential unit, the Subcontractor contracts with the unit's landlord ("Housing Assistance Payment" or "HAP Contracts")[12] to subsidize the tenant's rent by paying the subsidized portion thereof directly to the landlord.

d. Lease - State-Managed §8 Program

The tenant pays the balance of the rent to the landlord pursuant to the tenant's separate lease with the landlord. A HUD-required addendum must be included in such lease.

C. Your Rent-Subsidized Tenants

You receive rent subsidies through the two Programs, as summarized below.[13]

a. MRVP Program Tenant

This tenant's rent is paid to you, in part, by the tenant pursuant to a lease and, in part, by a certain municipality's housing authority ("Housing Authority"), as an LHA, pursuant to an MRVP Voucher Payment Contract.[14] The Housing Authority receives the funds to cover its payments of such rent subsidies pursuant to its State MRVP ACC Contract with DHCD.

b. Section 8 Program Tenant

This tenant's rent is paid to you, in part, by the tenant pursuant to a lease and, in part, by a certain Massachusetts regional, non-profit corporation ("Corporation"), as a Subcontractor, pursuant to a Section 8 Program HAP Contract. The Corporation, as a Subcontractor, receives the funds to cover its payments of such rent subsidies pursuant to its State §8 ACC Subcontract with DHCD. DHCD, as State PHA, receives the funds to cover its payments to the Corporation pursuant to its Federal §8 ACC Contract with HUD.

QUESTION:

Does your financial interest in the MRVP Program and/or Section 8 Program rent subsidies toward your tenants' rents violate G.L. c. 268A, §7.

ANSWER:

Yes.

DISCUSSION:

You were hired and are paid by the Hiring State Agency. You have been assigned to work full-time for DHCD and have reported to and been supervised, assigned work and evaluated by DHCD personnel. You are a state employee[15] of the Hiring State Agency within the meaning of G.L. c. 268A, and you participate in and have official responsibility for some DHCD activities.[16]

As a state employee, you are subject to the restrictions of §7, which prohibits a state employee from having a direct or indirect financial interest in a contract made by a state agency in which the Commonwealth or a state agency is an interested party unless he is eligible for and has received an exemption. The restrictions of §7 will not apply, however, to a state employee who, in good faith and within thirty days after he learns of an actual or prospective violation of the section, makes a full disclosure of his financial interests to the contracting agency and terminates or disposes of the interest. G.L. c. 268A, §7(a).

The theory behind §7 is well stated in the above-cited law review article by William Buss:

> Section 7 announces a rule the basis of which is that, if no exemption is applicable, any state employee is in a position to influence the awarding of contracts by any state agency in a way which may be financially beneficial to himself. In a sense, the rule is a prophylactic one. Because it is impossible to articulate a standard by which one can distinguish between employees in a position to influence and those who are not, all will be treated as if they have influence.

W. G. Buss, *The Massachusetts Conflict-of-Interest Statute: An Analysis*, 45 B.U. Law Rev. 299, 374.

1. MRVP Program

Under the MRVP Program, landlords receive rent subsidies for qualifying tenants under contracts with LHAs, which in turn have contracts with DHCD. As applied to your situation, two questions arise under §7. First, is the State MRVP ACC Contract between DHCD and the Housing Authority, as an LHA, to provide MRVP Program rent subsidies that will subsidize your tenant's rent a contract made by a state agency in which a state agency is an interested party? Second, do you have a financial interest in that Contract?

Beginning at least as early as 1981, the Commission determined that Chapter 707 Program contributions contracts between EOCD or DCA, as the administering state agency, and an LHA, which then paid rent subsidies to the landlord/state employee, was a contract made by a state agency in which the state agency was an interested party and in which the landlord/state employee had a financial interest. *EC-COI-81-189* (state legislator/partner in realty trust owning Chapter 707 Program rent-subsidized units would have impermissible financial interest in Chapter 707 contributions contract between DCA and the LHA even though the trust/landlord was not a party to that contract); *84-109* (judge/landlord of Chapter 707 Program rent-subsidized units had impermissible financial interest in contract between DCA and the LHA). In *EC-COI-87-14*, involving state agencies' financing low income housing projects, the Commission cited and adopted the rationale of its earlier opinions. *See also EC-COI-92-35*.

The MRVP Program is in all material respects the same as the former Chapter 707 Program. Thus, consistent with our precedent, we conclude (i) that DHCD's State MRVP ACC Contract with the Housing Authority to pay the Housing Authority for a portion of your tenant's rent obligation is a contract made by a state agency, namely DHCD, in which DHCD is an interested party and (ii) that, because you receive the subsidized portion of your tenant's rent from the Housing Authority pursuant to your MRVP Voucher Payment Contract, which is funded pursuant to the State MRVP ACC Contract, you have a financial interest in that state Contract.

2. Section 8 Program

a. State-Managed §8 Program

Under the State-Managed §8 Program, landlords receive rent subsidies for qualifying tenants under contracts with Subcontractors, which in turn have contracts with DHCD, which in turn has contracts with HUD. As applied to your situation, the same two questions arise under §7 as we posed in our analysis of your receipt of MRVP Program rent subsidies. First, is the State §8 ACC Subcontract between DHCD (as the State PHA) and the Corporation (as the Subcontractor) to provide Section 8 Program rent subsidies that will subsidize your tenant's rent a contract made by a state agency in which a state agency is an interested party? Second, do you have a financial interest in that Subcontract?

There does not appear to be any meaningful distinction between (i) DHCD's involvement, as a State PHA, in its State §8 ACC Subcontracts with Subcontractors such as the Corporation under the Section 8 Program and (ii) DHCD's involvement in its State MRVP ACC Contracts with LHAs such as the Housing Authority under the MRVP Program. In both Programs, DHCD plays a significant, substantive role, is an interested party to the subject contract and administers and disburses the funds to the entity that eventually contracts with the landlord to provide the rent

subsidy. The fact that the Section 8 Program funds originate at the federal level and the MRVP Program funds originate at the state level does not change our view. Among other reasons, that is because DHCD retains ultimate responsibility for assuring that HUD's Section 8 Program requirements are satisfied, establishes policies and procedures for Subcontractors' administration and disbursal of Section 8 Program rent subsidies, disburses monies to the Subcontractors and monitors each Subcontractors' performance.

The Commission has on several occasions considered a state employee/landlord's receipt of State-Managed §8 Program rent subsidies. *EC-COI-84-105* involved a state legislator/landlord who was to receive Section 8 Program rent subsidies through the same type of multi-level contractual arrangements as you do. The Commission concluded that the legislator had an impermissible financial interest in EOCD's Section 8 ACC Subcontracts with the Subcontractor. In *EC-COI-82-12*, a state employee/landlord was to receive Section 8 Program rent subsidies through contractual arrangement in which EOCD, as State PHA, contracted with HUD and then entered the HAP Contract directly with the landlord, *i.e.*, EOCD had no Subcontractor.[17] The Commission concluded that the state employee had an impermissible financial interest in a state contract. *Compare, EC-COI-81-189*, involving the state legislator/partner in a realty trust that received Section 8 Program rent subsidies emanating from a HUD Federal §8 ACC Contract with a Non-State PHA in which EOCD played a minimal role and was not a party to any contracts, where the Commission determined that such an interest would not implicate §7 for the legislator but specifically limited its conclusion to the facts of the case, reserving "its right to rule on the propriety of other contractual arrangements under the Section 8 Program which involve EOCD or DCA as a party to the contract." *Id.* n. 4.

Thus, as DHCD's role in the State-Managed §8 Program is in all material respects the same as its role in the management of the MRVP Program and consistent with our precedent, we conclude (i) that DHCD's State §8 ACC Subcontract with the Corporation to pay the Corporation for a portion of your tenant's rent obligation is a contract made by a state agency, namely DHCD, in which DHCD is an interested party[18] and (ii) that, because you receive the subsidized portion of your tenant's rent from the Corporation pursuant to your HAP Payment Contract, which is funded pursuant to that Subcontract, you have a financial interest in that Subcontract.

b. Section 8 Program Rent Subsidies - Managed by Non-State PHAs

In reaching the conclusion above regarding State-Managed §8 Program rent subsidies in which DHCD plays a substantive and contractual role, we do not alter our precedent addressing Section 8 Program rent subsidies that flow directly from HUD to Non-State PHAs, with no substantive involvement of any state agency, where we concluded that no state contract was involved. *EC-COI-84-109; 81-189*. In other words, this opinion does not pertain to Section 8 Program rent subsidies that are funded by non-state sources and managed by Non-State PHAs in which state agencies are not parties to contracts and play no substantive role.

3. Termination/Dispositionof Financial Interests in Contracts

As you have a financial interest in DHCD's State MRVP ACC Contract with the Housing Authority and in DHCD's State §8 ACC Subcontract with the Corporation and there are no §7 exemptions available to you,[19] you must make full written disclosure to DHCD of your financial interests in those two contracts and terminate or dispose of your interests.[20] In certain opinions involving housing and rent subsidies paid to a state employee/landlord, the Commission has permitted extra time in order to avoid undue hardship to innocent third parties, namely the tenants. *EC-COI-84-109; 84-105; 82-12; 81-189*, all cited above. *See also, EC-COI-83-117* (municipal employee/landlord) and *83-63* (county employee/landlord).

4. Possible Legislative Amendment

We are aware that this conclusion gives rise to concerns for other state employees who own residential rental properties that are or may be rented to tenants receiving MRVP Program or Section 8 Program rent subsidies. Indeed, it appears to have been for that reason that, in 1985, after issuing its 1983 and 1984 opinions cited above (*EC-COI-84-105; 84-109; 83-117; 83-63*), the Commission drafted, filed and supported the Legislature's enactment of a bill (House No. 1564) that would have permitted state, county and municipal employees to receive "housing assistance payments" on behalf of eligible tenants pursuant to a program of leased housing or rental assistance provided that the state, county or municipal employee, as the case may be, did not participate in or have official responsibility for the activities of the administering state, county or municipal agency, respectively.

That bill was not enacted. However, in 1987, the Legislature amended §20, the counterpart provision of §7 applicable to municipal employees, by adding clause (h), exempting from §20's general prohibition "a municipal employee who is the owner of residential rental property and rents such property to a tenant receiving a rental subsidy administered by a local housing authority, unless such employee is employed by such local housing authority in a capacity in which he has responsibility for the administration of such subsidy programs." *See EC-COI-92-31* (involving a leased housing inspector for a municipal housing authority who, as a private landlord, received from the authority housing subsidy payments on behalf of a tenant and qualified for the §20(h) exemption).

The Legislature did not enact a parallel amendment of §7.[21] If it had, such an amendment would have narrowed significantly the restrictive effects of §7 by exempting from §7's general prohibition a state employee, such as you, who is the owner of residential rental property and rents such property to a tenant receiving a rental subsidy administered by a state agency, unless such employee is employed by such state agency in a capacity in which he has responsibility for the administration of such subsidy programs.

DATE AUTHORIZED: November 19, 1996

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[1] The Directors of each of the Programs provided us information about the history, administration and operation of the Programs.

[2] The MRVP Program subsidies are currently approximately 60% tenant-based and approximately 40% project-based. The tenant-based component is known as the MRVP Mobility Program because tenants have more flexibility in choosing housing accommodations. Tenants entitled to MRVP Program rent subsidies receive either "mobile" vouchers or project-based housing vouchers.

[3] The regulations governing the MRVP Program define "Local Housing Agency (LHA)" as "Local Housing Authority, a Regional Non-Profit Corporation or other entity under contract to the Department to administer the [MRVP] Program." 760 Code Mass. Regs. § 49.03.

4. When DHCD's predecessor state agencies administered the MRVP Program and the Chapter 707 Program, they were not parties to any such contracts with landlords either.

[5] The former Chapter 707 Program was somewhat different in that the LHA, the landlord and the tenant were all parties to one contract, which combined the operative provisions of what are now the separate MRVP Voucher Payment Contract and the lease. However, in all respects material to this analysis, the former Chapter 707 Program and the MRVP Program are similar.

[6] The vast majority of Section 8 Program rent subsidies in Massachusetts are tenant-based.

[7] The federal regulations governing the Section 8 Program define "Public Housing Agency (PHA)" and "Housing Agency (HA)" as the "same thing," namely, "A State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) authorized to engage in or assist in the development or operation of low-income housing . . . ." 24 C.F.R. § 982.4. HUD is not authorized to and does not enter into Federal §8 ACC Contracts with private entities.

[8] DHCD performs a merely *pro forma* sign-off function on such Federal §8 ACC Contracts between HUD and Non-State PHAs.

[9] Of the 57,000 Section 8 Program rent subsidies for Massachusetts tenants, 74% flow directly from HUD to Non-State PHAs, without DHCD involvement; the other 26% flow from HUD to DHCD, a State PHA. (The foregoing figures are approximate.)

[10] DHCD is authorized to perform such functions itself if it so elects. In fact, before 1990 in the Greater Boston area, EOCD and DCA did not subcontract such responsibilities. Rather, they dealt directly with and disbursed Section 8 rent subsidies directly to landlords of subsidized tenants.

[11] We are informed that a public housing authority may serve as a Non-State PHA under a Federal §8 ACC Contract with HUD for certain Section 8 Program funds at the same time as it serves as a Subcontractor under a State §8 ACC Subcontract with DHCD for State-Managed Section 8 Program funds. Furthermore, such a housing authority may simultaneously serve as an LHA under a State ACC Contract with DHCD for MRVP Program funds.

[12] Such HAP Contracts incorporate and impose HUD's require-ments as well as DHCD's own requirements for the administration and disbursal of Section 8 Program subsidies.

[13] When you purchased the Building, you believed that both rent-subsidized tenants were subsidized through the Section 8 Program.

[14] This tenant receives and presents MRVP "mobile" housing vouchers.

[15] "State employee," a person performing services for or holding an office, position, employment, or membership in a state 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, including members of the general court and executive council. . . . G.L. c. 268A, §1(q).

[16] Because nothing in this opinion turns on whether you are also a "state employee" of DHCD, we need not decide that issue.

[17] Presumably, this took place in the Greater Boston area, where (before 1990) EOCD did enter HAP Contracts directly with landlords.

[18] To the extent that our brief reference in *EC-COI-92-35*, n.3., to the Section 8 Program suggests otherwise, based on the facts we have now been provided, we clarify that a State-Managed Section 8 Program rent subsidy does involve a contract made by a state agency in which a state agency is an interested party within the meaning of §7.

[19] The §7(b) exemption is available only to state employees who are not employed by the contracting agency and do not participate in or have official responsibility for any activities of the contracting agency.

[20] You have said that you intended to dispose of your interest in the Building if the Commission were to reach this conclusion.

[21] We also note that the Legislature did not enact a parallel exemption for county employee/landlords.

CONFLICT OF INTEREST OPINION
EC-COI-97-1

FACTS:

An individual who works as a private security guard for a shopping mall in Methuen ("City") would like to serve as an intermittent or reserve police officer for the City. The City's Chief of Police has nominated this individual for appointment as an intermittent police officer by the Mayor.[1] Methuen, like many municipalities in the Commonwealth, augments its regular police force through the use of reserve and intermittent police officers.

Pursuant to G.L. c. 147, §11, a city may establish a reserve police force. The mayor, chief of police or city marshal may assign the members of the reserve police force to duty whenever, and for such length of time, as they may deem necessary. *G.L. c. 147, §13.* When members of the reserve force are on duty, they "shall have all the powers and duties of members of the regular police force." *Id.*[2]

Methuen also has a permanent intermittent police force, which was established by special act. *St. 1945, c. 201, §1.*[3] Intermittent police officers may be called to duty when the City or the Chief of Police determine that their service is required. *Id.* Any member of the intermittent police force called into service also "shall have all of the powers, duties and rights" of a regular police officer. *Id.*

Both reserve and intermittent officers must complete the same course of study prior to exercising police powers. *G.L. c. 41, §96B.* A major difference between reserve and intermittent police in Methuen is that an individual can be appointed an intermittent police officer without having to complete a civil service examination.[4] For purposes of our opinion, we shall refer to both reserve and intermittent police officers as "Intermittent Officers".[5]

According to the Chief of Police, Intermittent Officers are most often called into service to perform municipal detail work[6] on a part-time basis when regular police are not available. Detail work is assigned only on a daily basis. Accordingly, an Intermittent Officer is not assigned to a municipal detail for more than one day at a time. The Chief of Police has informed us that, contrary to the requirement for full-time regular police officers, the Police Department does not consider Intermittent Officers to be "on duty" at all times nor does it authorize or require them to take reasonable action to preserve the peace or protect life and property when they are not on duty.[7]

As the Chief of Police has explained, Intermittent Officers need other employment because of the part-time nature of their police work for the City. He further noted that most of those who wish to become full-time regular police begin their careers by becoming Intermittent Officers. The Department believes that private security guard work, for example, provides background that benefits future police work.

QUESTION:

Does G.L. c. 268A, §23(b)(1) prohibit a part-time Intermittent Officer from also working privately as a security guard within Methuen?

ANSWER:

Section 23(b)(1) of G.L. c. 268A will not prohibit a part-time Intermittent Officer from working privately as a security guard within the City, as long as he or she does so when not on active police duty. An Intermittent Officer's private work will, however, be subject to the restrictions of §§17, 19 and 23 of the conflict of interest law noted below.

DISCUSSION:

Intermittent Officers are "municipal employees"[8] for purposes of the conflict of interest law. As such, they are subject to §23(b)(1), which prohibits a municipal employee from accepting "other employment involving compensation of substantial value,[9] the responsibilities of which are inherently incompatible with the responsibilities of his public office."

Section 23(b)1)

In *EC-COI-94-8*, we concluded that §23(b)(1) prohibited the Town ("Town") of Falmouth's full-time regular police officers from providing private security services in the Town, but outside of the Town's established detail system, because the Falmouth Police Department Manual required police to be "on duty" at all times, not only during their regular duty shifts. In Falmouth, regular police officers are required to take reasonable police action when necessary, even during their off-duty hours. Therefore, an officer performing private security services in Town "would be forced to choose between his public position obligations and the wishes of his private employer," thus creating the inherent incompatibility §23(b)(1) prohibits. We found that in such circumstances, the police officer's private employment as a security guard violates §23(b)(1). *See also EC-COI-94-3* (employment as home inspector potentially inconsistent with statutory obligations as building inspector); *91-14* (current member of the General Court may not conduct seminars regarding obtaining advantages before or otherwise lobbying the Legislature).

By contrast, Intermittent Officers in Methuen are not "on duty" at all times. When not on active duty, they have neither the authority nor the obligation to act as police officers. Therefore, the quandary we described in *EC-COI-94-8* would not arise for an Intermittent Officer in Methuen not on active duty because he or she would not be forced to choose between his or her public obligations and his or her duties as a private security guard at a facility located in the City. Thus, we conclude that §23(b)(1) does not preclude a part-time Intermittent Officer in Methuen from also working as a private security guard in the City when off duty.[10] Nonetheless, a Intermittent Officer must be aware that other sections of the conflict law, which we note briefly below, will restrict his or her private activities.[11]

Other Sections of G.L. c. 268A

In particular, §17(a) and (c) prohibit a municipal employee, such as an Intermittent Officer, from directly or indirectly receiving compensation[12] from, or acting as agent[13] for, anyone other than the City, in connection with or relation to a particular matter[14] in which the City is a party or has a direct and substantial interest.

For example, §17 generally would prohibit an Intermittent Officer working as a private security guard at a shopping mall from being privately compensated or acting as his private employer's agent in connection with a criminal incident that occurred at the mall and to which the City's police responded. *See e.g., EC-COI-89-30* (a Police Chief, who did not have twenty-four hour per day official duties and responsibilities, could not undertake or be paid privately to oversee an internal investigation of a crime at his private employer's facility which inevitably would involve his police department). An Intermittent Officer could not later submit claims or reports or give interviews on behalf of the shopping mall in connection with a Police Department's subsequent investigation leading to an arrest or charge.[15] *See also EC-COI-88-7 and EC-COI-93-5.* If the Intermittent Officer cannot practically arrange his or her private work to accommodate these restrictions, the Officer would have to discontinue such work in order to serve as an Intermittent Officer.[16]

Additionally, §19 would prohibit an Intermittent Officer from participating as such in particular matters in which his private employer had a reasonably foreseeable financial interest. *See e.g., EC-COI-93-20.* For example, he could not participate as an Officer in a claim, charge or arrest that could affect his private employer's financial interests, such as a charge that could impose a monetary penalty. If circumstances arise in which he would like to participate, he must obtain the following exemption in advance of his participation.

Under §19(b)(1), he must advise his appointing authority in writing about the nature and circumstances of the particular matter and make full disclosure of the financial interest. He must then receive a written determination made by his appointing authority that the financial interest is not so substantial as to be deemed likely to affect the integrity of his services to the City.

We also note that, under §23(b)(2), an Intermittent Officer may not use his official position to secure for himself or others unwarranted privileges or exemptions of substantial value that are not properly available to similarly-situated individuals. *EC-COI-93-17; 92-38.* For example, he could not use his position as an Intermittent Officer to elicit favorable treatment from the Police Department on behalf of the shopping mall. *See also EC-COI-92-7* (discusses restrictions over a public employee's business relationship with persons or entities within his regulatory jurisdiction).

Under §23(b)(3), an Intermittent Officer may not engage in any conduct that gives a reasonable basis for the impression that any person or entity can improperly influence or unduly enjoy his favor in the performance of his duties, or that he is likely to act or fail to act as a result of kinship, rank, or position of any person. To

dispel such an impression, the Officer must make a written disclosure of all the facts and circumstances to his appointing authority in advance of participating in the matter. *EC-COI-91-3; 89-19*; *Commission Fact Sheet, Avoiding "Appearances" of Conflicts of Interests, Standards of Conduct (Section 23)*. For example, if an Intermittent Officer had once worked for a private company and the Chief of Police assigned him to work on a matter involving that company, it might be reasonable to conclude that the Officer could be biased in his official work relating to that former employer. In such circumstances, §23(b)(3) would require him to file a written disclosure with his appointing authority about his private relationship with that employer.

Finally, §23(c) will prohibit an Intermittent Officer from engaging in any business or professional activity that will require him to disclose confidential information which he has gained by reason of his official position or authority and from improperly disclosing material or data which is exempt from the definition of a public record, *G.L. c. 4, §7. See e.g. EC-COI-91-1.*

DATE AUTHORIZED: March 12, 1997

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1] This request for advice under G. L. c. 268A comes from the Chief of Police on behalf of the individual.

[2] In municipalities, such as Methuen, that have accepted civil service law, an individual must complete a civil service examination, among other requirements, prior to being eligible for appointment as a reserve police officer. *G.L. c. 31, §59. See also G.L. c. 31, §§58, 61A.*

[3] According to the Chief of Police, the special act was intended to address the shortage of police personnel in the City caused by World War II.

[4] Although reserve police officers and permanent intermittent police officers may have once had a different status for purposes of civil service law, *see Op. Att'y. Gen., Pub. Doc. No. 12 at 90, (June 24, 1941)*, G. L. c. 31, §60, inserted by St. 1978, c. 393, §11, appears to treat them the same for purposes of appointment to the regular police force. See also *G. L. c. 31, §34; c. 32, §4(2)(b); c. 32, §85H; c. 41, §96B* (other examples that treat reserve and intermittent police the same) and *Costa v. Board of Selectmen of Billerica*, 377 Mass. 853, 854 (1979) (permanent intermittent police officers are "officers with tenured status but working only on such days as they might be called."). Nothing in our opinion, however, turns on what differences, if any, may exist between the two types of police officers for purposes of civil service laws.

[5] The total number of Intermittent Officers in Methuen varies from time to time because of promotion to regular, full-time status or simple attrition. Additionally, there are normal delays in filling the Intermittent Officer ranks. For example, the Chief of Police has noted that when Intermittent Officers are promoted to the full-time police force, their replacements, in the case of reserve officers, must come from the civil service list. The Chief also has noted that individuals he selects as potential intermittent police officers must be approved by the Mayor. The City is authorized to have up to seventeen reserve police officers, *G. L. c. 147, §12*, and up to twelve intermittent police officers. *St. 1945, c. 201, §1.*

[6] *See Commission Advisory No. 10, Chiefs of Police Doing Privately Paid Details* (describes municipal detail work which includes, among other things, traffic control at construction sites, crowd control and security work).

[7] Based upon the language in both G. L. c. 147, §13 that gives reserve and intermittent officers police powers "when on duty," and St. 1945, c, 201, §1, which gives intermittent officers police powers when "called into service," the City's attorney is of the opinion that Intermittent Officers possess police authority only upon assignment to active duty. Therefore, the Police Department has had a policy that Intermittent Officers may not exercise police powers when not on duty. By contrast, the Chief has noted that Departmental policy requires regular full-time police to be "on duty" at all times to preserve the public peace and protect life and property.

[8] "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, . . . G.L. c. 268A, §1(g).

[9] Anything valued at $50 or more is "of substantial value". *EC-COI-93-14.*

[10] We would, however, reach the same conclusion as we did in *EC-COI-94-8* if the Department established a policy, consistent with G. L. c. 147, §13 and St. 1945, c. 201, §1, that *required* Intermittent Officers to exercise police responsibilities when not on active duty, i.e., making them "on duty" at all times. Similarly, §23(b)(1) would prohibit an Intermittent Officer called to full-time active duty, for example, to fill in for a regular police officer on leave, from continuing to be employed as a private security guard in the City during such duty, if such an Officer were required to be on duty at all times.

[11] Based upon the limited facts presented to us, our advice about these other sections of c. 268A must necessarily be general in nature.

[12] "Compensation," any money, thing of value or economic benefit conferred on or received by any person in return for service rendered or to be rendered by himself or another. G.L. c. 268A, § 1(a).

[13] We have concluded that "the distinguishing factor of acting as agent within the meaning of the conflict law is 'acting on behalf of' some person or entity, a factor present is acting as spokesperson, negotiating, signing documents and submitting applications." *In re Sullivan*, 1987 SEC 312, 314-315; See also, *In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

[14] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

[15] We recognize, however, that as a practical matter, if the Intermittent Officer were working his private security shift when a criminal incident occurred at the mall, he should be allowed to answer the police's questions at the scene (as would any witness), without being required to forfeit his private pay for the remainder of his shift. Once such preliminary questioning had concluded, however, §17 would not allow him to continue to work with the police on behalf of the mall or be paid by his private employer in connection with an ongoing police investigation. He may, however, give "testimony under oath or [make] statements required to be made under penalty for perjury or contempt" in connection with the incident. *G. L. c. 268A, §17.*

[16] Alternatively, if Intermittent Officers were classified as special municipal employees, *G. L. c. 268A, §1(n)*, §17 could, in certain circumstances, impose fewer restrictions on their private activities. A special municipal employee is subject to §17(a) and (c) "only in relation to a particular matter (a) in which he has at any time participated as a municipal employee, or (b) which is or within one year has been the subject of his official responsibility, or (c) which is pending in the municipal agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special municipal employee who serves no more than sixty days during any period of three hundred and sixty-five consecutive days." *See e.g., EC-COI-91-5 and 85-49* (cases discuss calculation of the 60 day period).

For example, it would be likely that an Intermittent Officer who performed municipal detail work would neither have participated in nor had official responsibility over a police investigation of a crime involving his private employer, the shopping mall. Therefore, in such circumstances, if an Intermittent Officer were classified as a *special municipal employee*, §17(a) and (c) would not restrict him in his actions on behalf of the shopping mall in connection with a criminal incident as long as he did not serve as an Intermittent Officer more than sixty days during any three hundred and sixty-five day period.

CONFLICT OF INTEREST OPINION
EC-COI-97-2

FACTS:

You are a state official. You also are an attorney in private practice. In your law practice, you represent individuals who have been injured in the course of their employment. Your clients, who are not state employees, seek to obtain workers' compensation payments from their employers' insurers or from their employers. You represent these individuals in adjudicatory proceedings before the Division of Industrial Accidents ("DIA"). You state that, while you remain an elected state official, you will not represent injured state employees before the DIA.

The Commonwealth's Workers' Compensation Statute, G.L. c. 152, §§1-86, among other things, permits covered employees who have sustained an injury arising out of and during the course of their employment to collect monthly payments for weekly wage loss, as well as medical care and vocational rehabilitation. *See 29 L. Nason & R. Wall, Massachusetts Practice, §1 (1995 Supplement).* In exchange for waiving their rights to sue their employers in tort for work-related injuries, employees receive the possibility of obtaining compensation for a loss of earning capacity caused by a work-related injury, "regardless of the fault of their employers or the foreseeability of harm." *Murphy v. Commissioner of the Division of Industrial Accidents,* 415 Mass. 218, 222 (1993). The workers' compensation system is a type of wage loss protection, "based on the legislative judgment that `human loss directly arising out of commercial and industrial enterprises' is part of the operating cost of a business." *Id.*; *see also Neff v. Commissioner of the Dep't of Industrial Accidents,* 421 Mass. 70, 75 (1995); *Ahmed's Case*, 278 Mass. 180, 183 (1932).

Within seven days of receipt of a notice of an injury alleged to have arisen out of and in the course of employment and which incapacitates a worker from earning full wages for a period of five or more calendar days, an employer must notify its insurer, the injured employee and the DIA. G.L. c. 152, §6. Within fourteen days of receipt of a report of injury, the insurer must commence payment to the injured worker or notify the DIA, the employee and the employer that it refuses to commence payment. G.L. c. 152, §7. After an insurer's denial of benefits, an injured worker may file a claim for benefits with the DIA. Similarly, an insurer may file a complaint for modification or discontinuance of benefits. G.L. c. 152, §10.

When a claim or complaint has been received by the DIA there is an initial informal conciliatory proceeding before a DIA conciliator who attempts to resolve the dispute. G.L. c. 152, §10; *see also, Neff,* 421 Mass. at 74. If conciliation is not successful, the parties may elect to submit the case to binding arbitration before an independent arbitrator. G.L. c. 152, §§10, 10B. If arbitration is not sought, the conciliator refers the case to the Industrial Accident Board. G.L. c. 152, §§10, 10A; *see also, Murphy,* 415 Mass. at 223. When the

contested case is referred to the Board, it is assigned to an administrative law judge who initially schedules a conference. *Id.* At the conference the parties must identify the issues in dispute, summarize anticipated testimony, and may present oral arguments and documentary evidence. *Id.* The administrative law judge, within seven days after the conference, must issue a written order stating whether and to what extent relief should be granted. *G.L. c. 152, §10A (2); Murphy,* 415 Mass. at 224. A party aggrieved by a conference order may seek an adjudicatory hearing of his claim. Based on the evidence presented at the hearing, the administrative law judge renders a decision. G.L. c. 152, § 11. Any party aggrieved by the hearing decision may first appeal to a three member Industrial Accident Review Board and finally to the Appeals Court. G.L. c. 152, §§11(C), 12. To enforce an order of the administrative law judge, a party in interest must initiate an action in the Superior Court. G.L. c. 152, §12. If an insurer fails to make all compensation payments due to an injured employee under a DIA order or decision, the insurer will be liable for penalties, payable to the employee. G.L. c. 152, §8.

You characterize the DIA as a "forum" to hear workers' compensation disputes between two private parties - the injured worker and the private compensation insurance carrier, and you draw an analogy between the function of the DIA in hearing a claim and a court which litigates disputes between private parties.

QUESTION:

While you hold a position as a state official may you, in your private law practice, represent clients, who are not state employees, in workers' compensation proceedings before the Division of Industrial Accidents?

ANSWER:

Under G.L. c. 268A, §4, you may represent a client, who is not a state employee, in workers' compensation proceedings against an insurer, provided that the Commonwealth does not become a party to the proceedings and provided that the outcome of the proceedings does not affect any direct and substantial legal, pecuniary, or property rights or liabilities of the Commonwealth.

DISCUSSION:

G.L. c. 268A, §4(a) provides that "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." Further, G.L. c. 268A, §4(c) provides that "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." Section 4 is based on the principle that "public officials should not in general be permitted to step out of their official roles to assist private entities or persons in their dealings with government." Perkins, *The New Federal Conflict Law,* 76 Harv. L. Rev. 1113, 1120 (1963). In discussing §17(a), the municipal counterpart to §4(a), we have stated

> [The section] seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence--by action or inaction--official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered or to be rendered to the private interests when his sole loyalty should be to the public interest. *EC-COI-92-36. See also, Commonwealth v. Canon,* 373 Mass. 494, 504 (1977).

As a state official,[1] you are a state employee for purposes of the conflict of interest statute.[2] Additionally, proceedings to determine workers' compensation benefits are particular matters.[3] You recognize that G.L. c. 268A, §4 will prohibit you from representing a state employee who has been injured during the course of her state employment because the Attorney General will be a party to the proceedings and the Commonwealth will be required to pay any benefits that may be awarded during the proceeding. However, you contend that, in a workers' compensation proceeding in which the Commonwealth is not a party, the Commonwealth does not have a direct and substantial interest in the proceeding between a claimant employed in private industry and a compensation insurer.[4] You request that this Commission re-consider its opinion in *EC-COI-91-10*, where the Ethics Commission concluded that the Commonwealth has a direct and substantial interest in all workers' compensation matters.

In *EC-COI-91-10*, the Ethics Commission considered whether a former manager of the DIA was prohibited in his private law practice from representing private sector employees and private sector employers on matters before the DIA in which he may have participated or over which he had official responsibility in the two years before he left state service. We concluded that the Commonwealth has a direct and substantial interest in all workers' compensation matters based on "the Department's specific institutional interest in the enforcement of the workers' compensation law, and on the broad interest that the Commonwealth has in workers' compensation matters generally." Therefore, we determined that the former DIA employee was restricted in his private law practice from representing clients in all matters before the DIA. In reaching our decision, we relied on the regulatory and administrative role played by the Commissioner of Insurance and the DIA within the system of workers' compensation.

Subsequently, in *EC-COI-93-5*, in a discussion regarding §4, the Commission modified its position concerning whether extensive regulation of a matter, without more, was sufficient to find that the Commonwealth had a direct and substantial interest in the matter, stating "regulatory authority and oversight of an activity alone are not sufficient to find a particular matter in which the Commonwealth has a direct and substantial interest. Rather we must determine whether the regulated activity itself involves a "particular matter"... in which the employee is likely to become involved...is a particular matter in which the Commonwealth has a direct and substantial interest." In light of this discussion in *EC-COI-93-5* and in light of the fact that the Commission's decision, in *EC-COI-91-10*, focused on the general institutional and regulatory interests of DIA, rather than on the particular proceeding at issue, we will re-consider our prior *EC-COI-91-10* decision in order to answer the specific question of whether a proceeding before the DIA to consider a claim for benefits brought by a private sector employee against a private compensation insurer is a particular matter of direct and substantial interest to the Commonwealth.

When construing statutory language, we begin with the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of "interest" from *Webster's Third New International Dictionary* (unabridged) is "right, title or legal share in something; something in which one has a share of ownership or control." In legal parlance, the term "interest" is "the most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary*. Within the context of G.L. c. 268A, §4, interests of the Commonwealth would include proceedings affecting the Commonwealth's legal rights or liabilities, pecuniary interests, property interests or proceedings where the Commonwealth would have a stake in the proceedings. *See EC-COI-91-10* (Commonwealth has interest if outcome would require expenditure of public funds, exposure to liability, implicate government's rights and responsibilities); *EC-COI-88-6* (Town has direct and substantial interest in Ethics Commission proceedings against Town official as outcome may subject town to liability); *EC-COI-80-23* (Commonwealth, as a property abutter, has direct and substantial interest in a zoning change).

By using the modifying phrase "direct and substantial", the Legislature intended that the Commonwealth's interest in the proceedings or the outcome be significant and direct to the Commonwealth itself as an institution. As the Supreme Judicial Court noted, in deciding that a city does not have a direct and substantial interest in a criminal prosecution for a crime committed in the city, any interest of the city in the prosecution of a defendant for a violation of state law was not separate and distinct from the interests of the citizenry as a whole and was therefore not sufficiently direct to meet the standards under G.L. c. 268A. *Commonwealth v. Mello*, 11 Mass. App. Ct. 70, 73 (1980); *see also Burton v. United States*, 202 U.S. 344, 391-396 (1906) (direct interest of government must be more than government's interest as "parens patriae" or interest government shares with all citizens).

Under G.L. c. 268A, §4, within the context of litigation matters, the Commission has found that the Commonwealth is a party to and has a direct and substantial interest in all criminal matters and in all civil matters where the Commonwealth is named a party. *See EC-COI-89-31; 88-1; 82-31*. Full time state employees who are also attorneys may not represent private clients in particular matters which "bring the financial interest of the state into play" and in regulatory or adjudicatory proceedings in which the state is a party. *EC-COI-82-33*.

In comparison, the Commission has found that, although lawsuits between private parties pending in the Commonwealth's courts are particular matters, they are not generally of direct and substantial interest to the Commonwealth, absent a specific showing that the

Commonwealth would be directly affected. *See EC-COI-88-1; 80-54.* For example, *in EC-COI-80-16*, a Commonwealth attorney also served as a conservator in his private capacity. As conservator he was required to file a probate court accounting with the Department of Mental Health. The Commission stated that "while the Commonwealth has an interest in protecting legally incapacitated or incompetent persons and their property, that interest would be direct and substantial only where the Commonwealth is owed money." Similarly, in *EC-COI-83-67*, a consulting attorney to a city was asked to assist, in his private law practice, with the preparation of a brief in a lawsuit against another Massachusetts town. Although the city was not a party to the litigation, it was likely to file an *amicus curiae* brief because the potential decision in the suit, as precedent, could affect future cases brought against the city. The Commission determined that the city's interests in this litigation were not sufficiently direct because the outcome in the case would not have a direct effect on the city, rather, any precedential effect was indirect and only a potentiality.[5] *See also, EC-COI-83-120* (filing of *amicus curiae* brief by Secretary of State, without more, does not give Secretary's Office a direct and substantial interest in outcome).

After considering the facts of your situation and our precedent, we are persuaded that the Commonwealth's interests in a benefits claim under G.L. c. 152, made by a private claimant against a private insurer or employer before the DIA, are not sufficiently direct and substantial to implicate G.L. c. 268A, §4.[6] In such a proceeding before the DIA, the real parties in interest are the injured worker, the insurer and the employer. The claimant's rights and the employer's and insurer's obligations arise from the private employment relationship, and not from any benefits awarded by the government, such as social security disability or other general welfare assistance benefits. As one well-known commentator has described the rights and obligations under G.L. c. 152, "although the rights of employees and the duties of employers and insurers are created by the compensation act, they are essentially private rights, not sounding in contract or tort, but growing from the status of the parties in the employment relation." *29 L. Locke, Massachusetts Practice,* §10.

Generally, the Commonwealth does not have a stake in its determination whether or not a claimant receives benefits. The role of the Commonwealth in a benefits dispute is to provide an objective and impartial forum and to make a determination whether the requirements in the statute have been met for receipt of benefits. *29 L. Nason & R. Wall, Massachusetts Practice, §1.0 (1995 Supplement)* (Division of Dispute Resolution at the DIA serves as "quasi-judicial tribunal for adjudicating contested claims"). We do not consider that the resources spent by the DIA to hear a benefits claim are sufficient to create a direct and substantial interest by the Commonwealth. We have never found, in the analogous situation of civil litigation, that the judicial resources expended in deciding a lawsuit constitute a direct and substantial interest on the part of the Commonwealth. Nor do we find that the Commonwealth's interest is sufficiently direct and substantial because, if benefits are denied, an injured worker may potentially require some government assistance benefit.

Thus, under G.L. c. 268A, §4, you may, while you continue to be a state employee, privately represent parties in benefit claims before the DIA because we conclude that such proceedings are not of direct and substantial interest to the Commonwealth. Our conclusion in this case is limited to the situation where a private claimant and a private insurer (or employer) have a benefits dispute before the DIA. If the Commonwealth, through the Attorney General or other state agency counsel, enters the dispute at any stage in the proceeding, including a future appeal, you will be prohibited from continuing your legal representation because the Commonwealth would become a party to the action, and therefore, §4 would become implicated. Furthermore, if your proposed legal representation involves a challenge to the DIA's procedures or regulations, you may not undertake this representation because a state agency has a direct and substantial interest in its procedures and rules.[7] *See e.g., EC-COI-87-34; 81-34.* Also, if the benefits dispute involves the Workers' Compensation Trust Fund, G.L. c. 152, §65, such as the case of an uninsured private employer, you may not undertake that representation because any payment will be made from a Commonwealth fund, and the Commonwealth will be a party in interest. *See McLean's Case,* 93 N.E.2d 233, 235 (1950). For example, if before or during your representation of a client, it becomes apparent that the employer is uninsured or that the insurer will be unable to pay any claim, you must decline representation or withdraw because the Workers' Compensation Trust Fund will become a party.

DATE AUTHORIZED: April 9, 1997

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[5] (text of footnote deleted)

[2] "State employee," a person performing services for or holding an office, position, employment, or membership in a state 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, including members of the general court and executive council ... G.L. c. 268A, §1(q).

[3] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

[4] Briefly, in support of your contentions, you argue that the DIA is a "forum" similar to the courts in which to decide the rights of private parties, and the agency has no stake in the outcome. You urge us to consider a proceeding for benefits before the DIA to be analogous to a civil litigation trial between two private parties. The Commission has, in prior precedent, found that the Commonwealth does not have a direct and substantial interest in such litigation. *See EC-COI-80-54.* Moreover, you argue that state officials should be accorded the same treatment under the conflict statute as legislators to whom §4 applies less restrictively. Under G.L c. 268A, §4, ¶5, legislators may represent private parties for compensation if the proceeding is "quasi-judicial" which is defined as: (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." The Ethics Commission has found that workers' compensation proceedings meet the definition of "quasi-judicial" within the meaning of §4 and has permitted legislators to represent private parties before the DIA. *EC-COI-85-82.* Finally, you argue that your clients are not "doing business with the Commonwealth" when they seek workers' compensation benefits and most of your clients, when they seek your assistance, are not aware of your public position.

[5] According to the Commission, "the decision in this case will not have a direct effect on the city or any cases in which it is involved. Like any other court case to which it is not a party but which involves a law applicable to the city, the city has a (sic) indirect interest in the resolution of the case. However, such a potential effect does not give the city a direct and substantial interest for the purposes of §17. For example, the city would not have a direct and substantial interest in every United States Supreme Court case concerning police search and seizure procedures, despite the impact such a case may have on the City Police Department."

[6] Our conclusion in this opinion modifies the conclusion reached in *EC-COI-91-10*, to the extent that it applies to a workers' compensation proceeding between an employee who is not a state employee and a private insurer or self-insured employer. Our opinion today does not re-consider the conclusion in *EC-COI-91-10* that the Commonwealth has a direct and substantial interest in other types of DIA matters. *See, e.g.*, G.L. c. 152, §25; §25(c).

[7] The examples given are representative only and are not intended to be all-inclusive. The Commission's Legal Division is available for further advice if you have questions about specific situations.

CONFLICT OF INTEREST OPINION
EC-COI-97-3

FACTS:

You serve on the School Committee ("School Committee") of a municipality ("Municipality X"), the members of which are elected and uncompensated and have been classified as special municipal employees as provided by G.L. c. 268A, §1(n).

You were a member of the founding coalition of individuals who joined together to apply for and receive a charter to operate The ABC Charter School ("ABC School" or "ABC") and, without election or appointment, you continued on as a member of ABC's initial Board of Trustees ("Board of Trustees" or "Trustees"). The Board of Trustees includes employees and officials of Municipality X, parents and individuals associated with several private business and nonprofit entities.

The ABC School was created in 1995 by a 5-year charter granted by the Secretary of the Massachusetts Executive Office of Education ("EOE") pursuant to G.L. c. 71, §89 (Statute)[1] and its implementing regulations, 601 CMR §§1.00 *et seq.* ("Regulations"). ABC's by-laws ("By-Laws") provide that there may be no more than 15 Trustees and that the Trustees elect their own successors to staggered 3-year terms. The By-Laws establish no criteria or qualifications for membership on the Board of Trustees. The Trustees are not compensated for their services. ABC, acting through the Trustees, leases its building from Municipality X.

The ABC School has entered into a 5-year contract ("Contract") with DEF ("Educational Contractor") to operate and manage ABC, performing substantially all of ABC's educational services. The Contract was submitted to and reviewed by EOE during its charter-granting process.

You ask what limitations the conflict of interest law imposes on your serving as a member of the ABC School's Board of Trustees and as a School Committee member. In order to advise you, we will first provide an overview of the statutory and regulatory scheme governing charter schools such as ABC.

Statutory and Regulatory Framework

Organization and Purposes

A charter school is "*a body politic and corporate*, with all powers necessary or desirable for carrying out its charter program," and a "*public school*, operated under a charter granted by the board of education, which operates independently of any school committee and is managed by a board of trustees," who, once the charter is granted, "shall be deemed to be *public agents authorized by the Commonwealth* to supervise and control the charter school." Statute ¶¶7 and 1.[2] Among the purposes for establishing charter schools are to: stimulate the development of and provide innovative and performance-based programs within *public* education; provide more school-choice options and alternative, innovative methods of educational instruction and school structure and management; and "hold teachers and school administrators accountable for students' educational outcomes." Statute ¶2.

Governance, Governing Body and Employees

A charter school is governed by "its charter and the provisions of law regulating *other public schools*." Statute ¶12. While charter schools must have administrative and management plans, including by-laws, Regulations §1.05(2)(a), each school has considerable flexibility to implement an internal form of governance that is consistent with its mission and philosophy. Neither the Statute nor the Regulations prescribe the contents of charter schools' by-laws or the composition, qualifications, criteria for or manner of selection or terms of office of their initial or subsequent boards of trustees, all of which may vary from school to school.

A charter school's board of trustees and its employees are considered to be *public employers and public employees*, respectively, for tort liability and collective bargaining purposes, respectively. Statute ¶15. Charter school teachers who are employed by the school are subject to the state teacher retirement system. *Id.*[3]

Board of Trustees' Responsibilities and Powers

Charter school boards of trustees' responsibilities are similar to those of school committees. In consultation with teachers, the trustees must determine their school's curriculum and budget. Statute ¶14. Other trustee duties include the development of a student code of conduct and admissions, disciplinary and expulsion policies; personnel policies; and management and operations plans. EOE "1996 Charter School Application" at p. 15; Statute ¶¶4 and 10; Regulations §1.05(2).

Charter schools have "all powers necessary and desirable for carrying out their charter programs, including" (i) the powers to acquire real property for school facility use; to receive, solicit, and disburse funds, grants and/or gifts for school purposes; to contract for services, equipment and supplies; and (ii) such other powers available to business corporations that are not inconsistent with the Statute. Statute ¶7.

Governmental Control and Oversight

The Massachusetts State Board of Education ("Board of Education") exercises its authority under the Statute through the Commissioner of the Massachusetts Department of Education ("Department"). The Department is responsible for assessing the effectiveness and monitoring improvements of all public schools. G.L. c. 69, §1A, ¶10. Charter school students must "meet the same performance standards, testing and portfolio requirements set by the board of education in other *public* schools." Statute ¶13. Although a charter school's board of trustees is responsible for the charter school's overall governance, management and operation, the Board of Education[4] has numerous powers and responsibilities associated with its charter-granting and ongoing review and assessment role, including the following:

1. establishing and implementing procedures and guidelines for reviewing charter applications and granting, conditioning, revoking and renewing 5-year charters and placing schools on probation;

2. approving a school's mission, management and progress-assessment plans and material changes in its program or governance, including "substantive changes in its educational philosophy or mission, school schedule, admissions process, governance structure, by-laws, school management contract, code of conduct, enrollment capacity, or school location" and material changes that may have a "significant impact on a charter school's ability to fulfill its goals or mission";

3. approving changes in the composition of a school's board of trustees;

4. approving contracts under which a school intends "to procure substantially all educational services";

5. approving a school's student code of conduct and expulsion policies;

6. conducting ongoing reviews and assessments of schools, through annual reports, financial statements and on-site visits;

7. investigating complaints not adequately addressed by a school's board of trustees;

8. requiring charter amendments to certain substantive or material changes to a school; and

9. requiring remedial action, including probationary status or charter revocation, in case of changes in circumstances that significantly impact a school's ability to fulfill its goals or mission.

Statute ¶¶ 4-7, 10, 21-24; Regulations §§1.05(1), 1.05(2), 1.07-1.11.

Funding

The Statute and the Regulations, as implemented, provide that charter schools are to receive public funding through monies that, in effect, "follow" each student from the school district in which the student resides ("sending district") to the charter school the student attends. The Department calculates each sending district's "average cost per student," which, in traditional public schools, is funded in part directly by local property taxes and in part with so-called "Chapter 70" public school state aid. For each sending-district student who attends a charter school, an amount equal to the entire "average cost per student" in that sending district (*i.e.*, the aggregate of the amount that would ordinarily be paid by the municipality from local property taxes and the amount of Chapter 70 state aid) is deducted from the pool of Chapter 70 state aid that would otherwise be paid by the Commonwealth to that sending district. The State Treasurer then pays that entire amount directly to the student's selected charter school.[5] Statute ¶26; Regulations §§1.02 and 1.06. In actuality, through a combination of legislation and accounting mechanisms, the Commonwealth has lightened the economic burden for sending districts by fully or partially reimbursing sending districts for their lost Chapter 70 funds. St. 1995, c.267, §19, as amended by St. 1996, c. 151, §525. Charter schools may also receive funding from other public or private sources but may not charge tuition or application fees. Statute ¶¶7(g) and 4.

QUESTIONS:

1. For purposes of the conflict of interest law, (i) is the ABC School a public or a private entity, and (ii) if public, is it a state or municipal agency?

2. May you serve on both the Board of Trustees of the ABC School and the School Committee?

ANSWERS:

1. The ABC School is (i) a public rather than a private entity and (ii) a state rather than a municipal agency for purposes of the conflict of interest law. Because they are uncompensated for their services, the members of ABC's Board of Trustees are special state employees.

2. Yes, subject to the limitations discussed below.

DISCUSSION:

I. Jurisdiction

The threshold jurisdictional issues are whether the ABC School is a public or a private entity, and, if public, whether it is state or a municipal agency.

A. Public or Private Entity

It is well-established that:

> `[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, the end that the purpose of its framers may be effectuated.'

McMann v. State Ethics Commission, 32 Mass. App. Ct. 421, 424-425 (1992), quoting from earlier opinions of the Supreme Judicial Court.

Accordingly, we observe that, throughout the Statute, the Legislature has explicitly and consistently described charter schools as *public* schools and their educational programs as *public* education. Statute ¶¶2, 7, 12 and 13. The Statute characterizes charter schools' boards of trustees and employees as *public* employers and employees, respectively, for tort liability and collective bargaining purposes and provides that their teachers are subject to the state teacher retirement

system. Statute ¶15. In addition, charter schools' boards of trustees are deemed "to be *public agents* authorized by the commonwealth." Thus, based on the plain language of the Statute, we conclude that charter schools are public agencies for purposes of the conflict of interest law.[6]

B. State or Municipal Agency

In determining whether an entity is a state or municipal agency, the Commission has considered which level of government oversees and funds the entity and whether the entity carries out functions similar to those of a particular level of government. *See EC-COI-95-2*, citing earlier opinions. In this case, considering those factors and the totality of the circumstances described below, we conclude that, although the ABC School has certain local characteristics, it is a state agency for purposes of the conflict of interest law. *See, e.g., EC-COI-95-2* (Metropolitan Area Planning Council is a state agency although it has certain local characteristics).

First, the Board of Education (not municipalities or their school districts) has a wide range of control and oversight powers over the initial and continued existence and operations of charter schools, including the ultimate powers to create and extinguish them. During the charter-granting and ongoing review and assessment processes, the Department reviews each charter school's application, governance and management, educational program, goals and mission, evaluation plans, finances and other aspects of its structure and operations. Among its powers, the Board of Education may grant 5-year charters and impose conditions on charter schools, place charter schools on probationary status, renew or revoke charters, review and approve charter schools' contracts "to procure substantially all educational services" from others, approve student codes of conduct and admissions, disciplinary and expulsions policies and conduct ongoing reviews of and investigate complaints against charter schools. The Board is also empowered to review and approve various changes in a charter school's structure, governance, mission and operations and to review budgets, conduct audits and assess the performance of each school. *See* Governmental Control and Oversight discussion above. In addition, the Commonwealth (not a municipality or a school district) acquires title to charter schools' property when they cease to exist. Regulations §1.11(6).

Second, the Commonwealth at least partially funds charter schools. Under the Statute, the State Treasurer pays each charter school from state funds per student tuition payments based on "the average cost per student" multiplied by the number of students attending the school. At least currently, the Commonwealth partially or fully reimburses the sending districts for their Chapter 70 monies transferred to charter schools. While at least some of the Commonwealth's funding for a charter school may be derived from local property taxes, neither the municipality in which a charter school student resides nor the student's sending district, if different, has any control over the charter school funding process.

Finally, the provision of elementary and secondary education to children at the public expense is an essential and traditional governmental function. *See EC-COI-92-26*; *McMann, supra* at 425-427 (1992). While the Legislature has generally placed the duty of maintaining public schools and providing public education with municipalities acting through elected school committees (G.L. c. 71, §1, G.L. c. 43, §§31 and 33; G.L. c. 71, §71; *McMann, supra* at 425), the Supreme Judicial Court has determined that, under Part II, c. 5, §2 of the Massachusetts Constitution, ultimately the "the Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level . . . ." *McDuffy v. Secretary of Executive Office of Education*, 415 Mass. 545, 606 (1993). Through its enactment of the Statute, the Legislature has authorized charter schools' boards of trustees to provide an educational alternative under the oversight of the Board of Education and the Department, independently of school committees.

By contrast, then, to the situation with traditional public schools, the Statute and the Regulations explicitly provide that charter schools are to operate "independently of any school committee." Neither the Statute nor the Regulations contemplate any role for municipalities and/or school districts in the creation, operation or management of charter schools.

For these reasons, we conclude that charter schools are state agencies[7] for purposes of the conflict of interest law.

II. Application of Conflict of Interest Law

Given our conclusion that the ABC School is a state agency, as a member of its Board of Trustees, you are a special state employee.[8] As a School Committee member, you are a special municipal employee. *See* G.L. c. 268A, §1(n). You may serve on both the ABC

School's Board of Trustees and the School Committee subject to the restrictions of §§6, 17, 4 and 23.

A. Restrictions on Your Activities as a Trustee - §§6 and 17

Section 6

Section 6 will restrict your activities as a Trustee if you continue as a School Committee member. In relevant part, it prohibits a state employee from participating in any particular matter[9] in which to his knowledge he or a business organization in which he serves as an officer, director, trustee, partner or employee has a financial interest. "Participation"[10] includes both formal and informal lobbying of colleagues, reviewing and discussing, giving advice and making recommendations, as well as deciding and voting on particular matters. *EC-COI-92-30; see Graham v. McGrail*, 370 Mass. 133 (1976). The financial interest may be of any size and may be either positive or negative. *EC-COI-84-96.* It must, however, be direct and immediate or reasonably foreseeable in order to implicate §6. *EC-COI-84-123; EC-COI-86-25; 84-98; 84-96.*

Municipality X and its municipal agencies are considered to be "business organizations" for purposes of §6, *see EC-COI-92-25*, and, as a School Committee member, you are a municipal employee of Municipality X. Therefore, under §6, you may not, for example, participate as a Trustee in the Trustees' consideration of the business terms of the ABC School's lease of its building from Municipality X or other agreements for use of Municipality X's facilities. Moreover, you may not participate as a Trustee in matters such as the Trustees' application for limited grant or other money for which a Municipality X school or other municipal agency is a competitor. That is because Municipality X has a reasonably foreseeable financial interest in such matters.

In certain circumstances, a state employee who has an appointing official may seek and obtain an exemption from the §6 prohibition. However, it does not appear that as a Trustee, you have an appointing official. Therefore, in your situation, no exemption appears to be available to you. In reaching our conclusion that you do not have an appointing official, we have considered several factors. First, neither the Statute nor the Regulations prescribe any procedure for appointment or election of charter schools' boards of trustees. They are silent about who, if anyone, is to be the appointing official for charter schools' boards of trustees; they do not even prescribe a selection process or criteria for selection of such trustees. Second, in effect, you selected yourself to serve as a Trustee, having been a member of the ABC School's founding coalition and continued on as a member of its initial Board of Trustees. You cannot be your own "appointing official" for the purposes of §6 or any other provisions of the conflict of interest law. Finally, even though (during ABC's charter-granting process) EOE had the opportunity to review the composition of the initial Board of Trustees and presumably did not object to your serving, we cannot conclude from such tacit approval either that the Legislature intended the Board of Education or the Department to make the types of determinations contemplated for appointing officials by the §6 exemption process.[11]

Section 17

Section 17, applicable to you as a School Committee member-special municipal employee, will restrict your "outside" or non-municipal activities. Section 17 prohibits a municipal employee from receiving compensation from or acting as agent[12] or attorney for anyone other than the municipality or a municipal agency in relation to any particular matter in which the municipality or a municipal agency is a party or has a direct and substantial interest. Those limitations apply less restrictively to special municipal employees such as you in your capacity as School Committee member.

As applied to your situation, §17(c) will prohibit you from acting as the Board of Trustees' agent in relation to particular matters (i) in which you participated as a School Committee member, (ii) which are or within one year have been the subject of your official responsibility[13] as a School Committee member or (iii) which are pending before the School Committee (if you serve on more than 60 days[14] during any period of 365 consecutive days). On the other side of the lease example described above, assuming that such lease is the subject of your official responsibility as a School Committee member, you may not act as agent for the Board of Trustees in connection with that lease. *See, generally, Commission Advisory 13A* (reviewing restrictions on municipal employees' acting as agents).

B. Restrictions on Your Activities as a School Committee Member - §4

Section 4, the state counterpart of §17, is applicable to you as a Trustee-special state employee and will restrict your "outside" or non-state activities. It prohibits a state employee from receiving compensation

from or acting as agent or attorney for 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. The rationale behind these prohibitions is that public employees should be loyal to the state, and, where their loyalty to the state conflicts with their loyalty to another person or entity, the state's interest must prevail. Section 4's limitations apply less restrictively to special state employees such as you in your capacity as a Trustee.

As applied to your situation, §4(c) will prohibit you from acting as the School Committee's agent in relation to particular matters (i) in which you participated as a Trustee, (ii) which are or within one year have been the subject of your official responsibility as a Trustee or (iii) which are pending before the Board of Trustees (if you serve on more than 60 days during any period of 365 consecutive days). Thus, for example, assuming that the Board of Trustees' lease of its School building is the subject of your official responsibility as a Trustee, you may not act as agent for any Municipality X agency in connection with the lease. You may, however, participate in the School Committee's internal ordinary business, including discussions and even votes about such lease.[15] *See EC-COI-93-12; 92-25; Commission Advisory 13B* (reviewing restrictions on state employees' acting as agents).

C. Restrictions on Your Activities in Both Positions - §23

Section 23 imposes standards of conduct that are applicable to all public employees, certain of which are particularly relevant. First, §23(b)(2) prohibits a public employee from using his official position to secure for himself or others an unwarranted privilege of substantial value[16] that is not properly available to similarly situated individuals. Under §23(b)(2), the Commission has consistently prohibited public employees from using their titles, time during which they are supposed to be working for their public employers or public resources or facilities, including, for example, secretarial services and copying facilities, for the benefit of or to promote the interests of others. *See, e.g., Public Enforcement Letter 92-3; EC-COI-92-28*, n. 2; *EC-COI-90-04*.

As applied, you may not, for example, use your School Committee position or any resources or facilities of the School Committee to provide unwarranted benefits to the ABC School or the Educational Contractor, nor should you use your position as a Trustee or resources or facilities of ABC to provide unwarranted benefits to any Municipality X agency.

Second, §23(b)(3), the so-called "appearances" section, prohibits a public employee from acting in a manner that would lead a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence him 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, but this section also provides a means for dispelling any such impression. Thus, even if §6 would not require you to abstain from participating in particular matters that come before the Board of Trustees, you may still be required to file a written disclosure of all relevant facts before you participate. Similarly, you may be required to file such disclosures before participating in School Committee matters. Because, as a Trustee, you have no appointing official, that disclosure must be made in a manner that is public in nature.[17] As a School Committee member, you must file your disclosure with Municipality X's Clerk. We also suggest that it is good practice to make a similar oral, public disclosure for inclusion in the minutes of the meeting(s) at which such matter arises is reviewed, considered or voted upon.

Finally, §23(c)'s confidentiality standards prohibit a public employee from disclosing to others (including other levels of government) or using to further his personal interest confidential information that he acquires during his tenure as a public employee. "Confidential information" is information that is unavailable to the general public as "public records."

DATE AUTHORIZED: May 14, 1997

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[1] The Statute, originally enacted as §55 of the Education Reform Act, St. 1993, c. 71, was most recently amended by St. 1996, c. 151, §§223-225. Unless otherwise indicated, when we refer to the Statute, we mean the Statute as so amended.

[2] When quoting the Statute here and elsewhere, we have added emphasis.

[3] The Massachusetts Teachers Retirement Board has determined that charter school teachers who are employed by private management entities under contract with the schools are not subject to that system.

[4] In a governmental reorganization, the Legislature dismantled EOE and transferred to the Board of Education the responsibility for regulating and overseeing charter schools. St. 1996, c. 151, §§223 through 225. The Regulations are being amended to reflect that

change.

5/ (text of footnote deleted)

6/ If the Legislature had intended to exempt charter schools from the applicability of the conflict of interest law, it could have stated so explicitly, as it did, for example, by exempting charter schools from teacher tenure and dismissal laws. Statute ¶12.

7/ "State agency," any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, §1(p).

8/ In relevant part, a "state employee" is defined as "a person performing services for or holding an office, position, employment, or membership in a state 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. . . ." G.L. c. 268A, §1(q). In relevant part, a "special state employee" is defined as "a state employee . . . who is performing services or holding an office, position, employment or membership for which no compensation is provided. . . ." G.L. c. 268A, §1(o).

9/ "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

10/ "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

11/ As the Commission observed in *EC-COI-87-39*, n. 8., our conclusion will not foreclose us from reconsidering this issue, should we be squarely presented with facts indicating that the subject charter school trustee has an "appointing official(s)" who is appropriate and for whom it is feasible to exercise the role contemplated by §6. In this regard, we note that the initial and subsequent members of different charter schools' boards of trustees may be selected in a variety of ways in accordance with the particular charter school's by-laws.

12/ We have said that "the distinguishing factor of acting as agent within the meaning of the conflict law is `acting on behalf of' some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications." *In re Sullivan*, 1987 SEC 312, 314-315; *See also, In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

13/ "Official responsibility," the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action. G.L. c. 268A, §1(i). "Official responsibility turns on the authority to act, and not on whether that authority is exercised." *EC-COI-89-7.*

14/ Service on any portion of a day constitutes one day's service. *See EC-COI-91-5; 85-49.*

15/ In this regard, we note that §19, the municipal counterpart to §6, is not implicated because the Commission does not consider state agencies to be "business organizations." *See EC-COI-92-25*, n. 1; *92-11; 92-3*, n. 3; *85-67; AG Conflict Opinion No. 30* (Apr. 25, 1963).

16/ Anything having a value of $50 or more is "of substantial value." *EC-COI-93-14; Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes).*

17/ We advise you that you should file any such public disclosures with the Ethics Commission and the Board of Trustees.

CONFLICT OF INTEREST OPINION
EC-COI-97-4*

FACTS:

You have been elected to the Board of Selectmen of the Town of Lenox. In your capacity as a private attorney, you would like to post in *The Beacon* newspaper an advertisement offering municipal legal services. The advertisement would include, among your other professional and educational qualifications, that you are "currently a Selectman for the Town of Lenox."1/

QUESTION:

May you include your current or past public official titles in a description of your experience as part of a newspaper advertisement offering municipal legal services as a private attorney?

ANSWER:

Yes.

DISCUSSION:

As a member of the Board of Selectmen, you are a municipal employee2/ for purposes of the conflict of interest law. As such, you are subject to §23(b)(2) of G. L. c. 268A and may not "use or attempt to use [your] official position to secure for [yourself] or others unwarranted privileges or exemptions which are of substantial value3/ and which are not properly available to similarly situated individuals."

We have previously concluded that §23(b)(2) does not prohibit a member of the General Court who is also "of counsel" to a law firm from having his firm announce accurately his status as a member of the General Court as long as such an announcement is made on law firm stationery rather than through an official legislative press statement and the announcement does not in any other way use legislative resources. *EC-COI-89-31*. Similarly, in *EC-COI-92-39*, we noted that "it would be appropriate for even an appointed official to include a present or former title as part of biographical information in campaign literature." *Id.* at n. 3. In that opinion, we concluded that §23(b)(2) prohibits an *appointed* state official from using his official title to endorse a political candidate. There, we reiterated that an appointed public employee's official title is a public resource which may not be used for private purposes such as endorsing a commercial product or soliciting support for a political candidate from the official's agency vendors.[4] *Id.*

In contrast, an accurate statement in an advertisement of a public official's title in order to supply biographical information is simply a statement of fact. In view of our advice in *EC-COI-89-31* and *EC-COI-92-39*, we now clarify that §23(b)(2) does not prohibit elected or appointed officials from accurately identifying their current or past official titles in privately-funded advertisements of their services. Such an advertisement does not constitute an official's use of her official position to secure an *unwarranted* privilege or exemption under §23(b)(2).[5]

DATE AUTHORIZED: August 5, 1997

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*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

[1] The text of the advertisement reads, in pertinent part, "Janet H. Pumphrey, Esq. . . . is available to provide town counsel services to Massachusetts municipalities. A former long-term Assistant City Solicitor and currently a Selectman for the Town of Lenox, she has a wide range of municipal law experience . . . [her] experience in municipal law balanced with her years as an elected official affords her a unique perspective in town counsel services. . . ."

[2] As a member of a board of selectmen in a town with a population of fewer than 10,000, you are a special municipal employee. *G. L. c. 268A, §1(n).* The distinction between a "special municipal employee" and a "municipal employee" does not affect the application of the conflict of interest law to the facts of your request.

[3] The Commission defines "substantial value" to be $50.00 or more. *EC-COI-93-14 and n. 2.*

[4] We also noted that an *elected* official may use his title to endorse a political candidate. The elected official's title "forms an inherent part of his or her political identity because it connotes the important political fact of a successful electoral candidacy and is, in any event, inevitably connected with the elected official's name in the mind of the voting public." *Id.*

[5] Our opinion is necessarily limited to an analysis of the issues raised under only §23(b)(2) based upon the facts presented. Issues under other sections of G. L. c. 268A may arise whenever a current or former public employee also works in the private sector.

CONFLICT OF INTEREST OPINION
EC-FD-97-1

FACTS:

You ask whether you are required to report in your Statement of Financial Interests for the 1996 calendar year information about certain debts.

You are also engaged in the private practice of law. Several years ago, you joined a small law firm ("Firm"), a professional corporation,[1] which has several other shareholder/lawyers.[2] You own 10% of the Firm's outstanding shares of stock; you do not serve as a director or an officer of the Firm. You and the other shareholder/lawyers, as well as the Firm's associate lawyers and support staff, are employees of the Firm.

The Firm is indebted to an institutional lender ("Lender") as described below.[3]

Term Loan. About a year before you joined the Firm, the Firm borrowed $150,000 from the Lender on a demand-loan basis to finance its expenditures for decorating, purchasing office equipment and furniture and otherwise outfitting its new offices for its occupancy. About six months after you joined the Firm, the Firm refinanced its earlier borrowing with the Lender as a 5-year loan ("Term Loan"). The Term Loan is evidenced by a promissory note, signed on behalf of the Firm by its president. (That note replaced the demand note evidencing the Firm's initial debt.) The interest rate is "Prime + 1.5%." The outstanding balance of the Term Loan is approximately $109,000.

Revolving Loan. On the same date as the Term Loan was consummated, the Firm entered into a loan agreement with the Lender for a line of credit

of up to $300,000, increased more than a year later by amendment of the loan arrangements, to $500,000 ("Revolving Loan"). The proceeds of the Revolving Loan are used to finance the Firm's recoverable case costs made in connection with the Firm's practice (*e.g.*, expenditures for depositions, expert witnesses, medical examinations and consultants) and other of the Firm's ongoing expenses, including salaries (but never bonuses), during periods when the Firm's receipts are slow. The Revolving Loan is evidenced by a revolving demand promissory note, signed on behalf of the Firm by its president. The interest rate is "Prime + 1.5%," the same as the Term Loan. The outstanding balance of the Revolving Loan varies from time to time. When the Firm receives payments for its services (through case settlements or otherwise), it repays Loan principal; when the Firm requires more cash, it draws down the Loan.

You have informed us that the business terms of the Loans, including the interest rates, are typical of similar loans to similarly situated borrowers at the time the debts were incurred. As is customary in lending practice, the Lender required each of the shareholder/lawyers of the Firm to sign a guaranty ("Guaranty") of both Loans.[4] Each Guaranty explicitly provides that it "is an absolute, unconditional and continuing guaranty of the full and punctual payment and performance of the Borrower . . . and is in no way conditioned upon any requirement that the [Lender] first attempt to collect any of the Obligations from the Borrower or any other party primarily or secondarily liable with respect thereto or resort to any security or other means of obtaining payment of any of the Obligations. . . ."

We shall review below the applicable financial disclosure reporting requirements.

Section 5(g) of G.L. c. 268B requires certain candidates for public office, public employees and public officials (collectively, "Reporting Persons") to disclose in statements of financial interests ("SFIs") ten categories of information from the preceding calendar year. You are required to file an SFI. G.L. 268B, §§5(b) and 1(q). In particular, §5(g)(3) requires a Reporting Person to report:

> 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. (Emphasis added.)

To implement and administer the financial disclosure provisions of G.L. c. 268B, as required by §§3(a) and (b),[5] the Commission has developed and published an SFI reporting form and accompanying instructions ("Instructions"). In relevant part, Section 15 (Other Creditor Information) of the 1996 Instructions requires a Reporting Person to disclose "each debt, loan, or other liability in excess of $1,000 owed by" the Reporting Person to a creditor, debt of a corporation in which the Reporting Person owns 10% or more of the stock and debt guaranteed by the Reporting Person unless any of the foregoing is a debt incurred in the ordinary course of business.

QUESTION:

You ask whether the Term Loan and the Revolving Loan or either Loan may be excluded from reporting in your 1996 SFI as a debt incurred in the ordinary course of business of the Firm.

ANSWER:

The Term Loan and the Revolving Loan were debts incurred in the ordinary course of business of the Firm. Therefore, you are not required to report either Loan in your 1996 SFI.

DISCUSSION:

As a guarantor of the Loans and also as the owner of 10% of the Firm's stock, you are required to report each Loan in your 1996 SFI unless the subject Loan constitutes "debt incurred in the ordinary course of business" ("OCB debt"). If either Loan constitutes OCB debt, you need not report such Loan in your 1996 SFI. Otherwise, you must report such Loan.

A. Overview

In *EC-FD-94-1*, we wrote that when construing statutory language, we begin with the premise that the

> intent of the legislature is to be determined primarily from the words of the statute given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objective which the law seeks to fulfill. . . .

citing *Int'l. Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984); *O'Brien v. Director of DES*, 393 Mass. 482, 487-488 (1984). *See also*, G.L. c. 4, §6, cl. third.

G.L. c. 268B provides no definition or other helpful guidance about what constitutes OCB debt. Thus, we refer to dictionary definitions of "ordinary," "extraordinary," and "ordinary course of business" for the "plain meaning" of the phrase "ordinary course of business."

> "`Ordinary' - occurring or encountered in the usual course of events : not uncommon or exceptional : not remarkable : ROUTINE, NORMAL."
>
> "`Extraordinary' - . . . going beyond what is usual, regular, common or customary"

Webster's Third New International Dictionary (unabridged 1986).

> "`Ordinary course of business' - The transaction of business according to the usages and customs of the commercial world generally or of the particular community or (in some cases) of the particular individual whose acts are under consideration. . . ."

Black's Law Dictionary (5th ed. 1979).

B. Application to the Loans

Generally, the determination of whether a business debt is in the "ordinary course" will depend on the nature, type and size of the subject business. What may be ordinary for a large business may be extraordinary for a small one. For example, a debt incurred by a large, well-capitalized law firm to acquire real property (land, a building or a condominium unit) for its offices could be "in the ordinary course" while such a debt transaction would likely be extraordinary (unusual and not "of a kind to be expected in the normal course of events") for a small, under-capitalized law firm.

"Even though the concept of ordinary course is not new to the law and even though a wide array of transactions could be identified as clearly within the ordinary course, the margin between what is ordinary course and what is not is quite ragged and hard to distinguish." *Bankruptcy Practitioner Series*, West Publishing Co. (1992), §4-2. To assess the "ordinariness" of a transaction in which debt is incurred, we may look at the transaction in light of the factors referred to in the *Black's Law Dictionary* definition quoted above to determine (i) whether the debt is ordinary by comparison to debt incurred by businesses similar to the debtor's (an external focus) and (ii) whether the debt is ordinary for the debtor in particular (an internal focus).[6]

We shall analyze the Loans in light of those principles and the overview above.

Revolving Loan

Lines of credit, such as the Revolving Loan, are typically used by law firms "to support the short-term borrowing needs of the firm and are repaid through the conversion of work-in-process to accounts receivable to cash." David A. Rountree, "Banking Issues to Consider in Starting a Law Practice," *How to Start a Law Practice* (MCLE, 95-18.11), p. 121, Library of Congress Card No. 9576395. The Firm's use of the Revolving Loan reflects that practice. During "slow" receipt periods, the Firm draws down on the Revolving Loan to finance its day-to-day operations, such as the Firm's on-going expenses for recoverable case costs and salaries.[7] The Firm repays Loan principal when it receives payments for its professional services.

As the Revolving Loan debt was incurred by the Firm to finance the Firm's day-to-day business operations and appears to be "of the kind to be expected in the normal course of events," not extraordinary ("going beyond what is usual, regular, common or customary") in any sense of the term, we conclude that the Revolving Loan constitutes debt incurred in the ordinary course of business of the Firm and that you are, therefore, not required to report that Loan in your 1996 SFI.

Term Loan

The above-cited article on banking issues states that "[t]erm loans (typically with maturities of two to five

years) are appropriate for financing the purchase of fixed assets (furniture, fixtures and equipment) and are repaid through the earnings of the [law] firm." *Id.* at 121. The Term Loan debt was incurred by the Firm for just such purposes.[8] The Firm has been in existence for some years and used the Loan proceeds to refinance its earlier expenditures and financing incurred (before you joined the Firm) to decorate, purchase office equipment and furnishings and otherwise outfit its new offices for its continued operation as a law firm. Such acquisition, financing and refinancing by the Firm - a going concern - upon typical business terms seems to us to be in the ordinary course of business of the Firm.

Furthermore, when assessing the Term Loan transaction in light of the external and internal focus described above, we find that a borrowing to finance or refinance the "outfitting" of new offices for occupancy by an existing law firm is not "uncommon or exceptional" and does not go beyond what is "usual, regular, common or customary" for law firms generally and that such a borrowing seems ordinary for the Firm in particular. In sum, our conclusion is that the Term Loan constitutes debt incurred in the ordinary course of business of the Firm and that you are, therefore, not required to report that Loan in your 1996 SFI.

DATE AUTHORIZED: October 16, 1997

[1]Our description of the Firm is based entirely on records filed with the Secretary of the Commonwealth and information you have provided to us through your legal counsel.

[2]The Firm was formed more than 15 years ago.

[3]Our description of the Loans is based entirely on information and materials you have provided to us through your legal counsel.

[4]Lenders typically require personal guarantees of the partners or members of borrower-law firms, other than large, well-capitalized firms. David A. Rountree, "Banking Issues to Consider in Starting a Law Practice," *How to Start a Law Practice* (MCLE, 95-18.11), Library of Congress Card No. 9576395.

[5]These sections of the Commission's enabling legislation require the Commission to prescribe and publish rules and regulations to carry out the purposes of G.L. c. 268B and to prepare and publish forms for the required financial disclosure reports.

[6]Such an analysis has been used in the bankruptcy/reorganization context to assess the "ordinariness" of certain business transactions. Collier, *Lending Institutions and the Bankruptcy Code* (1996), ¶4.04[3], n. 9, citing *In re Waterfront Cos.*, 56 B.R. 31 (B. Ct. D. Minn. 1985); *see also, In re Johns-Manville Corp.*, 60 B.R. 612 (B. Ct. S.D.N.Y. 1986). That is not to suggest that what is "in the ordinary course of business" in a bankruptcy or reorganization situation is or should be determinative of what is "in the ordinary course of business" in non-distress debtor/creditor business transactions such as the Loans.

[7]Other such expenses might be for rent, utilities, insurance premiums, supplies, library and equipment maintenance, training and bar memberships.

[8]We note that a debt need not be incurred at regular intervals to constitute OCB debt. A debt that is incurred only once or infrequently by the debtor may constitute OCB debt if it can otherwise be characterized as ordinary, as discussed above.

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