

U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515

MEMORANDUM

To: Blake Chisam, Staff Director and Chief Counsel

From: Peg Perl, Counsel

Donald Sherman, Counsel

Date: August 18, 2009

Re: Ethics Provisions Applicable to Members of the Financial Crisis Inquiry Commission

SUMMARY

The purpose of this memo is to clarify questions members of the Financial Crisis Inquiry Commission (Commission) raised regarding whether they are special government employees (SGEs) and subject to the financial disclosure requirement, earned outside income limits and other ethical rules that apply to regular government employees. Members of the Commission who are estimated to perform the duties of the Commission on 130 days or fewer in a period of 365 consecutive days will be considered SGEs. SGEs are not restricted by the statutory limits on earned outside income and outside employment.

Members of the Commission are not subject to the financial disclosure requirement under the Ethics in Government Act (EIGA) regardless of their income or status as SGEs. However, given the nature of the Commission's mandate and the practices of other commissions created in the legislative branch, we recommend that members of the Commission and senior staff file public financial disclosure statements.

LEGAL BACKGROUND

I. Members of the Commission May Qualify as SGEs.

Members of the Financial Crisis Inquiry Commission (Commission) are considered government employees because they are appointed in the civil service, perform a Federal function, and are

supervised by a Federal official.¹ However, certain government employees are subject to different ethical provisions if they are designated as SGEs.²

The relevant statute defines an SGE as one of the following:

1. an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of 365 days, either on a full-time or intermittent basis;
2. a part-time United States Commissioner³;
3. a part-time United States magistrate judge; or
4. an independent counsel appointed under certain federal statutes.⁴

Members of the Commission must meet the more detailed requirements (noted in item 1 above) of the SGE definition. Therefore, a member of the Commission will be considered an SGE if he or she is estimated to perform the duties of the Commission on 130 or fewer days during the ensuing 365 day period. The Fraud Enforcement and Recovery Act of 2009 (FARA) anticipates that members of the Commission will be treated as part-time temporary employees. Members of the Commission are to be paid on a per diem basis and the statute states that the Commission shall terminate 60 days after the date on which the final report is submitted, listed in the statute as December 15, 2010.

When an agency designates an employee as an SGE, the agency must make a good faith estimate that the employee will work no more than 130 days during the ensuing 365 day period.⁵ Similarly, in order for members of the Commission to qualify as SGEs, the Commission must make a good faith estimate that the members will fall under the 130 day threshold. If, for example, the Commission estimates that members of the Commission will work for 124 days, between August 19, 2009 and August 18, 2010, then each member would be considered an SGE. If a member of the Commission “unexpectedly serves more than 130 days during the ensuing 365-day period, [he or she] still will be deemed an SGE for the remainder of that period.”⁶ However, at the beginning of the next 365-day period, the Commission should reevaluate whether the member or members of the Commission who exceeded the 130 day threshold are correctly designated as SGEs.⁷ This reevaluation and estimation process should occur at the end of each 365 day period through the duration of the Commission’s

¹ 5 U.S.C. §§ 2104, 2105 (2006).

² 18 U.S.C. § 202(a) (2006).

³ The statute does not define the term “United States Commissioner.” However, members of the Commission do not fit into this category. The statute defines the “legislative branch” to include Congress and “any ... commission established in the legislative branch.” The Fraud and Recovery Act of 2009 (FARA) explicitly states that the Financial Crisis Inquiry Commission “is established in the legislative branch,” thus setting members of this Commission apart from “United States Commissioner[s].”

⁴ 18 U.S.C. § 202(a) (2006).

⁵ OGE Informal Advisory Memorandum 00 X 1, 2000 WL 33407342 *2-3 (O.G.E., Feb. 15, 2000).

⁶ *Id.* at *3.

⁷ *Id.*

existence.⁸ We have consulted with attorneys at the Congressional Research Service, the Senate Ethics Committee and the TARP Commission. Our understanding is that the above approach has been used in the past by other commissions created in the legislative branch.

Any portion of any day that a member of the Commission performs the duties of the Commission constitutes a “day” of work. The FARA does not explicitly define how many hours are included in a “day” of work, but explains that each member “may be compensated ... for each day during which that member is engaged in the actual performance of the duties of the Commission.” Based on this language, if a member of the Commission performs the duties of the Commission for any portion of any calendar day, then he or she has “worked” a day for purposes of determining SGE status.

The Office of Government Ethics (OGE) has reviewed the appropriate method of counting the days of service for SGEs, and has likewise concluded “[a]ny day on which an SGE performs any work for which he or she is compensated by the Government should be counted as a day, regardless of the amount of time worked that day or the nature of the services.”⁹ Weekends and holidays are not exempted from this rule.¹⁰ However, the OGE has identified a category of *de minimis* uncompensated activities that need not be counted as a day of service. These activities include:

1. Uncompensated activities limited to strictly administrative matters, such as filling out personnel paperwork or scheduling meetings. For example, if an SGE spends an hour one day at her law office filling out an application for a security clearance to receive certain Government information, this day need not be counted toward the statutory limits.
2. Uncompensated brief communications, even if they touch on substantive matters. For example, if a member of the Commission spends five minutes composing and sending an e-mail message to another member, and the message is simply one or two sentences indicating the former’s view that a certain issue should be taken up by the committee, this activity does not warrant counting a day of service.
3. Uncompensated brief periods of reading or other preparation performed at the SGE’s home, regular place of business, or other setting away from a Government workplace, need not be counted. OGE is aware that many SGEs do occasional reading at home or at their private offices, in preparation for official meetings. Thus, for example, a member of the Commission who finds 15 minutes, amidst the press of other business, to read an article distributed by the Chair of the Commission need not count a day of service.¹¹

II. What are the Ethical Statutory Provisions that Apply to SGEs?

There are several conflict of interest and ethics statutory provisions that may apply differently to members of the Commission depending on whether they are classified as SGEs.

⁸ *See id.* We note that this is unlikely to be a serious issue for the Commission, given its statutory end date.

⁹ OGE Advisory Opinion 07 X 1 (O.G.E., Jan. 19, 2007).

¹⁰ *Id.*

¹¹ *See id.*

A. Financial Disclosure.

The Ethics in Government Act of 1978 (EIGA) requires some senior federal officials to make detailed, public financial disclosure requirements. Since members of the Commission are neither SGEs in the executive branch nor employees of the Congress whose compensation is disbursed by the Secretary of the Senate or the CAO of the House, they are not required by statute or by House Rules to file public financial disclosure statements.

Any government employee paid at a rate of more than \$117,787 per year, who is employed for more than 60 days in any given calendar year and whose compensation is disbursed by the Secretary of the Senate or the CAO of the House must file a public financial disclosure statement.¹² An SGE in the executive branch paid at a rate of more than \$117,787 per year and employed for more than 60 days in any given calendar year must file a public financial disclosure statement.¹³ We believe members of the Commission do not fall into either of these categories, and that, as a result, they are not statutorily required to file public financial disclosure statements.¹⁴

The financial disclosure requirement was created to assist in identifying potential conflicts of interest for government employees. Since members of other commissions created in the legislative branch have filed public financial disclosure statements, we recommend that members of the Commission also file public disclosure statements.¹⁵ Since the Commission was created in 2009, an odd numbered year, members of the Commission should file these documents with the House of Representatives.¹⁶ Members of the Commission should file their financial disclosure reports within 30 days of their assumption of the position. However, they would not face penalties for filing a late disclosure statement, since they are not required to file.

B. Earned Outside Income and Employment Restrictions.

The EIGA also sets limitations on outside income earned by any officer or employee of the Government except any special government employee. The limit on outside income earned by government employees paid at a rate of \$117,787 or more is \$26,550.¹⁷ In addition, regular government employees paid at a rate of \$117,787 or more may not receive any compensation for affiliating with a firm that provides professional services involving a fiduciary relationship; may not allow their name to

¹² 5 U.S.C. App. 4 § 101(f)(10) (2006); 5 U.S.C. App. 4 § 109(13) (2006).

¹³ 5 U.S.C. App. 4 § 101(f)(3) (2006).

¹⁴ The Senate Select Committee on Ethics, as well as the Congressional Research Service have concluded that members of similar commissions were required to file public financial disclosure statements. This conclusion is inconsistent with our reading of the relevant statutes, as well as prior advisory opinions drafted by the House Committee on Standards of Official Conduct.

¹⁵ For example, members of the 9/11 Commission (2002) and the Judicial Review Commission on Foreign Asset Control (1999) filed public financial disclosure statements despite the fact that both Commissions were legislative branch commissions and their members' compensation was not disbursed by the Secretary of the Senate or the CAO of the House.

¹⁶ 5 U.S.C. App. 4 § 103(h)(1)(A)(ii). Such filings are made with the Clerk of the House. Members of Commissions that have elected to file public disclosure statements have used the form generally used by the House of Representatives.

¹⁷ 5 U.S.C. App. 4 § 501(a)(1) (2006). The FARA notes that members of the Commission may be compensated at a rate no more than the daily equivalent for a position at level IV of the Executive Schedule under 5 U.S.C. § 5315. Level IV of the Executive Schedule is currently set at \$153,200 annually (effective January 2009). We understand that members of the Commission will be paid at this rate.

be used in such a firm; and may not receive any compensation for practicing a profession on the outside which involves a fiduciary relationship (law, e.g.).¹⁸

SGEs do not have to comply with these income and employment limitations regardless of their income.¹⁹ However, the United States Constitution generally prohibits persons “holding any Office of Profit or Trust under [the United States]” from accepting compensation from a foreign government.²⁰ Memoranda drafted by the Department of Justice’s Office of Legal Counsel in 2005 and 2007 identified several factors that make it difficult to determine conclusively whether members of the Commission hold an Office of Profit or Trust under the United States.²¹ The Department of Justice may decide that the Commission falls within this category because members receive compensation for their work on the Commission and have been given subpoena authority by the Congress.²² Based on our understanding of the emoluments clause of the Constitution and our interpretation of the relevant Department of Justice memoranda, we recommend that members of the Commission abide by the Constitutional prohibition on receiving compensation from a foreign government.

C. Bribery.

The statutory provision prohibiting bribery of “public officials” applies to “an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof,” including SGEs.²³

D. Gifts.

Government employees are generally prohibited from accepting personal gifts from parties doing business or having contracts with the employee’s agency or office, or those parties who may be substantially affected by the employee’s duties.²⁴ The United States Constitution also prohibits government employees from accepting personal gifts from foreign governments unless consented to by Congress.²⁵ However, under the Foreign Gifts & Decorations Act, government employees may accept gifts of “minimal value” offered as souvenirs, and in certain other cases, such as travel taking place entirely abroad.²⁶ These statutory limitations apply to SGEs, but members of the Commission are not subject to the restrictions of the House or Senate Gift Rules. In addition, the FARA explicitly states that

¹⁸ 5 U.S.C. App. 4 § 502(a)(1)-(5) (2006). Although the statute does not explicitly define the term “fiduciary relationship” we believe this term to include “the receipt of legal fees and other compensation for professional services [such as broker fees or an agency commission], and directors’ fees from serving on boards of corporations, associations, non-profit organizations and other entities.” See House Bipartisan Task Force on Ethics, *Report of H.R. 3660*, 101st Cong., 1st Sess. 16 (Comm. Print, Comm. on Rules 1989), reprinted in 135 *Cong. Rec.* H9253, H9256 (daily ed. Nov. 21, 1989).

¹⁹ 5 U.S.C. App. 4 § 505(2) (2006) (SGEs are excluded from the definition of “officer or employee” under the statute.).

²⁰ U.S. Constitution, Art. I, Sec. 9, cl. 8.

²¹ See *Application of the Emoluments Clause to a Member of the President’s Council on Bioethics*, Dept. of Justice at 1 (Mar. 9, 2005) (available at http://www.usdoj.gov/olc/2005/050309_emoluments_clause.pdf); see also *Application of the Emoluments Clause to a Member of the FBI Director’s Advisory Board*, Dept. of Justice at 1 (Jun. 15, 2007) (available at http://www.usdoj.gov/olc/2007/fbi_advisory_board_opinion_061507.pdf).

²² *Id.* at 7-8, 11, 15.

²³ 18 U.S.C. §201(2006).

²⁴ 5 U.S.C. § 7353 (2006).

²⁵ U.S. Constitution, Art. I, Sec. 9, cl. 8.

²⁶ 5 U.S.C. §7342 (2006).

“[t]he Commission may accept, use, and dispose of gifts or donations of services or property.” It is our opinion that this provision does not authorize individual members of the Commission to accept personal gifts unrelated to their service on the Commission, but rather allows the Commission as a body to accept donations of services or property in furtherance of its work.

E. Compensation to members of the Commission in matters affecting the Government.

Generally, federal employees are prohibited from receiving or sharing in compensation for representational activities on behalf of private parties before the Federal Government. Violators may be subject to criminal and/or civil penalties. SGEs are subject to this provision as well, but only to the extent that the SGE represents someone or shares in fees for representing someone before the Government on a “particular matter involving a specific party or parties” on which the employee had worked “personally and substantially,” or on a matter before the agency or department employing the special Government employee if he or she worked more than 60 days in the previous 365 days in that agency.²⁷

F. Activities of members of the Commission in claims against the Government.

Generally, federal employees are prohibited from acting as an “agent or attorney,” with or without compensation, for private parties before the Federal Government on any matter. Violators may be subject to criminal and/or civil penalties. SGEs are subject to this provision as well, but only to the extent that the SGE acts as an “agent or attorney” for a private party before the Federal Government on a “particular matter involving a specific party or parties” on which the employee had worked “personally and substantially,” or on a matter before the agency or department employing the special Government employee if he or she worked more than 60 days in the previous 365 days in that agency.²⁸

G. Restrictions on Former Employees.²⁹

Former legislative branch employees³⁰ may not “lobby” or try to influence the particular office, bureau, or agency that the employee leaves for one year after leaving Government employment.³¹ This one-year “cooling-off” or “no contact” provision applies to members of the Commission if they are compensated at a rate of \$153,200 per year, regardless of their status as SGEs.³² The statute’s one year restriction would prohibit former members of the Commission from lobbying the Commission after leaving the Commission, but would not prevent them from lobbying the Congress as a whole.³³ Persons

²⁷ 18 U.S.C. §203(c)(1) and (2) (2006).

²⁸ 18 U.S.C. §205(c)(1) and (2) (2006).

²⁹ 18 U.S.C. § 207 (2006).

³⁰ The lobbying prohibition relevant to members of the Commission applies to those employees who work 60 or more days, during the 1-year period before the termination of such employment, and are paid at a rate equal to or greater than the basic rate of pay payable for level IV of the Executive Schedule. The FARA notes that members of the Commission may be compensated at a rate no more than the daily equivalent for a position at level IV of the Executive Schedule under 5 U.S.C. § 5315. Level IV of the Executive Schedule is currently set at \$153,200 annually (effective January 2009). We understand that members of the Commission will be paid at this rate.

³¹ See 18 U.S.C. § 207(e)(6)(2006).

³² See 18 U.S.C. §§ 207(e)(6) & 207(e)(7)(B)(2006).

³³ *Id.*

who are covered by this one-year “cooling off” period are also barred for one year from representing any official foreign interests before the United States.³⁴

H. Financial Conflicts of Interest.³⁵

Members of the Commission are exempt from the statute prohibiting government employees from working on any governmental matter in which the employee, the employee’s family, or the employee’s outside business, has any financial interest. This rule does not apply, as a general matter, to the legislative branch (unless the agency could be considered an “independent” agency).³⁶ The members of the Commission would not be covered by this provision because the Commission was established in the legislative branch and is not an independent agency. However, because avoiding conflicts of interest are critical, we assume the Commission will create a conflicts rule.

I. Prohibition on Supplemental Salary.³⁷

Members of the Commission are exempt from the statute prohibiting government employees from receiving any supplemental income for performing their official governmental duties. The statute includes an exception that applies to uncompensated SGEs, but not SGEs that, like members of the Commission, are compensated by the government for their work. Violators may be subject to criminal and/or civil penalties. However, this rule does not apply to the legislative branch. The Members of the Commission would not be covered by this provision because the Commission was established in the legislative branch and is not an independent agency.

³⁴ 18 U.S.C. § 207(f) (2006).

³⁵ 18 U.S.C. § 208 (2006).

³⁶ See DOJ opinion on Gambling Impact Study Commission.

³⁷ 18 U.S.C. § 209 (2006).