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# The Proposed Michigan Government Ethics Act of 1999: Providing Guidance to Michigan Public Officials and Employees

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# The Proposed Michigan Government Ethics Act of 1999: Providing Guidance to Michigan Public Officials and Employees

MICHAEL A. LAWRENCE\*

## I. INTRODUCTION

During the past twenty-five years, due in large part to problems exposed by Watergate, many states, as well as the federal government, have undertaken to adopt or revise their government ethics laws and standards. As noted by the public interest group Common Cause:

[In the early 1970s,] relatively few states had comprehensive or effective ethics laws on the books. Today, this is no longer the case. Most states have enacted ethics laws that constrain public officials from using their positions in government for private gain . . . . On the other hand, not all ethics laws passed . . . were comprehensive . . . . There is clearly a need to revise and strengthen some state laws.<sup>1</sup>

Michigan is among the states whose ethics laws need to be revised. Accordingly, this Article proposes a new Government Ethics Act, complete with detailed section-by-section comments.<sup>2</sup>

Michigan's current ethics laws are inadequate in several key respects. First, current ethics laws do not elucidate a clearly defined,

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\* Professor of Law, Detroit College of Law at Michigan State University; J.D., University of Wisconsin Law School. The Ethics Roundtable of the Michigan Municipal League and Mr. David Caylor, retired city attorney for El Paso, Texas, and former chairman of the Ethics Section of the International Municipal Lawyers Association, provided many helpful written comments. The able research assistance of Deanne Andrews Lawrence, Donald Nystrom, and Starr Hewitt is much appreciated, as is the hardworking secretarial support of Linda Oswald.

1. MODEL ETHICS LAW FOR STATE GOVERNMENT 1 (Common Cause 1989).

2. This Article conveys the findings and conclusions contained in a report delivered to the Michigan Law Revision Commission in November 1998. In early 1998, the Commission authorized a comprehensive review and research report regarding Michigan's ethics laws. The Commission was particularly interested in knowing how Michigan's ethics laws compared to the ethics laws of its sister states. The Commission was also interested in knowing how Michigan law could be changed (1) to better define what is and is not a conflict of interest, (2) to provide procedures for determining whether a conflict exists, and (3) to prescribe penalties for violations.

The Proposed Act has generated significant interest in the Michigan House Committee on Constitutional Law and Ethics, as well as the popular media.

comprehensive set of conflict-of-interest and revolving-door standards. Second, current ethics laws require nothing more than minimal transactional disclosure of potential conflicts. Third, current ethics laws do not provide for a strong and independent Ethics Board to enforce the statutes. These three requirements - a clearly defined list of proscribed activities, disclosure, and a strong independent Ethics Board - are the backbone to an effective ethics law.

This Article contains a proposed ethics act, as well as a detailed explanation of how the proposed act addresses each of the current act's deficiencies. Part II reviews Michigan's current laws regarding ethics. Part III describes the results of a fifty-state ethics law survey. Part IV contains the Proposed Michigan Ethics Act of 1999 (proposed Act), and, finally, Part V offers section-by-section commentary on the proposed Act.

While it may seem counterintuitive, public officials and employees in Michigan should welcome the changes recommended in this Article's proposed Act. Public officials should not fear a comprehensive code of ethics. Instead, a comprehensive code of ethics should be preferred over the current alternatives, where public officials "lack guidance as to what they may and may not do, and consequently too often fall prey to accusations by self-proclaimed ethics 'experts' of unspecified 'unethical' conduct."<sup>3</sup> The certainty that a clearly worded, succinct code of ethics engenders would be an advantage to public officials. As one commentator has suggested, "[b]ereft of a comprehensive, comprehensible Code and even an agency to authoritatively interpret . . . ethics laws, local government officials faced with ethical dilemmas search in vain for counsel."<sup>4</sup>

## II. MICHIGAN'S CURRENT ETHICS LAWS

Michigan's current government ethics laws are primarily published under one of the following statutory headings: Conflict of Interest,<sup>5</sup> Contracts of Public Servants with Public Entities,<sup>6</sup> or Stan-

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3. Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALB. L. REV. 1321, 1340 (1996).

4. Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 263 (1991). One advantageous feature of the proposed Act allows government officials and employees to seek the advice of the Ethics Board. See *infra* Part IV, Section 409 (Advisory Opinions).

5. MICH. COMP. LAWS ANN. §§ 15.301-310 (West 1994 & Supp. 1998). These sections of the Michigan Compiled Laws constitute the implementing legislation for section 10 of Article IV of the Michigan Constitution. Section 10 of Article IV states: "No member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest." MICH. CONST. art. IV, § 10.

6. MICH. COMP. LAWS ANN. §§ 15.321-328 (West 1994 & Supp. 1998).

dards of Conduct for Public Officers and Employees.<sup>7</sup> There are also a number of context-specific provisions scattered throughout the Michigan Compiled Laws.<sup>8</sup> The legislature would probably choose to retain the context-specific provisions to the extent that they supplement or complement the proposed Act. To the extent that a particular context-specific provision conflicts with the proposed Act, the legislature should amend the conflicting provision so that the conflicting provision either complies with the proposed Act or states that it is intended to prevail over the proposed Act.

The narrow scope of Michigan's current government ethics legislation is most curious. For example, while the Conflict of Interest and Contracts With Public Entities statutes apply to state executive, legislative, and judicial officials and employees, as well as officials and employees of state political subdivisions, the Standards of Conduct provisions cover only the state executive branch. Any revision of the Standards of Conduct provisions should, therefore, encompass all branches of the state government, including all legislative, judicial, and political subdivisions.<sup>9</sup> The existing Standards of Conduct provisions are, however, quite comprehensive and simply drafted. The Standards of Conduct provisions prohibit state executive officials and employees from: (1) divulging confidential information; (2) representing their own opinions as that of the government; (3) using resources without authorization; (4) accepting articles of value that might tend to influence the public official or employee; (5) using

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7. *Id.* §§ 15.341-348.

8. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 4.411-430 (West 1994 & Supp. 1998) (Michigan Lobbyist Registration Act); MICH. COMP. LAWS §§ 169.201-282 (West 1989 & Supp. 1998) (Michigan Campaign Finance Act); MICH. COMP. LAWS ANN. §§ 432.201-278 (West 1995 & Supp. 1998) (Michigan Gaming Control & Revenue Act); MICH. COMP. LAWS ANN. §§ 460.1-8 (West 1991 & Supp. 1998) (Public Service Commission). *See also* Memorandum from Kevin Kennedy, Executive Secretary, Michigan Law Review Commission, to the members of the Michigan Law Review Commission (Mar. 10, 1998) (citing various sections of the Michigan Compiled Laws) [hereinafter *Memorandum from Kevin Kennedy*]; Exec. Order No. 1993-2, Mich. Reg. (Feb. 1993) (declaring that members and employees of the Michigan Jobs Commission are subject to sections 15.301 through 15.321 of the Michigan Compiled Laws); Exec. Reorg. Order No. 1992-15, Mich. Reg. (June 1992) (declaring that the State Child Abuse and Neglect Prevention Board shall develop procedures to assure that grants or transfers made by it to the Department of Social Services are free of any conflict of interest); Exec. Order No. 1996-9 & 10, Mich. Reg. (Dec. 1996) (establishing restrictions on appointments to the Michigan Gaming Control Board and the Interim Executive Director position in order to avoid conflicts of interest); Admin. Order No. 1996-11, MICH. CT. R. 563 (establishing an anti-nepotism policy to avoid conflicts of interest in the hiring of relatives as court personnel).

9. This Article proceeds under the assertion that the creation of an investigative Ethics Board, possessing no power to impose penalties or sanctions, does not run afoul of the separation of powers provisions contained in section 2 of Article III of the Michigan Constitution. *See infra* Part V.

their official position for personal gain; (6) holding incompatible offices; and (7) participating in transactions<sup>10</sup> that create a conflict of interest.

Michigan's current ethics laws lack sufficient disclosure requirements. Overly-intrusive disclosure requirements, however, may chill people's willingness to serve in state and local government. Furthermore, systems that require annual financial disclosures are too cumbersome and expensive to administer. In most circumstances, the marginal benefits associated with annual disclosure systems simply do not justify the expense. Therefore, this Article opts for a simple transactional disclosure system.<sup>11</sup>

The proposed Act is a hybrid of a number of sources. Over the last couple of decades, several government ethics advocacy organizations have proposed model ethics legislation, parts of which have been incorporated into the proposed Act.<sup>12</sup> Significant portions of the proposed Act are modeled after prior legislation that was signed into law in 1975, only to be subsequently struck down by the Michigan Supreme Court for "embracing more than one object."<sup>13</sup> The prior act is quite instructional because it offers text that the legislature was willing to accept. Finally, the proposed Act derives substantial guidance from the ethics statutes of a number of Michigan's sister states.

The proposed Act is quite simple in format and language. Chapter One contains definitions and miscellaneous provisions. Chapter Two contains the actual Code of Ethics, setting forth a clearly defined list of proscribed and required activities. Chapter Three details penalties for noncompliance. Finally, Chapter Four contains provisions regarding administration of the proposed Act through a newly con-

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10. MICH. COMP. LAWS ANN. § 15.342.

11. Consistent with this Article's theme that government ethics legislation should be primarily preventive and not punitive in nature, the proposed disclosure requirements are not onerous in scope or detail. Instead, the proposed disclosure requirements are designed to illustrate potential transactional conflicts of interest, thus allowing the individual to monitor his or her behavior proactively. *See infra* Part IV. Should the Legislature favor a system of annual financial reporting, Appendix A provides sample language for the necessary provisions.

12. The proposed Act most closely resembles the model legislation provided in Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 FORDHAM URB. L.J. 61 (1993). The Davies model was selected as the proposed Act's basic template despite the fact that it was specifically intended for *local* government because of its superior organizational clarity and simplicity. Other major influences include: MODEL LAW FOR CAMPAIGN FINANCE, ETHICS AND LOBBYING REGULATION (Council on Gov't Ethics Laws 1991); MODEL STATE CONFLICT OF INTEREST AND FINANCIAL DISCLOSURE LAW (National Mun. League 1979); MODEL ETHICS LAW FOR STATE GOVERNMENT (Common Cause 1989); NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATIVE ETHICS (1976).

13. *See* MICH. COMP. LAWS §§ 169.1-200 (1979) (repealed 1980); *See also In re Advisory Opinion*, 240 N.W.2d 193 (Mich. 1976).

stituted Ethics Board. Appendix A provides optional annual disclosure requirements and Appendix B provides a comparative table of ethics laws in the fifty states.

The proposed Act is sure to elicit objections. First, a substantial amount of money will be required to administer the proposed Act. Specifically, in order to do its job effectively, the newly-constituted Ethics Board will need considerable resources. For example, in 1992, the state of Ohio budgeted \$660,000 for its six-member Ohio Ethics Commission. Even then the Ohio Ethics Commission was considered underfunded.<sup>14</sup> Undoubtedly, administration of Ohio's annual financial reporting system—a reporting system *not* required by the proposed Act—consumed a significant percentage of the Commission's budget.<sup>15</sup> An estimation of the resources needed to administer the proposed Act has not been attempted. Although the proposed Act imposes significant responsibilities on the newly-created Ethics Board, other governmental entities should not be appreciably burdened.

This Article represents the first step in what promises to be a long debate between legislators, executive policy makers, and many others. Experiences encountered by other states while revising their ethics laws are illustrative. For example, commentators reported that Ohio's ethics laws were the "subject of intense scrutiny, analysis, and political debate."<sup>16</sup> Similarly, for two years from 1990 through 1992, the New York State Temporary State Commission on Local Government Ethics "was charged with enforcing the 1987 Ethics in Government Act, with aiding municipalities in addressing their ethics concerns, and with proposing new ethics legislation."<sup>17</sup> If the experiences of Ohio and New York are any guide, effecting wholesale change of Michigan's ethics laws will be a task of substantial magnitude. This Article seeks to initiate this change by providing a proposed Act that incorporates certain fundamentals and that will serve as a point-of-departure for the legislature in establishing a comprehensive and workable Government Ethics Act.

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14. See Jack P. Desario & David E. Freel, *Ohio Ethics Law Reforms: Tracing the Political and Legal Implications*, 30 AKRON L. REV. 129, 133 (1996). Although fifteen staff positions were originally authorized, successive budget cuts reduced that number to eleven, the smallest staff since 1977. Funding for the eleven staff positions was also taken from the \$660,000 allocated to the Commission. According to some critics, the reduction in staff and resources clearly hampered the Commission's efforts. *Id.* at 134.

15. Approximately 7,200 individual financial disclosure statements were filed with the Ohio Ethics Commission in 1994. *Id.* at 131. The Ohio Ethics Commission had jurisdiction over an estimated 16,000 public officials and 500,000 public employees as of 1994. *Id.*

16. *Id.* at 129.

17. Davies, *supra* note 12, at 61.

### III. SURVEY RESULTS

Ethics laws can be divided into two major groups: (1) laws that impose restrictions on conduct and (2) laws that impose disclosure requirements. Accordingly, a fifty state survey reviewed each state's ethics laws for eleven key provisions - seven that addressed restrictions on conduct, and four that addressed disclosure requirements. First, regarding restrictions on conduct, the survey evaluated whether the state explicitly restricted:

- (1) use of the government position to obtain personal benefits;
- (2) acceptance of items of value to influence official action;
- (3) use or dissemination of confidential information;
- (4) post-governmental employment (*i.e.*, revolving door);
- (5) representation of private clients before the public entity;
- (6) contractual conflicts of interest; and
- (7) political solicitation of subordinates.

Next, regarding disclosure provisions, the survey evaluated whether the state required written disclosure of:

- (1) real property holdings;
- (2) outside income;
- (3) gifts; and
- (4) creditors.

The survey then assigned a value between one and five to each response depending upon the comprehensiveness of the provision's coverage.<sup>18</sup> If a provision provided no coverage, it was assigned a value of "1." If a provision excluded three or more classes of public officials or employees, it was assigned a value of "2." If a provision excluded two classes, it was assigned a value of "3." If a provision excluded only one class of public officials or employees, it was assigned a value of "4." Finally, if the provision covered *all* classes of public officials and employees without exception, it was assigned a value of

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18. "Coverage" refers to the scope of public officials and employees subject to the provision. For example, a provision may only apply to paid executive branch public officials, excluding for example executive branch public employees, unpaid appointees and officials, all legislative branch public officials and employees, all judicial branch public officials and employees, etc. Under such circumstances the provision would be assigned a value of "2." By contrast, another state's laws might cover *all* public officials and employees, without exception.

"5."<sup>19</sup> The data were then divided into four groupings: (1) all fifty states, (2) states located in the federal Sixth Circuit, (3) states located in the Midwest, and (4) the ten most heavily populated states. Michigan's current ethics laws, as well as the proposed Act, were then compared against each of the groupings.

#### A. *The Fifty States*

Evaluating Michigan's current ethics law against Group One, the fifty states, revealed that:

1. Michigan has the thirty-seventh most comprehensive ethics laws;<sup>20</sup>
2. Michigan has the twenty-eighth most comprehensive Group One "restrictions on conduct" requirements;<sup>21</sup> and
3. Michigan has the forty-fourth most comprehensive Group Two "disclosure" requirements.<sup>22</sup>

Evaluating the proposed Act against the fifty states, however, revealed that:

1. Michigan would have the fifteenth most comprehensive ethics laws;<sup>23</sup>
2. Michigan would be one of seven states that have the most comprehensive Group One "restrictions on conduct" requirements;<sup>24</sup> and

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19. See *supra* Appendix B for a summary of the survey results. It must be noted, however, that while the empirical comparison of ethics laws in the fifty states, *supra* Part III & Appendix B, has its merits, it also has inherent limitations. A spreadsheet such as that shown in Appendix B, while capable of effectively evaluating objective data, cannot effectively evaluate subjective data, such as accessibility and clarity of drafting—matters with which the proposed Act excels *vis-a-vis* other states.

20. Michigan's average for all eleven provisions was 2.27. The five states with the most comprehensive ethics laws were Washington (5.00), South Carolina (4.91), Alabama (4.91), Massachusetts (4.63), and Arizona (4.63). The five states with the least comprehensive ethics laws were North Carolina (1.18), Vermont (1.55), South Dakota (1.64), Maine (1.64), and New Hampshire (1.73).

21. Michigan's average for the seven Group One provisions was 3.00.

22. Michigan is one of only six states with *zero* financial disclosure requirements. The other states are Georgia, Idaho, Indiana, North Carolina, and Wyoming.

The survey also revealed that: (1) twenty-two states either had no gift disclosure, or required only one group to disclose; (2) thirteen states excluded unpaid volunteers from most requirements; (3) twenty-three had no, or a very minimal, bar on political solicitation of employees; (4) twenty-seven states had no (or minimal) requirements to disclose creditors; and (5) thirty-four states require comprehensive disclosure of outside income.

23. Michigan's average for all eleven provisions applying the proposed Act was 3.91.



3. Michigan would have the thirty-eighth most comprehensive Group Two "disclosure" requirements.<sup>25</sup>

### *B. The Sixth Circuit*

Evaluating Michigan's current ethics laws against the ethics laws of the four Sixth Circuit states, Michigan, Ohio, Kentucky, and Tennessee, revealed that:

1. Michigan has the third most comprehensive ethics laws;<sup>26</sup>
2. Michigan has the most comprehensive Group One "restrictions on conduct" requirements;<sup>27</sup> and
3. Michigan has the least comprehensive Group Two "disclosure" requirements.<sup>28</sup>

Evaluating the proposed Act against the ethics laws of the four Sixth Circuit states, however, revealed that:

1. Michigan would have the most comprehensive ethics laws;<sup>29</sup>
2. Michigan would have the most comprehensive Group One "restrictions on conduct" requirements;<sup>30</sup> and
3. Michigan and Tennessee would have the least comprehensive Group Two "disclosure" requirements.<sup>31</sup>

24. Michigan's average for the seven Group 1 provisions was 5.00. Six other states, Arizona, Massachusetts, Rhode Island, South Carolina, Texas, and Washington, also had a 5.00 average for the seven "restrictions on conduct" provisions.

25. Under the proposed Act, Michigan has values of "1" on the first two "disclosure" provisions (disclosure of real property and of outside income), "5" on the third (disclosure of gifts), and "1" on the fourth (disclosure of creditors). The proposed Act does not require disclosure of real property, unrelated outside income, and creditors, under the belief that such a requirement approaches the line of overintrusiveness. The proposed Act is based upon the belief that transactional disclosure is more than adequate.

26. The overall averages for all eleven provisions are: Kentucky (3.27), Ohio (3.09), Michigan (2.27), and Tennessee (1.91).

27. The averages for the seven Group 1 provisions are: Michigan (3.00), Kentucky (2.71), Ohio (2.00), and Tennessee (1.85).

28. The averages for the four Group 2 provisions are: Ohio (5.00), Kentucky (4.25), Tennessee (2.00), and Michigan (1.00).

29. Under the proposed Act, Michigan's overall average for all eleven provisions was 3.91, as compared to Kentucky (3.27), Ohio (3.09), and Tennessee (1.91).

30. Under the proposed Act, Michigan's average for the seven Group One provisions was 5.00, as compared to Kentucky (2.71), Ohio (2.00), and Tennessee (1.85).

31. Under the proposed Act, Michigan's average for the four Group 2 provisions was 2.00, as compared to Ohio (5.00), Kentucky (4.25), and Tennessee (2.00).

*C. The Midwestern States*

Evaluating Michigan's current ethics laws against the seven Midwestern states, Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, and Iowa, revealed that:

1. Michigan has the sixth most comprehensive ethics laws;<sup>32</sup>
2. Michigan has the third most comprehensive Group One "restrictions on conduct" requirements;<sup>33</sup> and
3. Michigan and Indiana have the least comprehensive Group Two "disclosure" requirements.<sup>34</sup>

Evaluating the proposed Act against the seven Midwestern states, however, revealed that:

1. Michigan would have the second most comprehensive ethics laws;<sup>35</sup>
2. Michigan would have the most comprehensive Group One "restrictions on conduct" requirements;<sup>36</sup> and
3. Michigan would have the fourth most comprehensive Group Two "disclosure" requirements.<sup>37</sup>

*D. The Ten Most Populated States*

Evaluating Michigan's current ethics laws against the ten most populated states, California, New York, Texas, Pennsylvania, Illinois, Ohio, Michigan, New Jersey, and North Carolina, revealed that:<sup>38</sup>

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32. The overall averages for all eleven provisions were: Wisconsin (4.45), Illinois (3.64), Iowa (3.36), Ohio (3.09), Minnesota (2.36), Michigan (2.27), and Indiana (2.09).

33. The averages for the seven Group 1 provisions were: Wisconsin (4.14), Iowa (3.86), Michigan (3.00), Illinois (2.86), Indiana (2.71), Ohio (2.00), and Minnesota (1.86).

34. The averages for the four Group 2 provisions were: Wisconsin (5.00), Illinois (5.00), Ohio (5.00), Minnesota (3.25), Iowa (2.50), Indiana (1.00), and Michigan (1.00).

35. Under the proposed Act, Michigan's overall average for all eleven provisions was 3.91, as compared to Wisconsin (4.45), Illinois (3.64), Iowa (3.36), Ohio (3.09), Minnesota (2.36), and Indiana (2.09).

36. Under the proposed Act, Michigan's average for the seven Group One provisions was 5.00, as compared to Wisconsin (4.14), Iowa (3.86), Illinois (2.86), Indiana (2.71), Ohio (2.00), and Minnesota (1.86).

37. Under the proposed Act, Michigan's average for the four Group Two provisions was 2.00, as compared to Wisconsin (5.00), Illinois (5.00), Ohio (5.00), Minnesota (3.25), Iowa (2.50), and Indiana (1.00).

38. The ten largest states in order of population according to the 1990 census were: California (29.8 million), New York (18.0 million), Texas (17.0 million), Florida (12.9 million), Illinois (11.9 million), Pennsylvania (11.9 million), Ohio (10.8

1. Michigan and Pennsylvania have the eighth most comprehensive ethics laws;<sup>39</sup>
2. Michigan has the third most comprehensive Group One “restrictions on conduct” requirements;<sup>40</sup> and
3. Michigan and North Carolina have the least comprehensive Group Two “financial” requirements.<sup>41</sup>

Evaluating the proposed Act against the ten most populated states, however, revealed that:

1. Michigan would have the third most comprehensive ethics laws;<sup>42</sup>
2. Michigan and Texas would have the most comprehensive Group One “restrictions on conduct” requirements;<sup>43</sup> and
3. Michigan would have the sixth most comprehensive Group Two “disclosure” requirements.<sup>44</sup>

The survey results confirm that the proposed Act would bring Michigan into a leadership posture *vis-a-vis* its sister states. With regard to the Group One “restrictions on conduct” requirements, the proposed Act is at the top of the list of those states setting high standards for its public officials and employees. At the same time, with regard to the Group Two “disclosure” requirements, the proposed Act is rigorous in its requirement that public officials and employees disclose conflicts and receipt of items of value on a transactional ba-

million), Michigan (9.3 million), New Jersey (7.7 million), and North Carolina (6.6 million).

39. The overall averages for all eleven provisions were: Florida (4.27), Texas (4.27), Illinois (3.64), New Jersey (3.18), Ohio (3.09), California (2.82), New York (2.64), Michigan (2.27), Pennsylvania (2.27), and North Carolina (1.18).

40. The averages for the seven Group 1 provisions were: Texas (5.00), Florida (4.43), Michigan (3.00), Illinois (2.86), New Jersey (2.86), California (2.14), Ohio (2.00), New York (1.86), Pennsylvania (1.71), and North Carolina (1.29).

41. The averages for the four Group 2 provisions were: Illinois (5.00), Ohio (5.00), California (4.00), Florida (4.00), New York (4.00), New Jersey (3.75), Pennsylvania (3.25), Texas (3.00), Michigan (1.00), and North Carolina (1.00).

42. Under the proposed Act, Michigan’s overall average for all eleven provisions was 3.91, as compared to Florida (4.27), Texas (4.27), Illinois (3.64), New Jersey (3.18), Ohio (3.09), California (2.82), New York (2.64), Pennsylvania (2.27), and North Carolina (1.18).

43. Under the proposed Act, Michigan’s average for the seven Group One provisions was 5.00, as compared to Texas (5.00), Florida (4.43), Illinois (2.86), New Jersey (2.86), California (2.14), Ohio (2.00), New York (1.86), Pennsylvania (1.71), and North Carolina (1.29).

44. Under the proposed Act, Michigan’s average for the four Group Two provisions was 2.00, as compared to Illinois (5.00), Ohio (5.00), California (4.00), Florida (4.00), New York (4.00), New Jersey (3.75), Pennsylvania (3.25), Texas (3.00), and North Carolina (1.00).

sis, but does not require annual disclosure of real property holdings and outside income. The proposed Act attempts to strike the proper balance between setting high, objective standards for all public officials and employees, while not burdening officials and employees with unrealistically strict disclosure requirements.

#### IV. PROPOSED GOVERNMENT ETHICS ACT OF 1999<sup>45</sup>

##### **Preamble**

The purpose of this Act is to establish high standards of ethical conduct for public officials and employees of the State of Michigan and its political subdivisions; to afford public officials and employees of the State of Michigan and its political subdivisions clear guidance on such standards; to promote public confidence in the integrity of the governance and administration of the State of Michigan and its political subdivisions and their agencies and administrative offices; to facilitate consideration of potential ethical problems before they arise, minimize unwarranted suspicion, and enhance the accountability of government to the people by requiring public disclosure by public officials and employees of relevant transactions; to specify penalties for violations; and to provide for the fair and effective administration of this law through the establishment of a state Ethics Board.

This Act shall be known by and may be cited as the "Michigan Government Ethics Act."

#### **CHAPTER ONE. DEFINITIONS; GENERAL PROVISIONS.**

##### **Section 101. Definitions.**

For the purposes of this Act:

(1) "Anything of value" includes any gift, financial benefit, or other item that is pecuniary or compensatory in value to a person, and also includes, but is not limited to, any valuable act, advance, award, contract, compensation, contribution, deposit, emolument, employment, favor, fee, forbearance, fringe benefit, gratuity, hono-

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45. As noted above, *see supra* note 12, the draft language and section-by-section explanation of the draft language (Parts IV and V) draw heavily from the model ethics law devised by the New York State Temporary Commission on Local Government Ethics, in addition to a variety of sources. This Article does not cite each instance where the proposed Act's language was drawn from other sources because to do so would detract from the presentation of the proposed Act by overrunning it with footnotes. The author, however, wishes to give proper attribution to Mark Davies and the New York Commission on Local Government Ethics for their work.

The text of the proposed Act is presented as it would be submitted for codification, with proper emphasis where appropriate for clarity.

rarium, loan, offer, payment, perquisite, privilege, promise, reward, remuneration, service, subscription, or the promise that any of these items will be conferred in the future, if such item or act of value is conferred or performed without the lawful exchange of consideration that is at least equal in value to the item or act conferred or performed. For purposes of this definition, the following items do *not* constitute “anything of value”:

- (a) payment by a governmental entity of salaries, compensation, or employee benefits; or payment by an employer or business other than a governmental entity of salaries, compensation, employee benefits, or pursuant to a contract, when the payment is unrelated to a public official or public official’s or employee’s status as a public official or employee and is not made for the purpose of influencing, directly or indirectly, the vote, official action, or decision of a public official or employee; or
- (b) fees, expenses, or income, including those resulting from outside employment, which are permitted and reported in accordance with the policies of the governmental entity; or
- (c) authorized reimbursement of actual and necessary expenses; or
- (d) admission, regardless of value, to events to which public officials or employees are invited in their official, representative capacities as public officials or employees; or
- (e) campaign or political contributions that are made and reported in accordance with state law; or
- (f) hospitality extended for a purpose unrelated to the official business of a governmental entity; or
- (g) reasonable hosting, including travel and expenses, entertainment, meals, or refreshments furnished in connection with public events, appearances or ceremonies related to official governmental entity business, if furnished by the sponsor of such public event; or in connection with speaking engagements, teaching or rendering other public assistance to an organization or another governmental entity (this provision applies only if the governmental entity does not also pay a person for the same activity); or
- (h) reasonable gratuities given by a group in appreciation for a public official or employee speaking or making any presentation before a group; or
- (i) awards publicly presented in recognition of public serv-

ice; or

(j) gifts or other tokens of recognition presented by representatives of governmental entities or political subdivisions acting in their official capacities; or

(k) anything of value, regardless of the value, when the item of value is offered to a governmental entity, is accepted on behalf of the governmental entity, and is to remain the property of the governmental entity; or

(l) commercially reasonable loans made in the ordinary course of a lender's business in accordance with prevailing rates and terms, and which do not discriminate against or in favor of an individual who is a public official or employee because of such individual's status as a public official or employee; or

(m) complimentary copies of trade publications; or

(n) any unsolicited benefit conferred by person or business if the economic value totals less than \$100 per calendar year, and if there is no express or implied understanding or agreement that a vote, official action, or decision of a public official or employee will be influenced; or

(o) reasonable compensation for a published work that did not involve the use of a governmental entity's time, equipment, facilities, supplies, staff, or other resources, if the payment is arranged or paid by the publisher of the work; or

(p) reasonable compensation for a published work that did involve the use of a governmental entity's time, equipment, facilities, supplies, staff, or other resources, if the payment of the compensation to the public official or employee is lawfully authorized by a representative of the governmental entity who is empowered to authorize such compensation; or

(q) anything of value, if the payment, gift, or other transfer of value is unrelated to and does not arise from the recipient's holding or having held a public position, and if the activity or occasion for which it is given does not involve the use of a governmental entity's time, equipment, facilities, supplies, staff, or other resources in any manner or degree that is not available to the general public; or

(r) anything of value received as a devise, bequest, or inheritance; or

(s) a gift received from a relative, or spouse's relative, within the third degree of consanguinity.

(2) "Confidential information" means information deemed to be privileged or confidential by a regulation or practice of the unit of government with which a public official or employee is affiliated.

(3) "Customer or client" means;

(a) any person to whom a public official or employee has supplied goods or services during the previous twelve months having a value greater than \$1,000 in the aggregate; or

(b) any person to whom a public official's or employee's outside employer or business has supplied goods or services during the previous twelve months having, in the aggregate, a value greater than \$1,000, but only if the official or employee knows the outside employer or business supplied the goods or services.

(4) "Ethics Board" means the Ethics Board established pursuant to section 401 of this Act.

(5) "Gift" and "financial benefit" fall within the definition for "anything of value" (section 101(1)).

(6) "Governmental Entity" includes both the State and its political subdivisions.

(7) "Immediate family" means a spouse, child, grandchild, brother, sister, parent, or grandparent of the public official or employee, or a person claimed as a dependent on the public official's or employee's latest individual state income tax return.

(8) "Governmental Entity" includes both the State and its political subdivisions.

(9) "Matter" means, unless the context of this Act indicates otherwise, any act or potential act in which the discretionary decision of a public body, official, or employee may result in anything of value to a person.

(10) "Ministerial act" means an action performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the act.

(11) "Outside employer or business" means:

(a) any activity, other than service to the state or local government, from which the public official or employee receives compensation for services rendered or goods sold or produced;

(b) any entity, other than the state or local government, of which the public official or employee is a member, official, director, or employee and from which he or she receives

compensation for services rendered or goods sold or produced; or

(c) any entity in which the public official or employee has an ownership interest, except a corporation of which the public official or employee owns less than ten percent of the outstanding stock.

For purposes of this definition, "compensation" shall not include reimbursement for necessary expenses, including travel expenses.

(12) "Person" shall include both individuals and entities.

(13) "Political subdivision" includes all public bodies corporate within but not including the State, including all agencies thereof or any non-incorporated body within the State of whatever nature, including all agencies thereof, or any court, department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of the State, a city, village, township, or county.

(14) "Public employee" means an individual employed in a non-civil service capacity either at the state level or at the local level.

(15) "Public official" means an elected or appointed individual in the executive branch of the state government or political subdivision thereof, an elected or appointed individual in the state legislative branch or political subdivision thereof, or an elected or appointed official in the judicial branch of the state government or a political subdivision thereof; any elected or appointed member of a board of education; and an elected or appointed member of a governing body of a state institution of higher education. The definition applies whether the individual is paid or unpaid, and applies without limitation to all members of any office, administration, agency, board, bureau, council, commission, committee, department, or division of the state government or political subdivision thereof that possesses any final decisionmaking authority. For purposes of this definition, "public officer" means the same as "public official."

(16) "Subordinate" of a public official or employee shall mean another public official or employee, or other employee over whose activities he or she has direction, supervision, or control.

### **Section 102. Effects on Other Laws.**

This Act repeals and replaces 1968 Mich. Pub. Acts 318, MICH. COMP. LAWS ANN §§ 15.301-15.310 (Conflict of Interest); 1968 Mich. Pub. Acts 317, MICH. COMP. LAWS ANN §§ 15.321-15.330 (Contracts of . . . Public Entities); and 1973 Mich. Pub. Acts 196, MICH. COMP. LAWS ANN §§ 15.341-15.348 (Standards . . . Employees).



**Section 103. Effective Date.**

This Act shall take effect on January 1, 2000.

**Section 104. Constitutionality.**

Pursuant to Article III, section 8 of the Michigan Constitution, the Michigan Supreme Court shall rule on the constitutionality of this Act before January 1, 2000.

**Section 105. Preemption; Coordination With Ethics Ordinances of Political Subdivisions.**

(1) Cities, villages, townships, and counties should have the opportunity to exercise the primary role in establishing and enforcing ethics regulations for local public officials and employees.

(2) A city, village, township, or county may adopt a local ethics ordinance that includes the substance of section 101, Chapter Two, and Chapter Three of this Act. To have effect, any such proposed local ethics ordinance must be approved by the Ethics Board pursuant to this section. If the local governmental entity does not have an ethics ordinance that has been approved by the Ethics Board, public officials and employees within that local governmental entity will be subject to this Act.

(3) To be approved under this section, a local ethics ordinance must create a local ethics oversight board, which will perform functions similar to those performed by this Act's Ethics Board. The ethics ordinance should vest ample authority in the ethics oversight board to enforce the ordinance, much as this Act's Chapter Four vests such authority in the Ethics Board. Such authority should include, at a minimum, the power to collect and review transactional disclosure statements; the power to investigate alleged ethics violations; the power to impose or recommend sanctions; the power to issue advisory opinions; and the power to engage in training and education efforts.

(4) A local ethics ordinance created under this section may be more restrictive than this Act.

(5) Prior to adoption, or as soon as possible following the adoption of a local ethics ordinance, the city, village, township, or county shall submit to the Ethics Board a copy of the ordinance that it determines meets the requirements of this section. If the local governmental entity has an existing ordinance that it contends is at least as restrictive as this Act, that ordinance may be submitted to the Ethics Board at any time. The Ethics Board, in consultation with the Ethics Subcommittee of the Michigan Municipal League, shall review ethics ordinances submitted under this section to assure their adequacy. If the Ethics Board finds that an ordinance is not in compliance with this section, the Ethics Board, in consultation with the Eth-

ics Subcommittee of the Michigan Municipal League, shall work with the local governmental entity to bring the ordinance into compliance and inform the entity of the failure to comply and in what ways the submitted ordinance is deficient. Unless the local governmental entity receives notice within 90 days of submittal that the ordinance they submit to the Ethics Board under this subsection is not in compliance, the ordinance shall be considered to be approved by the Ethics Board.

(6) A city, village, township, or county may adopt, submit to the Ethics Board, and obtain approval of an ethics ordinance based on this Act or an equivalent ordinance as provided in this section by [date]. If a city, village, township, or county does not have an approved ordinance by [date], this Act shall apply to that local governmental entity. Notwithstanding any other provision of this section, a city, village, township, or county may adopt an ethics ordinance at any time, and upon the approval of the Ethics Board, that ordinance shall take the place of this Act.

(7) The Ethics Board, in consultation with the Ethics Subcommittee of the Michigan Municipal League, shall assist cities, villages, townships, and counties in developing ordinances that meet the requirements of this section.

#### **Section 106. Miscellaneous Provisions.**

(1) No existing right or remedy shall be lost, impaired, or affected by reason of this Act.

(2) If any provision of this Act is held by a court of competent jurisdiction to be invalid, that decision shall not affect the validity and effectiveness of the remaining provisions of this Act.

### **CHAPTER TWO. CODE OF ETHICS.**

#### **Section 201. Misuse of Office.**

(1) A public official or employee shall not use that person's public office, or take or fail to take any action, in order to obtain anything of value, except as allowed by law, for himself or herself or any other person or entity.

(2) A person who knowingly violates section 201 is guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both, and any additional penalties as specified in Chapter Three of this Act.

#### **Section 202. Prohibition on Accepting Anything of Value.**

(1) A public official or employee shall not solicit nor accept anything of value in connection with his or her official responsibilities.

(2) A person shall not offer or give to a public official or em-

ployee or any of the following persons anything of value in connection with the official's or employee's official responsibilities:

- (a) a member of the public official's or employee's immediate family;
- (b) an outside employer or a business or trust with which the public official or employee is associated; or
- (c) a customer or client of the public official or employee.

(3) A person who knowingly violates section 202 is guilty of either a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment of not more than 90 days, or both; or a felony in the case of bribery, punishable by a fine of not more than \$5,000, or imprisonment in the state prison of not more than 10 years, or both; and any additional penalties as specified in Chapter Three of this Act.

### **Section 203. Representation.**

(1) A state public official or employee shall not represent for compensation any other person in any matter that person has before the unit of state government with which the official or employee is directly affiliated.

(2) A public official or employee of a political subdivision with population of 25,000 or more shall not represent for compensation any other person in any matter that person has before the political subdivision.

(3) A public official or employee of a political subdivision with population of less than 25,000 may not represent for compensation any other person in a matter that person has before the political subdivision, unless the legislative body of the political subdivision approves the representation by formal resolution.

(4) A person who knowingly violates section 203 is guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both, and any additional penalties as specified in Chapter Three of this Act.

### **Section 204. Confidential Information.**

Current and former public officials and employees shall not disclose any confidential information or use it to primarily further anyone's personal interests, except as to the extent permitted by law. A person who knowingly violates section 204 is subject to the provisions contained in Chapter Three of this Act.

**Section 205. Political Solicitation.**

A public official or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the official or employee, unless that subordinate is a political appointee, to participate in an election campaign or contribute to a political committee.

A person who knowingly violates section 205 is subject to the provisions contained in Chapter Three of this Act.

**Section 206. Prohibited Contracts.**

(1) A public official or employee, a member of that individual's immediate family, outside employer, or business with which the individual is associated shall not enter into a contract valued at \$1,500 or more with the governmental body with which the public official or employee is affiliated, unless the contract is awarded through an open and public competitive process that includes prior public notice and subsequent availability for public inspection of the proposals considered and the contract awarded.

(2) Any public official or employee who has or later acquires an interest in any actual or proposed contract with the government body with whom the public official or employee is affiliated shall publicly disclose the nature and extent of that interest as required by section 210 of this Act.

(3) Voidability of contract. A contract or agreement which is executed in violation of this section or the constitutional provisions that it implements shall be voidable only if the person who entered into the contract or took assignment thereof had actual knowledge of the prohibited conflict. In the case of a person other than an individual, the actual knowledge must be that of an individual or body finally approving the contract.

A contract involving prohibited conflicts of interest under this section shall be voidable only by a decree of a court of proper jurisdiction. Any such decree shall provide for the reimbursement of any person for the reasonable value of moneys, goods, material, labor, or services furnished under the contract, to the extent that the state has benefited thereby. This provision shall not prohibit the parties from arriving at an amicable settlement.

(4) A person who knowingly violates any portion of section 206 is guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both; or a felony, punishable by a fine of not more than \$5,000, or imprisonment in the state prison of not more than 10 years, or both; and any additional penalties as specified in Chapter Three of this Act.

**Section 207. Revolving Door.**

(1) A former public official shall not appear or practice before the government body with which he or she was affiliated, except on his or her own behalf, or receive compensation for working on any matter before that government body, for a period of one year after the termination of his official service. The restriction does not apply where the former public official performed only ministerial acts on the relevant subject matter while working for the government body. For purposes of this section only, the restriction does not apply to former public officials who served the government body in an unpaid capacity.

(2) A person who knowingly violates section 207 is guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both; and any additional penalties as specified in Chapter Three of this Act.

**Section 208. Inducement of Violations of the Code of Ethics.**

(1) No person, whether or not a public official or employee, shall induce or attempt to induce a public official or employee to violate any of the provisions of this Chapter.

(2) Any person, whether or not a public official or employee, who intentionally or knowingly violates any provision of this Chapter shall be subject to being enjoined from entering into any contract with the state or political subdivision, as the case may be, for a period not to exceed two years.

(3) Nothing in this section shall be construed to prohibit any person from receiving a service or benefit, or from using a facility, that is generally available to the public provided the person does so in the same manner or degree that is available to the public.

(4) Under this section, a corporation, partnership, or other entity shall not be held vicariously liable for the actions of an employee unless the employee acted in the execution of company policy or custom.

(5) A person who knowingly violates section 208 is guilty of either a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment of not more than 90 days, or both; or a felony, punishable by a fine of not more than \$5,000, or imprisonment in the state prison of not more than 10 years, or both, and any additional penalties as specified in Chapter Three of this Act.

**Section 209. Recusal.**

(1) A public official or employee shall promptly recuse himself or herself from acting formally or informally on a matter before the state or political subdivision with which he or she is affiliated when

he or she knows that acting on the matter, or failing to act on the matter, may result in a violation of Chapter Two of this Act.

(2) Pursuant to section 210 of this Act, when a public official or employee is required to recuse himself or herself from acting (or refraining from acting) on a matter, he or she shall file a transactional disclosure statement with the Ethics Board.

(3) A person who knowingly violates section 209 is guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both, and any additional penalties as specified in Chapter Three of this Act.

#### **Section 210. Transactional Disclosure.**

(1) Whenever a public official or employee is required to recuse himself or herself under section 209 of this Act, he or she shall:

- (a) immediately refrain from participating further in the matter;
- (b) promptly inform his or her superior, if any; and
- (c) promptly file with the Ethics Board a signed statement disclosing the reason for recusal.

(2) A person who knowingly violates section 210 is subject to the provisions of Chapter Three of this Act.

#### **Section 211. Exclusion for Lawful Action.**

The provisions of this Chapter shall not prohibit or require conduct specifically authorized by statute, rule, regulation, or Constitution of the State of Michigan, or of the United States.

### **CHAPTER THREE. PENALTIES; INJUNCTIVE RELIEF.**

#### **Section 301. Disciplinary Action.**

Any public official or employee who engages in any action that violates any provision of this Act may be warned, reprimanded, suspended, or removed from office or employment, or be subject to any other sanction authorized by law or collective bargaining agreement, by the appointing authority, person, or body authorized by law to impose such sanctions. A warning, reprimand, suspension, removal, or other authorized sanction may be imposed in addition to any other penalty contained in this Act or in any other provision of law.

#### **Section 302. Civil Fine.**

Any public official or employee who violates any provision of this Act may be subject to a civil fine of up to \$1,500 for each violation, in addition to any other penalty contained in any other provision of law

or in this Act, other than a civil forfeiture pursuant to section 304. This civil fine shall be imposed by a court of appropriate jurisdiction or the appointing authority or person or body authorized by law to impose such sanctions.

### **Section 303. Damages.**

Any person, whether or not a public official or employee, who violates any provision of this Act shall be liable in damages to the governmental entity for any losses or increased costs incurred by the governmental entity as a result of the violation. Such damages may be imposed by a court of appropriate jurisdiction in addition to any other penalty contained in any other provision of law or in this Act, other than a civil forfeiture pursuant to section 304.

### **Section 304. Civil Forfeiture.**

To the extent allowed by law, any person, whether or not a public official or employee, who intentionally or knowingly violates any provision of this Act may be subject to a civil forfeiture to the governmental entity of a sum equal to three times the value of any financial benefit he or she received as a result of the conduct that constituted the violation. A civil forfeiture may be imposed by a court of appropriate jurisdiction in addition to any other penalty contained in any other provision of law or in this Act, other than a civil fine pursuant to section 302 or damages pursuant to section 303.

### **Section 305. Criminal Sanctions.**

To the extent allowed by law, any person, whether or not a public official or employee, who violates a provision of this Act that specifies a criminal penalty for such violation, shall be subject to criminal prosecution.

### **Section 306. Injunctive Relief.**

Any person, whether or not a public official or employee, who violates any provision of this Act may be subject to an action or special proceeding, as appropriate, in a court of proper jurisdiction for injunctive relief to enjoin that person from violating this Act or to compel that person to comply with the provisions of this Act.

## **CHAPTER FOUR. ADMINISTRATIVE PROVISIONS.**

### **Section 401. Ethics Board: Establishment; Qualifications of Members; Appointment of Members; Term of Office.**

- (1) The Board of Ethics is created as an autonomous entity.
- (2) The Board of Ethics shall consist of 7 members appointed by the governor as follows:

- (a) one member from a list of at least 3 individuals submitted by the majority party of the Senate;
- (b) one member from a list of at least 3 individuals submitted by the minority party of the Senate;
- (c) one member from a list of at least 3 individuals submitted by the majority party of the House of Representatives;
- (d) one member from a list of at least 3 individuals submitted by the minority party of the House of Representatives;
- (e) one member from a list compiled by the governor; and
- (f) two members from a list compiled by the Ethics Subcommittee of the Michigan Municipal League.

(3) The terms shall expire on March 31 of the year in which the terms are designated to expire. A member of the Board shall serve for an initial term of 4 years, or until the member's successor is appointed and qualified, except that of those members first appointed:

- (a) the 2 members appointed pursuant to subsection (2) (f) shall serve for 4 years. Their initial terms shall constitute full terms and will expire on March 31, 2004 [assuming the proposed Act goes into effect in the year 2000].
- (b) the 2 members appointed pursuant to subsection (2) (c) and (d) shall serve initial terms of 2 years. Their initial terms shall expire on March 31, 2002.
- (c) the 3 members appointed pursuant to subsection (2) (a), (b), and (e) shall serve initial terms of 3 years. Their initial terms shall expire on March 31, 2003.

(4) An individual shall not serve more than 2 full terms on the Board.

(5) A vacancy occurring other than by the expiration of a term of office shall be filled for the unexpired term of that office. A vacancy occurring on the Board shall be filled within 30 days in the manner in which that position was originally filled.

(6) The Board shall elect a chairperson and a vice-chairperson. The vice-chairperson shall act as chairperson in the absence of the chairperson or if the office of the chairperson becomes vacant. A meeting may be called by the chairperson or by a majority of the Board.

(7) Four members of the Board constitute a quorum and the concurrence of at least 4 members is required for any action or recommendation of the Board. The votes shall be by a record roll call. Notice of the meetings of the Board shall be made public.

(8) The attorney general and state personnel director shall serve



ex officio without the right to vote.

(9) Members of the Board shall serve without compensation, but shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties.

(10) With the consent of the civil service commission, the state personnel director shall provide clerical or administrative assistance from the department of civil service as the Board may, from time to time, request.

(11) For purposes of this section, time served on the currently existing Board of Ethics formed pursuant to section 15.344 of the Michigan Compiled Laws shall not count toward time served on the Board of Ethics formed pursuant to section 401 of this Act.

#### **Section 402. Prohibited Conduct By, and Restrictions On, Members of Ethics Board.**

A member of the Ethics Board shall not, while a member of the Board:

- (1) hold elective public office or elective political party office;
- (2) accept appointment to or become a candidate for public office or elected political party office;
- (3) be employed as or act as a lobbyist; or
- (4) participate in any election campaign. An Ethics Board member may, however, make campaign contributions.

#### **Section 403. Ethics Board; Removal of Members.**

An Ethics Board member may be removed from office by the governor pursuant to Article V, § 10 of the Michigan Constitution, after written notice and opportunity for reply. Additional grounds for removal shall be failure to meet the qualifications and restrictions set forth in sections 401 and 402 of this Act or for other violations of this Act.

#### **Section 404. Ethics Board; Jurisdiction, Powers, and Duties.**

(1) The Ethics Board may only act with respect to the public officials and employees covered by this Act.

(2) The termination of a public official's or employee's term of office or employment with the governmental entity shall not affect the jurisdiction of the Ethics Board with respect to the requirements imposed on him or her by this Act.

(3) The Ethics Board shall have the following powers and duties:

- (a) to promulgate rules pursuant to 1969 Mich. Pub. Acts 306, as amended MICH. COMP. LAWS § 24.201 (1969), MICH. COMP. LAWS ANN § 24.315 (West 1993), to carry out the provisions of this Act, and to govern its own procedures;

(b) to appoint hearing officials, an executive director, if necessary, and such other staff as are necessary to carry out its duties under this Act, and to delegate authority to the executive director, if any, to act in the name of the Board between meetings of the Board, provided that the delegation is in writing and the specific powers to be delegated are enumerated and further provided that the Board shall not delegate the power to determine violations, recommend disciplinary action, impose any civil fine, refer any matter to a prosecutor, initiate an action for injunction, or render any advisory opinion. An executive director shall observe the restrictions of an Ethics Board member as specified in section 402 of this Act;

(c) to review and approve, pursuant to section 105 of this Act and in consultation with the Ethics Subcommittee of the Michigan Municipal League, alternative ethics ordinances of political subdivisions.

(d) To carry out, as it sees fit, examinations of certain disclosure statements filed pursuant to section 210, and such records and other documents that substantiate the information therein for compliance with the provisions of this Act.

(e) to review, index, maintain on file, and dispose of sworn complaints and to make notifications and conduct investigations pursuant to sections 406 and 407;

(f) to conduct hearings, recommend disciplinary action, assess penalties, make referrals, and initiate appropriate actions and proceedings pursuant to section 407;

(g) to grant waivers pursuant to section 408;

(h) to render, index, and maintain on file advisory opinions pursuant to section 409 and to prepare and publish non-confidential special reports and technical studies to further the purposes of this Act. In the issuance of advisory opinions, investigative reports and recommendations, and other reports, the Board shall be advised as to legal matters by the attorney general;

(i) to provide training and education to public officials and employees pursuant to section 412;

(j) to prepare an annual report and recommend changes to this Act pursuant to section 413;

(k) to provide for public inspection of certain records pursuant to section 414; and

(1) to select provisions of this Act, special reports and technical studies for reproduction and distribution pursuant to section 415.

(4) When a recommendation to an appropriate authority is made by the Ethics Board that affects a classified employee (i.e., civil service), the authority shall initiate appropriate proceedings in accordance with such recommendation and pursuant to the rules of the appropriate civil service commission.

#### **Section 405. Review of Disclosure Statements.**

The Ethics Board shall review transactional disclosure statements filed pursuant to section 210 of this Act as necessary to carry out the requirements of this Act.

#### **Section 406. Investigations.**

(1) Upon receipt of a sworn complaint alleging a violation of this Act, or upon determining on its own initiative that a violation of this Act may exist, the Ethics Board shall have the power and duty to conduct any investigation necessary to carry out the provisions of this Act. In conducting any such investigation, the Ethics Board may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records that it may deem relevant and material.

(2) If it is determined by a majority vote of the Board that there is reason to believe that this Act was violated, the Board shall initiate appropriate investigative proceedings to determine whether a violation occurred. The Board shall mail notice of the investigation and the nature of the alleged violation to a person under investigation within 5 days after the decision to undertake an investigation is made. Every 60 days thereafter until the matter is terminated, the Board shall mail to the complainant and to the alleged violator notice of the action taken to date by the Board together with the reasons for the action or nonaction.

(3) Except as otherwise required by law, the Board's actions and the records relative to an investigation shall be confidential until the Board makes a final determination under this section.

(4) Proceedings of the Board in conducting investigations shall be in accordance with 1969 Mich. Pub. Acts 306, as amended, and shall be by closed session except that the session or hearing shall be open if the alleged violator requests an open session or hearing, and except as required otherwise by the Michigan Open Meetings Act 1976 Mich. Pub. Acts 67 (Michigan Compiled Laws §§ 15.261-15.275).

(5) All governmental entities shall cooperate with the Board in the conduct of its investigations.

(6) When the Ethics Board concludes its investigative proceedings it shall determine if this Act was violated. If the Board determines that the Act was not violated, the records and actions relative to the investigation and determination shall remain confidential unless the person investigated requests in writing that the records and actions be made public. If the Board determines that the Act was violated, the Board shall make a recommendation of sanction to the appropriate authority designated in section 407.

#### **Section 407. Hearings; Assessment of Penalties; Injunctive Relief.**

##### **(1) Disciplinary action.**

In its discretion, after a hearing providing for due process procedural requirements and subject to any applicable provisions of law and collective bargaining agreements, the Ethics Board may recommend appropriate disciplinary action pursuant to section 301 of this Act. The recommendation of the Ethics Board shall be made to the appointing authority or person or body authorized by law to impose or recommend such sanctions. For purposes of this Act, the appointing authority or person or body authorized by law to impose or recommend sanctions for various individuals are as follows:

- (a) in the case of an appointed official or employee, the appointing authority with supervisory responsibility for the person whose activities were investigated;
- (b) in the case of a legislator, the special committee of the legislature on ethics created pursuant to section 410 of this Act;
- (c) in the case of a judge, the judicial tenure commission, as required under Article VI, section 30 of the Michigan Constitution;
- (d) in the case of the Attorney General or Secretary of State, the Governor; and
- (e) in the case of the Governor or Lieutenant Governor, the Legislature.

The Board shall conduct and complete the hearing with reasonable promptness, unless in its discretion the Board refers the matter to the authority or person or body authorized by law to impose disciplinary action or unless the Board refers the matter to the appropriate prosecutor. If such a referral is made, the Board may adjourn the matter pending determination by the authority, person, body, or prosecutor.

##### **(2) Civil fine.**

In its discretion and after a hearing providing for due process procedural requirements, the Ethics Board, pursuant to section 302

of this Act and to the extent allowed by law, may recommend that a civil fine, not to exceed \$1,500 for each violation, be imposed upon a public official or employee found by the Board to have violated this Act. The recommendation of the Ethics Board shall be made to the appointing authority or person or body authorized by law to impose or recommend such sanctions. The Board shall conduct and complete the hearing with reasonable promptness. The civil fine shall be payable to the governmental unit with whom the public official or employee is affiliated.

(3) Damages.

The state or the political subdivision with which the public official or employee is affiliated, or the Ethics Board on behalf of the state or political subdivision, may initiate an action or special proceeding, as appropriate, in a court of appropriate jurisdiction to obtain damages, as provided in section 303 of this Act.

(4) Civil forfeiture.

The state or the political subdivision with which the public official or employee is affiliated, or the Ethics Board on behalf of the state or political subdivision, may initiate an action or special proceeding, as appropriate, in a court of appropriate jurisdiction to obtain civil forfeiture, as provided in section 304 of this Act.

(5) Prosecutions.

As provided in section 305 of this Act, the Ethics Board may refer to the appropriate prosecutor potential criminal violations of this Act. Nothing contained in this Act shall be construed to restrict the authority of the appropriate prosecutor to prosecute a violation of this Act or of any other law. The appropriate prosecutor for all state public officials and employees is the Attorney General alone.

(6) Injunctive relief.

(a) The Ethics Board, the state, or the political subdivision with which the public official or employee is affiliated, may initiate an action or special proceeding, as appropriate, in a court of appropriate jurisdiction for injunctive relief to enjoin a violation of this Act or to compel compliance with the provisions of this Act, as provided in section 306.

(b) Any resident, official, or employee of the state or a political subdivision thereof may initiate an action or special proceeding, as appropriate, in a court of appropriate jurisdiction for injunctive relief to enjoin a public official or employee from violating this Act or to compel a public official or employee to comply with the provisions of this Act, as provided in section 306.

(c) No action or special proceeding shall be prosecuted or maintained pursuant to subsection (6)(b), unless (i) the

plaintiff or petitioner shall have filed with the Ethics Board a sworn complaint alleging the violation by the official or employee, (ii) it shall appear by and as an allegation in the complaint or petition filed with the court that at least six months have elapsed since the filing of the complaint with the Ethics Board and that the Ethics Board has failed to file a determination in the matter, and (iii) the action or special proceeding shall be commenced within ten months after the filing of the complaint with the Ethics Board.

#### **Section 408. Waivers.**

(1) Upon written application and upon a showing of compelling need by the applicant, the Ethics Board may in exceptional circumstances grant the applicant a waiver of any of the provisions of this Act.

(2) Waivers may only be granted at an open session after public notice in the official newspaper designated by the state or political subdivision thereof, for the publication of laws, notices, and other matters required by law to be published, that such waiver is being considered. Waivers shall be in writing and shall state the grounds upon which they are granted. Within 10 days after granting a waiver, the Ethics Board shall publish a notice in the official newspaper setting forth the name of the person requesting the waiver and a general description of the nature of the waiver. All applications, decisions, and other records and proceedings relating to waivers shall be indexed and maintained on file by the Ethics Board.

#### **Section 409. Advisory Opinions.**

(1) Upon the written request of any public official or employee, the Ethics Board may render a written advisory opinion with respect to the interpretation or application of this Act. Any other person may similarly request an advisory opinion but only with respect to whether his or her own action might violate a provision of this Act.

(2) Advisory opinions and requests for advisory opinions shall be indexed and maintained on file by the Ethics Board.

(3) Any person who has submitted to the Ethics Board a written request for an advisory opinion may bring and maintain a civil action by right against the Board to compel it to issue the advisory opinion. The complaint shall clearly identify the matters or proceedings before the Board that are involved. No action shall be prosecuted or maintained pursuant to this section unless (a) it shall appear by and as an allegation in the petition or complaint that at least six months have elapsed since the filing of the request and that the Ethics Board has failed to file any determination in the matter, and (b) the action

is commenced within ten months after the submission of the request for the advisory opinion.

(4) An advisory opinion rendered by the Ethics Board, until and unless amended or revoked, shall be binding upon the Ethics Board in any subsequent proceeding concerning the person who requested the opinion and who acted in good faith, unless he or she omitted or misstated a material fact. The opinion may also be relied upon by the person, and may be introduced and used as a defense, in any civil action brought by the Ethics Board or the state or political subdivision thereof.

#### **Section 410. Special Committee of Legislature on Ethics.**

(1) There is created a special committee of the Legislature on Ethics to consist of 3 members of the Senate and 3 members of the House of Representatives, at least 1 of whom from each house shall be a member of the minority party, to be appointed in the same manner as standing committees of the Senate and the House. The members of the special committee shall serve without compensation, but shall be entitled to actual and necessary expenses while on the business of the committee. The special committee may establish, by majority vote, its rules and procedures.

(2) The special committee shall act upon a recommendation made by the Ethics Board pursuant to section 407 of this Act. Specifically, the special committee shall conduct such further investigation it deems necessary and issue a report and recommendation to the appropriate house of the legislature.

#### **Section 411. Judicial Review.**

Any person aggrieved by a decision of the Ethics Board may seek judicial review and relief in a court of appropriate jurisdiction.

#### **Section 412. Training and Education.**

The Ethics Board shall:

(1) through the Secretary of State and county clerks and other necessary means, make information concerning this Act available to public officials and employees of the state of Michigan and of all political subdivisions thereof, to the public, and to persons interested in doing business with the state or with any political subdivision, and

(2) together with the Secretary of State and county clerks, develop educational materials and an educational program for public officials and employees of the state and its political subdivisions regarding the provisions of this Act.

**Section 413. Annual Reports; Review of Ethics Laws.**

(1) The Ethics Board shall prepare and submit an annual report to the Governor, who will then disseminate the report, summarizing the activities of the Board. The report may also recommend changes to the text or administration of this Act.

(2) The Ethics Board shall periodically review this Act and the Board's rules, regulations, and administrative procedures to determine whether they promote integrity, public confidence, and participation in state and local government and whether they set forth clear and enforceable common sense standards of conduct.

**Section 414. Public Inspection of Records; Public Access to Meetings.**

(1) The only records of the Ethics Board that shall be available for public inspection are those whose disclosure is required by law.

(2) No meeting or proceeding of the Ethics Board concerning misconduct, nonfeasance, or neglect in office by a public official or employee shall be open to the public, except upon the request of the official or employee or as required by law.

**Section 415. Distribution and Posting; Act; Special Reports; Technical Studies.**

(1) Within 90 days after the effective date of this Act, and thereafter as appropriate, the Ethics Board shall transmit to the Secretary of State and county clerks, in a suitable form, copies of those provisions of this Act that the Ethics Board deems necessary for posting and distribution. Within ten days after receipt of those copies, the Secretary of State and county clerks shall:

(a) cause the copies to be posted conspicuously in every public building under the jurisdiction of the state and its political subdivisions covered by this Act; and

(b) cause the copies to be distributed to every public official and employee of the state and political subdivision, and made readily available to the public.

(2) Every public official or employee elected or appointed thereafter shall be furnished a copy of those provisions within ten days of commencement of his or her position.

(3) Failure of the Secretary of State or county clerks to comply with the provisions of this section or failure of any public official or employee to receive a copy of the provisions of this Act shall have no effect on the duty of compliance with this Act or on the enforcement of its provisions.



(4) From time to time the Ethics Board shall transmit to the Secretary of State and county clerks, in a form suitable for distribution, copies of special reports and technical studies relating to this Act and its administration.

## V. ANALYSIS AND EXPLANATION

### A. Preamble.

Ethics laws are designed to improve the integrity of government employees, hopefully improving the public's perception of government employees at the same time. Ethics laws are also designed to encourage, not discourage, citizens from participating in government employment. The proposed Act seeks to fulfill both of these goals.

Other statutes, such as the Civil Service Acts, regulate ethics within limited facets of state and local government.<sup>46</sup> Michigan common law also regulates the obligations of public officials.<sup>47</sup> The Attorney General's Office has also issued a number of opinions that interpret Michigan's existing conflict of interest statutes,<sup>48</sup> as well as the public official's common law fiduciary duty.<sup>49</sup>

The proposed Act primarily addresses conflicts between the public and private interests of officials and employees. With regard to the incompatibility of public offices, the so-called "Two Hats" provision, the existing Michigan Incompatible Public Offices Act<sup>50</sup> should

46. The proposed Act applies to civil servants, but only to the extent that it does not supersede the State Civil Service Act or the Civil Service Acts of any political subdivisions. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 38.401-428, .451-470, .501-518 (West 1997).

47. *See, e.g.*, *People v. Township of Overysse*, 11 Mich. 222, 225 (1863) (stating that public servants, as agents of the public entity they serve, owe a fiduciary duty to the entity); *Woodward v. City of Wakefield*, 210 N.W. 322, 323 (Mich. 1926) ("It is the policy of the law to keep municipal officials far enough removed from temptation as to insure the exercise of their unselfish interest on behalf of the municipality."); *Abrahamson v. Wendell*, 249 N.W.2d 302, 304 (Mich. Ct. App. 1976) (stating that decision makers "must seek to avoid even the appearance of impropriety").

48. *See Memorandum from Kevin Kennedy, supra* note 8, at 9-13 (citing various Michigan Attorney General opinions); *see also* 1979 Mich. Op. Att'y Gen. 44; 1979 Mich. Op. Att'y Gen. 162; 1980 Mich. Op. Att'y Gen. 688; 1980 Mich. Op. Att'y Gen. 703; 1980 Mich. Op. Att'y Gen. 719; 1980 Mich. Op. Att'y Gen. 732; 1980 Mich. Op. Att'y Gen. 1088; 1981 Mich. Op. Att'y Gen. 218; 1982 Mich. Op. Att'y Gen. 110; 1984 Mich. Op. Att'y Gen. 238; 1987 Mich. Op. Att'y Gen. 197; 1989 Mich. Op. Att'y Gen. 27; 1989 Mich. Op. Att'y Gen. 80; 1992 Mich. Op. Att'y Gen. 149; 1992 Mich. Op. Att'y Gen. 190; 1994 Mich. Op. Att'y Gen. 151; 1995 Mich. Op. Att'y Gen. 66.

49. *See Memorandum from Kevin Kennedy, supra* note 8, at 23-25 (citing various Michigan Attorney General opinions).

50. MICH. COMP. LAWS ANN. §§ 15.181-185 (West 1994 & Supp. 1998). The existing Incompatible Public Offices Act should be retained because of its succinctness and comprehensiveness. The Incompatible Public Offices Act prohibits a public official or employee from holding two or more public offices simultaneously if the si-

be retained. The proposed Act, however, would supersede the Two-Hats provision contained in section 15.342 of the Michigan Compiled Laws, which currently establishes the standard of conduct for public officials and employees.<sup>51</sup>

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multaneous retention of the offices results in any of the following: (1) the subordination of one public office to another; (2) the supervision of one public office by another; or (3) a breach of duty of public office. *Id.* § 15.181.

According to the Incompatible Public Offices Act:

[T]he term 'public officer' means a person who is elected or appointed to (i) [a]n office established under the state constitution of 1963, (ii) [a] public office of a city, village, township, or county, [or] (iii) [a] department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state.

*Id.* § 15.181(c). *See, e.g.,* Detroit Area Agency on Aging v. Office of Serv. to the Aging, 534 N.W.2d 229 (Mich. Ct. App. 1995) (stating that vacating one office will solve a public official's dilemma of two incompatible offices, but not necessarily a conflict of interest); Wayne County Prosecutor v. Kinney, 458 N.W.2d 674 (Mich. Ct. App. 1990) (occupying the offices of city council member and paid volunteer firefighter violates the Incompatible Public Offices Act); Contesti v. Attorney Gen., 416 N.W.2d 410 (Mich. Ct. App. 1987) (stating that when township's board of trustees and school district are in a contractual relationship, offices of township trustee and school district superintendent are incompatible for purposes of the Incompatible Public Offices Act).

The Michigan Constitution also prohibits dual office holding by members of the legislature: "No person holding any office, employment or position under the United States or this state or political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature." MICH. CONST. art. IV, § 8.

The Attorney General's Office has also developed an extensive body of opinions regarding the compatibility of public offices. *See, e.g., Memorandum from Kevin Kennedy, supra* note 8, at 22-24 (citing various Michigan Attorney General opinions). *See also* 1988 Mich. Op. Att'y Gen. 354; 1978 Mich. Op. Att'y Gen. 339; 1981 Mich. Op. Att'y Gen. 185; 1983 Mich. Op. Att'y Gen. 73; 1983 Mich. Op. Att'y Gen. 66; 1983 Mich. Op. Att'y Gen. 175; 1984 Mich. Op. Att'y Gen. 274; 1991 Mich. Op. Att'y Gen. 76; 1992 Mich. Op. Att'y Gen. 139; 1992 Mich. Op. Att'y Gen. 175; 1992 Mich. Op. Att'y Gen. 193; 1992 Mich. Op. Att'y Gen. 205.

51. As previously noted, the proposed Act would supersede all current provisions regarding the standard of conduct for public officers and employees. *See* MICH. COMP. LAWS ANN. §§ 15.341-346 (West 1994) (commonly referred to as the "Code of Ethics"). In regard to the Two-Hats provision, section 15.342(6) states:

Except as provided in section 2a, a public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties.

*Id.* § 15.342(6). This additional language regarding dual office holding is redundant and serves only to complicate matters. Therefore, sections 15.181 through 15.185, alone, should govern incompatibility of office.

As noted above, the success of any ethics law rests upon a triad of provisions: an understandable and comprehensive Code of Ethics, sensible disclosure, and a reasonable enforcement mechanism. Without all three of these provisions, the ethics law's structure will topple.<sup>52</sup> Furthermore, an unintelligible ethics law cannot be obeyed or enforced. The proposed Act, therefore, places heavy emphasis upon an easily understandable organization, content, and word usage, particularly in provisions that directly affect the activities of officials. An ethics law *must* be user friendly. Otherwise, it fails in its essential purpose of providing guidance to officials and confidence to citizens.

Accordingly, the proposed Act is divided into two parts. The first part, Chapters One through Three, contains provisions that directly address the conduct of public officials and employees. The second part, Chapter Four, contains provisions for administering the proposed Act. Except for attorneys and Ethics Board members, public officials and employees will normally have no occasion to consult the second part of the proposed Act. The provisions of concern to officials and employees are therefore grouped into the first three chapters of the proposed Act.

#### *B. Chapter One: Definitions; General Provisions.*

##### *1. Section 101. Definitions.*

The definitions contained in section 101 of the proposed Act are kept to a minimum and do not impose any additional duties. However, in light of the fact that some violations involve potential criminal penalties, it is important to provide ample detail to assure that public officials and employees understand what behavior is covered by the proposed Act. The proposed Act includes a relatively objective enumeration of what is and is not included in the definition of "anything of value." Where a potential for criminal prosecution is involved, it seems wise to make foreseeable exemptions explicit rather than to rely solely on the common sense and good judgment of prosecutors to refrain from prosecuting technical violations. An objective standard is provided as opposed to a subjective standard, which might provide an alternative definition of "anything of value" as "anything, regardless of its monetary value, perceived or intended by either the one who offers it or the one to whom it is offered to be sufficient in value to influence a public official or employee in the performance or non-performance of an official action."

A major problem with a subjective standard is the difficulty of proving a person's state of mind. By contrast, the objective standard

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52. See discussion *supra* Part I.

provided in section 101(1) is preferable from a simplicity standpoint and because it is easier to prove than the more subjective standard. An alternative objective definition is included in one model act as:

- (a) a pecuniary item, including money, or a bank bill or note;
- (b) a promissory note, bill of exchange, order, draft, warrant, check, or bond given for the payment of money;
- (c) a contract, agreement, promise, or other obligation for an advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money;
- (d) a stock, bond, note, or other investment interest in an entity;
- (e) a fee or honorarium;
- (f) a receipt given for the payment of money or other property;
- (g) a gift, tangible good, chattel, or an interest in a gift, tangible good, or chattel;
- (h) a loan or forgiveness of indebtedness;
- (i) a work of art, antique, or collectible;
- (j) an automobile or other means of personal transportation;
- (k) real property or an interest in real property, including title to realty, a fee simple or partial interest, present or future, contingent or vested, a leasehold interest, or other beneficial interest in realty;
- (l) a right in action;
- (m) a rebate or discount in the price of anything of value unless the rebate or discount is made in the ordinary course of business to a member of the public without regard to that person's status as a public official or employee, or the sale or trade of something for reasonable compensation that would ordinarily not be available to a member of the public;
- (n) a promise or offer of employment;
- (o) reimbursement or payment for travel expenses from nongovernmental individuals or entities, except for reimbursement/payments from non-profit organizations;

(p) any of the items listed in items (a)-(o) as they relate to a trust; or

(q) any other financial benefit or thing of value that is pecuniary or compensatory in value to a person.<sup>53</sup>

An employee of a large corporation may not know many of the customers or clients of his or her employer and should not be penalized for that understandable ignorance. For that reason, the “knows” language is included in section 101(3)(b). The definition of public employee, as well as that for public official, contained in sections 101(14) and 101(15) are virtually identical to the definition that was contained in the prior 1975 Michigan Ethics Act.<sup>54</sup> Sections 101(14) and 101(15) also mirror the definitions of public employee and public official contained in the Incompatible Public Offices Act.<sup>55</sup>

The definition of public employee may be too broad. It may not be necessary to subject employees with little decision making authority to the strictures of the proposed Act. It makes more sense, however, to define public employee broadly, because potential violations may fall through the cracks otherwise. In practice, employees with little decision making authority will seldom be confronted with ethical issues.

The definition of public official contained in section 101(15) includes unpaid, as well as paid, officials. At the municipal level it is the unpaid officials, such as zoning and planning board members, who often wield the greatest power. The proposed Act regulates not only executive and legislative officials and employees, but also judicial officials and employees.

## 2. Section 102. Effects on Other Laws.

In repealing these three statutory sections and replacing them with one consolidated section, the proposed Act simplifies and clarifies Michigan’s ethics rules. One matter that must be addressed is whether the proposed Act might “embrace more than one object” in violation of the Michigan Constitution.<sup>56</sup> The Michigan Supreme

53. MODEL LAW FOR CAMPAIGN FINANCE, ETHICS, AND LOBBYING REGULATION, *supra* note 12, § 204.01.

54. See MICH. COMP. LAWS § 169.14 (1979) (repealed 1980) (defining public employee as “an employee of the state or a political subdivision thereof”). The 1975 Act was later invalidated by the Michigan Supreme Court. See *infra* notes 56-59 and accompanying text.

55. MICH. COMP. LAWS §§ 15.181-185. See *supra* note 50 and accompanying text.

56. “No law shall embrace more than one object, which shall be expressed in its title.” MICH. CONST. art. IV, § 24.

Court invalidated the 1975 Ethics Act for embracing more than one object, stating:<sup>57</sup>

The Act created the political ethics commission as an autonomous entity within the department of state and provided for its composition, powers and duties[ ]; provided requirements for the establishment of candidate committees (after defining 'candidate' to include an elected officeholder) and provided for the filing of statements or organization and reporting of contributions and expenditures[ ]; set maximum limits on expenditures by candidates for certain offices[ ]; established a state campaign fund with a diversion of certain taxpayer-designated portions of income tax revenues to the fund for distribution to qualifying gubernatorial candidates[ ]; proscribed conflicts of interest[ ]; required designated individuals to file financial disclosures for themselves and members of their immediate families[ ]; required the registration and reporting of lobbying activities[ ]; and provided for the repeal of five existing laws.<sup>58</sup>

In striking down the 1975 Act, the court explained that:

[S]ome of the concepts sought to be obtained by the enactment have no necessary connection with each other . . . . For example, the creation of a state campaign fund for gubernatorial candidates is foreign to and incongruous with regulation of lobbying activities; the financial disclosure provisions aimed at preventing unethical conduct are foreign to and incongruous with the organization of a campaign committee.<sup>59</sup>

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57. See *In re Request for Advisory Opinion*, 240 N.W.2d 193 (Mich. 1976) (responding to the first of ten questions posed to it by the House of Representatives concerning the constitutionality of the 1975 Ethics Act); see also *Advisory Opinion on Constitutionality of P.A. 227*, 242 N.W.2d 3 (Mich. 1976) (supplementing its earlier *Advisory Opinion* regarding the 1975 Ethics Act by addressing questions 2-10 propounded by the House of Representatives). Eight of the nine questions addressed by the court in this supplemental *Advisory Opinion* are beyond the scope of the proposed Act and thus irrelevant to this discussion. The one question addressed in the supplemental *Advisory Opinion* that would be relevant to the proposed Act if the Legislature were to decide to require financial disclosure is *Certified Question VII*, concerning the constitutionality of certain financial disclosure requirements. In its response to this question, the court found certain provisions of Public Act 227 that required a broad range of individuals to conform to a single standard for disclosing certain financial information unconstitutional. The court suggested that while the requirements as enacted were acceptable as to some of the named persons, creation of a broad single class was overbroad and thus in violation of the equal protection clause. *Id.* at 21.

58. *In re Request for Advisory Opinion*, 240 N.W.2d at 194 (citations omitted).

59. *Id.* at 196.

Furthermore, the Act repealed five individual and distinct acts concerning "the licensing and regulation of legislative agents; the corrupt practice section of the general election law; two specific conflict of interest statutes; and an ethics act."<sup>60</sup>

The proposed Act, however, arguably does not embrace more than one object. All objects contemplated by the proposed Act relate to one topic and one topic alone: the establishment of a single comprehensive Ethics Act that can be understood by a person of reasonable intelligence who may be called upon to comply with its terms. As noted by the court in *In re Request for Advisory Opinion*:

This Court cannot engage in idle speculation as to whether, for instance, the provision relating to ethical conduct and conflict of interest contracts would on their own merits have been adopted by the Legislature, nor those relating to campaign contributions and expenditures, nor those establishing the state campaign fund for gubernatorial elections, nor those regulation [sic] lobbyists.<sup>61</sup>

The court's comment, grouping together the ethics and conflict of interest provisions in the first phrase, suggests that the court considered the separate provisions concerning conflict of interest and ethics as comprising a single object, while it considered the various other campaign finance and lobbying provisions of the 1975 Act to be separate objects.

Moreover, the fact that the proposed Act contains a provision repealing existing statutes in addition to proposing new legislation does not bump the Act into the status of "embracing more than one object." In order to streamline and consolidate legislation, any old legislation that addresses the same topics must be repealed. Nor does the mere fact that the proposed Act repeals three individual and distinct acts necessarily suggest it embraces more than one object in violation of section 24 of Article IV of the Michigan Constitution.<sup>62</sup> The court recognized that, in the interests of revision, consolidation, and classification of the laws, it sometimes makes sense to repeal two or more separate, though substantively related, acts with a subsequent single act.<sup>63</sup>

In summary, the constitutional provision mandating that a law shall not embrace more than one object has never been intended to

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60. *Id.* at 195.

61. *Id.* at 196.

62. *See supra* note 56.

63. That the adoption of a comprehensive ethics act requires the repeal of three individual acts is also proof that Michigan's current ethics laws are unorganized. In any event, if the Legislature is concerned that the proposed Act's repeal of the three statutes will push the legislation into the realm of embracing more than one object, it would be easy to separate the repeals into one or more separate bills.

create a formalistic barrier to the "revis[ion], consolidat[ion] and classif[ication] of the laws with respect to a particular object."<sup>64</sup> The Michigan Supreme Court has suggested that legislation amounting to the establishment of a code, or unified law, does not violate section 24 of Article IV of the Michigan Constitution.<sup>65</sup> Because the proposed Act essentially creates a new "code of ethics," it does not embrace more than one object and is, therefore, constitutional.

### 3. Section 103. Effective Date.

If the proposed Act were passed and signed into law in 1999, the effective date would be January 1, 2000.

### 4. Section 104. Constitutionality.

On "solemn occasions," the legislature may ask the Michigan Supreme Court for an advisory opinion regarding the constitutionality of a particular piece of legislation. Due to the nature of the proposed Act, making wholesale changes to Michigan's current ethics laws, it would be advantageous to seek an advisory opinion from the court. The proposed Act potentially implicates several Michigan constitutional provisions. For example, the proposed act may conflict with section 2 of Article III,<sup>66</sup> concerning separation of powers, because the Ethics Board would have the power to investigate and recommend penalties for violations of the Act. Under such circumstances, an issue exists as to whether it is constitutional to create an autonomous entity that has authority across the various branches of the Michigan government.

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64. *In re Request for Advisory Opinion*, 240 N.W.2d at 195. As noted long ago by Justice Cooley:

The history and purpose of this constitutional provision are . . . well understood . . . . The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state.

*People ex rel. Drake v. Mahaney*, 13 Mich. 481, 494-95 (1865).

The proposed Act is not the type of bill described by Justice Cooley. The proposed Act embraces the idea of creating a single ethics act that can be understood and applied by the very people whom it would affect.

65. *In re Request of Governor & Senate on Constitutionality of 1972 P.A. No. 294*, 208 N.W.2d 469 (Mich. 1973).

66. Section 2 of Article III states: "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." MICH. CONST. art. III, § 2.



The proposed Act may also conflict with section 7 of Article IV,<sup>67</sup> regarding qualifications for legislative office, and section 16 of Article IV,<sup>68</sup> stating that each house of government has the sole power to evaluate its members. Similarly, the proposed Act may conflict with section 10 of Article IV,<sup>69</sup> which prohibits substantial conflicts of interest by legislators and state officers. Issues regarding section 10 would include whether the proposed Act's provisions constitute sufficiently substantial conflicts, especially in light of the specified *de minimis* amounts contained in sections 101 and 206 of the proposed Act, and if not, whether the constitution in fact allows the Legislature to prohibit less than substantial conflicts.

Furthermore, the proposed Act may conflict with section 10 of Article V,<sup>70</sup> establishing the grounds for removing or suspending officers from office, because section 403 of the proposed Act may exceed the stated restrictions by specifying additional grounds for removal. The proposed Act may also conflict with provisions regarding the Judicial Tenure Commission's duties contained in section 30 of Article VI<sup>71</sup> because sections 406 and 407 permit the Ethics Board to investigate and make recommendations concerning judges. Finally, section 7 of Article XI,<sup>72</sup> concerning the impeachment of civil officers, may be implicated by the proposed Act. The main issue under Article XI concerns whether the proposed Act's provisions regarding removal of legislators from office comply with Article XI's provisions.

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67. Under section 7 of Article IV, a legislative candidate must (1) be a United States citizen, (2) at least 21 years of age, and (3) be eligible to vote in the district that he seeks to represent. MICH. CONST. art. IV, § 7.

68. In relevant part, section 16 of Article IV states: "Each house shall be the sole judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of all the members elected thereto and serving therein, expel a member." MICH. CONST. art. IV, § 16.

69. Section 10 states that "[n]o member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest." MICH. CONST. art. IV, § 10.

70. Section 10 establishes the governor's power and duty to "inquire into the condition and administration of any public office and the acts of any public officer." MICH. CONST. art. V, § 10. The governor's powers under section 10 include the power to remove or suspend public officers from office. *Id.*

71. Under section 30, the Judicial Tenure Commission is charged with providing information and recommendations regarding judicial misconduct to the Michigan Supreme Court. MICH. CONST. art. VI, § 30.

72. Section 7 states: "The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office or for crimes or misdemeanors, but a majority of the members elected thereto and serving therein shall be necessary to direct an impeachment." MICH. CONST. art. XI, § 7.

5. *Section 105. Preemption; Coordination With Ethics Ordinances of Political Subdivisions.*

In recognition of the principle that local governmental entities should have the primary responsibility for establishing and enforcing ethics regulations for local public officials and public employees, this Section gives a city, village, or township the opportunity to “opt-out” of the proposed Act, so long as this local governmental entity enacts an ethics ordinance of its own that meets with the approval of the Ethics Board. To pass muster, a local ordinance must include the substance of section 101 and Chapters Two and Three of the proposed Act, and must create an ethics oversight board that would perform functions similar to those performed by the Ethics Board under Chapter Four of the proposed Act.

Under section 105 the Ethics Board is required to perform its ordinance review and approval function in consultation with the Ethics Subcommittee of the Michigan Municipal League.

6. *Section 106. Miscellaneous Provisions.*

Section 106(2) emphasizes the fact that if one or more of the provisions of the proposed Act are struck down by the Michigan Supreme Court, the remaining provisions are still effective.

C. *Chapter 2: Code of Ethics.*

A Code of Ethics is the heart and soul of any ethics law. The Code’s primary purpose is to provide guidance to officials and citizens. Therefore, the Code must be easy for lay persons to understand and apply. The provisions of the Code of Ethics must be read together with the definitions in section 101 of the proposed Act.

1. *Section 201. Misuse of Office.*

Section 201 is modeled after the 1975 Ethics Act,<sup>73</sup> as well several model acts.<sup>74</sup> Section 201 prohibits a public official from misusing public office. Sometimes inaction personally benefits an official or his close associates, for example, when a code enforcement official fails to cite his brother for a zoning violation. For that reason, section 201 also prohibits the official from refraining from acting. In either case, the official must recuse himself pursuant to section 209.

Section 201 does not prohibit the public official or employee from receiving governmental entity services or benefits, or use of governmental entity facilities that are generally available on the same terms and conditions to residents or a class of residents in the state or

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73. See MICH. COMP. LAWS § 169.121 (1979) (repealed 1980).

74. See MODEL LAW FOR CAMPAIGN FINANCE, ETHICS AND LOBBYING REGULATION, *supra* note 12, §§ 204, 210; Davies, *supra* note 12, at 69 (§ 100(1)).

local community. An official or employee should be able to receive the same services and benefits as any other resident, provided that the official does not receive preferential treatment. Nor does section 201 prohibit a public official or employee from performing ministerial acts. The village clerk may, for example, issue a fishing license to her brother.

Instead of specifying penalties within each individual section of the Code of Ethics, a general penalty provision may be included in the Act. A general penalty provisions might state, for example: "Section 212. Penalties. A person who knowingly violates any provision in this Chapter is subject to the provisions contained in Chapter Three of this Act." The proposed Act includes a penalty provision within each independent section in order to remove any doubt concerning the penalty for each particular violation.

2. *Section 202. Prohibition on Accepting Anything of Value.*

Section 202, which is modeled upon several model acts,<sup>75</sup> very simply prohibits acceptance of anything of value in connection with official responsibilities. The simplicity of this provision should provide clear direction to public officials and employees regarding gifts and other items accepted in connection with their jobs.

Section 202(2) applies to private citizens and entities. Under current Michigan law, absent outright bribery,<sup>76</sup> the occasional dishonest private citizen or company that induces a governmental entity official to violate ethics laws runs no risk of penalty. For example, hoping to keep a village's business, a bank might give a personal loan to the village treasurer at a below-market interest rate. If caught, the official will lose his job, the bank, however, will lose nothing. The proposed Act imposes some responsibility on private citizens, vendors, developers, and providers to ensure that public officials and employees comply with ethics laws. Section 101(1) excludes a number of items from the definition of "anything of value."

The penalty provision of section 202 provides that violation constitutes either a misdemeanor or a felony, allowing the Ethics Board a measure of discretion to consider the severity of the violation. The relevant Michigan bribery statutes provide that such violations constitute a felony.<sup>77</sup> The legislature, however, may wish to follow the lead of other statutes and mandate that a public official or employee who violates section 202 is automatically guilty of a felony. Under the proposed Act, it would be desirable to vest greater flexibility in the

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75. See MODEL LAW FOR CAMPAIGN FINANCE, ETHICS AND LOBBYING REGULATION, *supra* note 12; Davies, *supra* note 12.

76. MICH. COMP. LAWS §§ 750.117, .121.

77. *Id.*

Board of Ethics, allowing the Board to consider the circumstances of each particular case in determining what sanction it will recommend.

### 3. Section 203. Representation.

Section 203 distinguishes between state and political subdivisions with a population of 25,000 or more and political subdivisions with a population of less than 25,000. Under section 203, officials or employees of political subdivisions with a population less than 25,000 may represent another person before the political subdivision as long as the local governing body approves by formal resolution. This exception provides for the unique circumstances and limited resources that sometimes exist in smaller communities.

If the exception contained in section 203 is not retained, it should be noted that under section 408 the Ethics Board may waive any provision of the proposed Act, thereby providing a means to accomplish the same result currently contained under section 203. Political subdivisions in smaller communities should, however, have the de-centralized authority to determine whether to allow a local public official or employee to represent another person before the political subdivision.

Section 203 is not intended to prevent representation of constituents by elected officials without compensation in matters of public advocacy. After all, elected officials are elected to serve their constituents. For example, when a resident complains to a town board member that the town highway department blocks the resident's driveway with snow, the board member must be able to pursue that complaint with the proper town authorities.

In addition to the limited exceptions for local representation, the proposed Act's exclusion for actions authorized by state or federal law contained in section 211 allows an official to represent or assist persons in an official capacity.<sup>78</sup> The bar on representation does not prohibit an official from participating in the fee that his business associate receives from such appearances or representation.

Section 203's penalty provision is modeled after model acts, as well as a similar provision in the 1975 Ethics Act.<sup>79</sup> The parallel representation provision of the 1975 Ethics Act actually specified that such representation was a felony, punishable by a fine of not more

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78. See also *supra* note 66-68 and accompanying text (regarding the receipt of state or local services or benefits generally available to residents of the state or local jurisdiction and, in matters of public advocacy, the representation of constituents by elected officials without compensation).

79. See MICH. COMP. LAWS §§ 169.121, .178 (repealed 1980); MODEL LAW FOR CAMPAIGN FINANCE, ETHICS AND LOBBYING REGULATION, *supra* note 12; Davies, *supra* note 12.

than \$10,000, or imprisonment for not more than three years (or both).<sup>80</sup> The proposed Act does not provide for such harsh penalties.

#### 4. Section 204. Confidential Information.

Section 204 applies to all confidential information (as defined or recognized by the governmental unit with which the public official or employee is affiliated), however acquired. Section 204 prohibits using confidential information primarily in furtherance of personal interests. Public officials must use confidential information to further the public's interest, but in doing so, they often coincidentally further someone else's personal interests. Confidential information, however, may be disclosed as permitted by law, including state whistleblower laws.<sup>81</sup>

The legislature may wish to explicitly state that a criminal breach of confidentiality constitutes a misdemeanor. As a misdemeanor, the breach would be punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both. Additional penalties may be specified in Chapter Three of the proposed Act.

#### 5. Section 205. Political Solicitation.

The Code of Ethics bans political solicitation of subordinates by officials, except when the subordinate is a political appointee. Section 205, however, does not restrict voluntary political contributions or political activity by any official. Section 205 merely prohibits an official from putting the political bite on a subordinate.

#### 6. Section 206. Prohibited Contracts.

Section 206 supersedes and incorporates many elements of the Conflict of Interest Act<sup>82</sup> and the Contracts of Public Servants with Public Entities Act,<sup>83</sup> as well as portions of the 1975 Ethics Act and certain model acts.<sup>84</sup> As structured, section 206 is sympathetic to the unique circumstances in many small rural communities, where members of the legislative body, or other elected or appointed officials, may own the only hardware store, gas station, or snow plowing service in the area. If section 206 prohibited such contracts outright, the political subdivision would need either to ignore the prohibition against contracts with political subdivision officials or obtain the goods and services from distant vendors at a significantly higher

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80. MICH. COMP. LAWS § 169.178.

81. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1994).

82. *Id.* §§ 15.301-.310 (West 1994 & Supp. 1998).

83. *Id.* §§ 15.321-.330.

84. *See* MICH. COMP. LAWS §§ 169.1-200 (1979) (repealed 1980); MODEL LAW FOR CAMPAIGN FINANCE, ETHICS AND LOBBYING REGULATION, *supra* note 12, § 281; Davies, *supra* note 12, at 81 (§ 104).

price. Under section 206, public officials and employees may contract with political subdivision as long as they adhere to the process and disclosure requirements of section 206. Section 206's \$1,500 *de minimis* requirement is imposed in part to comply with the constitutional requirement of section 10 of Article IV, which prohibits substantial conflicts of interest by legislators and state officers. The legislature, however, may wish to incorporate an escalator clause. The escalator clause could be easily based upon the Consumer Price Index or some other objective indicator.

Furthermore, the legislature may wish to exempt contracts involving public officials that have not raised ethical questions. Such an exemption could be worded as: "This section does not apply to a contract when the public official or employee does not solicit the contract, does not take part in the negotiations for or in the approval of the contract or an amendment thereto, and does not in any way represent either party in the transaction." Similar language was included in the 1975 Ethics Act.<sup>85</sup>

Section 206 is aimed at preventing public officials and employees from engaging in certain activities under circumstances creating substantial conflicts of interest. Section 206, however, is not intended to penalize innocent contractors. Accordingly, under section 206(3), contracts are voidable, not void. The voidability provision models a similar provision contained in the 1975 Ethics Act.<sup>86</sup> Innocent contractors are further protected by the provision stating that only a court of proper jurisdiction may decree a contract void. Section 206's penalty provision specifies that violation of section 206 constitutes either a misdemeanor or, for especially egregious violations, a felony. Interestingly, the 1975 Ethics Act did not specify the penalties imposed for entering into a prohibited contract.<sup>87</sup>

#### 7. Section 207. Revolving Door.

Section 207 applies only to those former officials who have served in a paid capacity because unpaid volunteers should not be penalized for their previous public service. Section 207's revolving door provision restricts only the former official; not the former official's business associates. For example, a former mayor is prohibited from working on matters that are for, or before, his municipality for a period of one year after expiration of his mayoral term. The mayor's colleagues, however, could. Furthermore, consistent with section 203's representation provision, the former official is not prohibited from profiting from his associates' business with the government body.

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85. See MICH. COMP. LAWS § 169.123 (repealed 1980).

86. *Id.*

87. *Id.*

A business whose owner and sole employee is a former official, however, would be effectively barred from appearing before the state or political subdivision for a period of one year. Therefore, section 206 may prove to be a hardship for particular former officials. In such situations, the Ethics Board would have the power to grant a waiver under section 408. Furthermore, section 207 only prohibits the former official from appearing on behalf of customers or clients. The official may appear on his or her own behalf. For example, a former official seeking a zoning variance for his home may appear before the zoning board on his own behalf. Finally, section 207 only applies to officials or employees whose former positions involved some level of discretionary authority. Employees who performed only ministerial actions during their government employment are not subject to section 207's restrictions.

*8. Section 208. Inducement of Violations of the Government Code of Ethics.*

Similar to section 202, section 208 applies to both public officials or employees and private citizens. Under section 208(2), any person who intentionally or knowingly violates a provision of the Code of Ethics, including private citizens or businesses that induce public officials or employees to violate the Code of Ethics, may be enjoined from doing business with the state or political subdivision for a period not to exceed two years. The governing body of the appropriate state or local government, or the Ethics Board, is responsible for initiating disciplinary proceedings. Penalties, however, are imposed by a court, not the government agency or the Ethics Board. Section 208(4) addresses the concern that an entire corporation may be penalized for the illicit and unauthorized acts of an individual employee.

*9. Section 209. Recusal.*

Section 209 requires that an official refrain from participating in a matter before a government entity with which the official is affiliated if such participation would constitute a violation of the Code of Ethics. Mere abstention from voting on the matter is not sufficient. Because recusal involves a conflict of interest, the public official should file a transactional disclosure form under section 210. The disclosure requirement is designed to protect the public official or employee by officially documenting the individual's compliance with the ethics standards.

*10. Section 210. Transactional Disclosure.*

As noted by the Michigan Supreme Court:

Disclosure assists in preserving the integrity of the political process. It is legitimate for the Legislature to provide a means for effectively investigating possible conflicts of interest. Disclosure requirements promote integrity, fairness and public confidence in government as well as providing the citizens with information concerning an officeholder's integrity and fitness for office.<sup>88</sup>

Transactional disclosure contemplates pinpoint disclosure of a conflict at the time the conflict arises. Section 210 requires prompt disclosure anytime a public official or employee is required to recuse himself under section 209. Failure to disclose exposes the individual to the penalties and sanctions contained in Chapter Three.

The transactional disclosure requirement of section 210 serves the desired goal of "provid[ing] a means of indicating to officials, the public, and the press where potential conflicts may arise,"<sup>89</sup> and of helping to foster a climate of mutual trust between public officials and those whom they serve. As one commentator has suggested:

[E]thics in government is not merely the absence of corruption but the presence of trust . . . .

Ethics laws and enforcement efforts aimed solely at deterring corruption fail to apprehend that simple truth. Indeed, they foster the notion, unjustified in fact, that public officials are inherently dishonest. Such a policy not only fails to achieve its narrow goal of combating [sic] corruption but also destroys trust in municipal officials and thus ultimately undermines both the perception and reality of integrity in government.

The purpose of ethics laws lies not in the promulgation of rules nor in the amassing of information nor even in the punishment of wrongdoers, but rather in the creation of a more ethical government, in perception and in fact . . . .

In the end, the touchstone of integrity in government, and the ultimate test of the [ethics legislation's] success, reside in the willingness of good citizens to serve in [state and] local government. Laws and agencies that chill that willingness to serve do far more harm than good. When, however, good citizens clamor to join the ranks of state and local officials, the ethical health of the [state and local] communities run strong.<sup>90</sup>

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88. Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10), 242 N.W.2d 3, 19-20 (Mich. 1976).

89. Davies, *supra* note 4, at 264.

90. *Id.* at 266-67.



11. *Section 211. Exclusion for Lawful Action.*

Section 211 highlights the fact that the proposed Act's Code of Ethics does not require or prohibit conduct specifically authorized by the constitution and laws of the State of Michigan or of the United States.

D. *Chapter 3: Penalties; Injunctive Relief.*

Chapter Three, in conjunction with the penalty provisions contained in Chapter Two, provides clear penalties for violations of the proposed Act. One of the major problems with the existing Michigan ethics laws is the unclear and inconsistent penalties for violations. For example, a violation of the Conflict of Interest Act<sup>91</sup> results in "appropriate disciplinary action by the governor if he is an administrative officer of the state or if he is a judicial officer of the state, then by the governor on a concurrent resolution adopted by 2/3 of the members elected to and serving in each house of the legislature."<sup>92</sup> The statute, however, provides no definition of the term "appropriate disciplinary action," creating unacceptable ambiguity.

Furthermore, the Contracts of Public Servants With Public Entities Act<sup>93</sup> provides that "any person violating the provisions of this act is guilty of a misdemeanor."<sup>94</sup> Similarly, the Standards of Conduct for Public Officers and Employees Act,<sup>95</sup> provides that the executive board of ethics shall "make recommendations concerning individual cases to the appointing authority with supervisory responsibility for the person whose activities have been investigated."<sup>96</sup> The Standards of Conduct for Public Officers and Employees Act further requires that, after the board makes a recommendation to the board of ethics concerning an unclassified employee or appointee,<sup>97</sup> "the appointing authority shall take appropriate disciplinary action which may include dismissal."<sup>98</sup> The Act, however, provides no definition of the term "appropriate disciplinary action."

The proposed Act provides an appropriate range of penalties for ethical improprieties. Sections 401 through 404 provide a myriad of penalties, including disciplinary action, civil fines, damages, or civil

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91. MICH. COMP. LAWS §§ 15.301-.310.

92. *Id.* § 15.308.

93. *Id.* §§ 15.321-.330.

94. *Id.* § 15.327.

95. *Id.* §§ 15.341-.348.

96. *Id.* § 15.345(1)(a).

97. When the board's recommendation affects a classified employee (i.e., a civil servant), section 15.345(3) requires that the appointing authority proceed in accordance with the recommendation and the rules of the civil service commission. MICH. COMP. LAWS § 15.345(3).

98. *Id.* § 15.345(4).

forfeiture to the appointing authority. It is the Ethics Board's responsibility to recommend the appropriate action to the appointing authority. The appointing authority, in conjunction with a court of proper jurisdiction, then imposes the actual penalty.

*1. Section 301. Disciplinary Action.*

In conjunction with section 407(1), section 301 grants the appropriate entity the power to reprimand, remove, or suspend a public official or employee. Reprimand, removal, or suspension may be made either upon the recommendation of the Ethics Board, or upon the entity's own initiative.

*2. Section 302. Civil Fine.*

Section 302 operates in conjunction with section 407(2). Under section 302, the Ethics Board may recommend that the appointing entity assess a maximum civil fine of \$1,500 against a public official or employee. Fifteen hundred dollars will normally be sufficient. Under section 303, however, the official may be assessed damages, by a court of appropriate jurisdiction, in addition to the civil fine. To avoid unfairness, the Act precludes imposition of both a civil fine and a civil forfeiture under section 304.

*3. Section 303. Damages.*

Section 303 operates in conjunction with section 407(3). Under section 303, persons other than public officials and employees may be assessed damages for violating certain provisions of the proposed Act, for example, section 202(2) or section 208. Public officials and employees may be assessed damages under section 303 either together with, or instead of, any civil fines imposed under section 302. Section 303 recognizes the government's right to obtain damages from an individual whose unlawful acts have resulted in loss to the public fisc. To avoid unfairness, however, the proposed Act precludes imposition of both damages and civil forfeiture under section 304.

*4. Section 304. Civil Forfeiture.*

Section 304 operates in conjunction with section 407(4), which provides that either the Ethics Board or the government may seek civil forfeiture of up to three times the amount that the person violating the Act benefited financially from the violation. Similar to section 303, section 304 applies to government officials or employees and other persons as well. It is envisioned that section 304 will be utilized for especially egregious violations of the proposed Act.

5. *Section 305. Criminal Sanctions.*

Section 305 operates in conjunction with section 407(5), as well as all other provisions of the proposed Act in which the specified penalty is a misdemeanor or felony, in providing that a person in violation of the proposed Act may be prosecuted for that violation. The proposed Act contains one caveat: only the attorney general may prosecute state officials and employees.

6. *Section 306. Injunctive Relief.*

Section 306 operates in conjunction with section 407(6) in providing that a person violating the proposed Act may be subject to an action to enjoin the violation or to compel compliance with the Act. As specified in section 407(6), an action or special proceeding may be initiated by either the Ethics Board, the state, the political subdivision with which the person is affiliated, or any resident, official, or employee of the state with proper standing.

E. *Chapter 4: Administrative Provisions*

Chapter Four contains provisions regarding administration of the proposed Government Ethics Act. Generally, only those persons charged with administering the law will need to consult Chapter Four.

1. *Section 401. Ethics Board: Establishment; Qualifications of Members; Appointment of Members; Term of Office.*

Section 401 is based in part on the 1975 Ethics Act<sup>99</sup> and is also substantively quite similar to section 15.344 of the Michigan Compiled Laws, which specifies particulars regarding the Standards of Conduct for Public Officers and Employers Act.<sup>100</sup> Under section 401, terms of office on the Ethics Board are staggered to provide continuity in the work and philosophy of the Board. Terms of office are sufficiently long to ensure that board members acquire expertise, but not so long as to discourage persons from serving on the Board. In addition, the proposed Act contains a term limitation to ensure that Ethics Board members do not become entrenched on the Board.

Section 401(10) was taken verbatim from section 15.344(3) of the Michigan Compiled Laws, which allows the Ethics Board to request, and the state personnel director to provide, with the consent of the civil service commission, clerical or administrative assistance from the ranks of civil service workers.<sup>101</sup>

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99. *Id.* § 169.31 (repealed 1980).

100. MICH. COMP. LAWS ANN. §§ 15.341-348 (West 1994).

101. MICH. COMP. LAWS § 15.344(3).

2. *Section 402. Prohibited Conduct By, and Restrictions On, Members of Ethics Board.*

Section 402, based upon the 1975 Ethics Act,<sup>102</sup> prohibits certain conduct by a member of the Ethics Board during the time that individual sits on the Board. Section 402 is designed to strengthen both the perception and the reality of a nonpartisan Board of Ethics. Some state statutes and model acts prohibit certain conduct for a specified time period both before and after the board member's term. The proposed Act, however, does not provide for such a scheme under the belief that such a scheme is too restrictive on board members.

3. *Section 403. Ethics Board: Removal of Members.*

Members of the Ethics Board may be removed by the governor, pursuant to section 10 of Article V of the Michigan Constitution.<sup>103</sup>

4. *Section 404. Ethics Board; Jurisdiction; Powers and Duties.*

Section 404 is largely based upon the 1975 Ethics Act.<sup>104</sup> Furthermore, section 404's requirement that the Board be advised on legal matters by the attorney general is modeled after section 15.345 of the Michigan Compiled Laws. Under section 404, the Ethics Board may appoint an executive secretary to assist it in accomplishing its duties.

Classified state and local government civil service are folded into the proposed Act. Under such a scheme, the Ethics Board could conduct investigations and recommend sanctions to individual civil service commissions. In fact, the Standards of Conduct for Public Officers and Employees Act employs a similar scheme, stating:

(3). When a recommendation to an [appropriate] authority is made by the [Ethics] Board which affects a classified employee [(i.e., civil service),] the [ ] authority shall initiate appropriate proceedings in accordance with such recommendation and pursuant to the rules of the civil service commission.

(4). When a recommendation to an [appropriate] authority is made by the board concerning an unclassified employee or appointee, the [ ] authority shall take appropriate disciplinary action [in accordance with such recommendation and pursuant to this act] which may include dismissal.<sup>105</sup>

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102. See MICH. COMP. LAWS § 169.33 (repealed 1980).

103. See *supra* note 70.

104. See MICH. COMP. LAWS §§ 169.35-.36 (repealed 1980).

105. *Id.* §§ 15.345(3)-(4).

The proposed Act does not include such language at the present time.

5. *Section 405. Review of Disclosure Statements.*

Section 405 requires the Ethics Board to review disclosure statements as it sees fit.

6. *Section 406. Investigations.*

Section 406, largely based upon the 1975 Ethics Act,<sup>106</sup> defines the Ethics Board's powers and duties of investigation. Section 406 also contains key procedural protections for both the person charged with violating the Act and the complainant. For example, Section 406(2) requires that the Board provide notice to the subject of an investigation within five days after the Board decides to investigate the individual, and to inform the parties regarding the progress of the investigation every sixty days thereafter until the investigation is terminated. In order to protect the privacy of the individual being investigated, section 406 requires that the Board's records and proceedings remain closed to the extent allowed by law. The person under investigation, however, may request that the records and actions be made public.

7. *Section 407. Recommendations of Ethics Board to Appropriate Authorities; Action by Authority.*

Section 407(1) provides that the Ethics Board itself has no authority to take disciplinary action. Instead, the Board must issue a recommendation to the person or body authorized to take disciplinary action. Under section 407(2), however, the Ethics Board may issue a recommendation that the authorized person or body impose a civil fine.

There are two schools of thought regarding the imposition of civil fines. Under the first school of thought, the Ethics Board itself is vested with the power to impose penalties, assuming such a scheme does not violate separation of powers. Under the second school of thought, the Board makes recommendations to an appropriate authority, which reviews the Board's recommendation and then either dismisses the matter or imposes penalties.

The first school of thought provides a significant advantage by vesting the power to impose fines in a neutral Ethics Board. Under such a scheme, chances are slight that even a perception of "cronism" would attach to the Board's proceedings and recommendations. On the other hand, it is possible that the authorized entity will have perspectives and insights on particular matters that the Eth-

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106. *See id.* § 169.38.

ics Board may not. It would seem proper to allow the entity to capitalize on those perspectives during the disciplinary proceedings.

A constitutional question also exists as to whether an independent Ethics Board has the power to impose penalties upon officials and employees of separate branches of state and local governments under section 2 of Article III of the Michigan Constitution.<sup>107</sup> To avoid any separation of powers issues, the proposed Act provides that the Ethics Board only investigate and merely recommend sanctions—a role that is more certain to survive constitutional scrutiny.<sup>108</sup>

Section 407(3) provides that either the Ethics Board, or the state or political subdivision of the state with which the alleged violator is affiliated, may initiate an action to obtain damages pursuant to section 303. Furthermore, section 407(4) provides that either the Ethics Board, or the state or the political subdivision of the state with which the alleged violator is affiliated, may initiate an action to obtain civil forfeiture pursuant to section 304. Section 407(5) provides that the Ethics Board may refer information regarding violations of the Proposed Act to the appropriate prosecutor with recommended criminal penalties. For state officials and employees, the appropriate prosecutor is the attorney general.

Under section 407(6), any one of several entities may initiate an action or special proceeding in a court of appropriate jurisdiction to seek injunctive relief, to enjoin a violation, or to compel compliance with the proposed Act. The Ethics Board, the state, the political subdivision of the state with which the alleged violator is affiliated, or any resident, official, or employee of the state or political subdivision, may initiate proceedings against a violator. Because allegations of unethical conduct raise sensitive questions that cannot be left unresolved, section 407(6)(c) addresses the failure of the Ethics Board to act on a matter before it, and acknowledges the right of a citizen or official, within limitations, to seek the aid of the court in compelling an official to comply with ethics laws or in determining what obligations those laws impose when the Ethics Board has failed to act.

Section 407(6)(c), does not grant a citizen or official a right to seek to enjoin the Ethics Board itself. A petitioner must first submit a sworn complaint to the Ethics Board. The Ethics Board must act on the complaint within at least six months. If a complaint is not acted upon within ten months after filing, the petitioner may initiate an action in court. This “exhaustion of administrative remedies” requirement is necessitated by the excessive cost the state might otherwise incur as a result of repeated lawsuits. The fact that section 407(6)(c) grants a petitioner a right to initiate formal proceedings against the Ethics Board, does not dispense with usual standing requirements.

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107. See *supra* Part V.B.4.

108. See *supra* notes 56-61 and accompanying text.

8. *Section 408. Waivers.*

While a waiver provision is dangerous because it opens the door to the wholesale gutting of ethics laws, encourages political pressure on the Ethics Board by various individuals and groups within the community, and leads to charges of partiality, all of which undercut the perception of the Ethics Board as an impartial nonpartisan body of high integrity, a waiver provision is necessary to allow the Board the flexibility to accommodate inevitable special circumstances. To minimize the risks, section 408 sets a high standard for granting waivers. Under section 408, a waiver is to be granted only upon a showing of "compelling need" or "exceptional circumstances." Notice of a waiver application, as well as the granting of a waiver, must be published in the political subdivision's official newspaper. All waiver proceedings must occur at an open session of the Ethics Board.

9. *Section 409. Advisory Opinions.*

To avoid burdening the Ethics Board with requests for advisory opinions, the proposed Act permits a private citizen to request an advisory opinion only as to the permissibility of his or her own conduct. Any public official, on the other hand, may request an advisory opinion with respect to his own, a subordinate's, a superior's, or even a colleague's conduct. Furthermore, section 409 only addresses formal advisory opinions. The Ethics Board remains free to openly answer questions with respect to the proposed Act.

Recognizing that persons requesting advisory opinions need quick answers to their ethics questions, section 409 acknowledges the right of a person to seek judicial assistance in compelling the Ethics Board to respond to a request for an advisory opinion or in answering a question. An applicant cannot institute formal proceedings, however, until six months have lapsed since the submission of a request. An official against whom a complaint has been made, or who is otherwise under investigation by the Ethics Board, may immediately request an advisory opinion as to the propriety of his or her conduct and, if no answer is received within six months of the request, may proceed under section 409. Much of the language in section 409(3) concerning civil action to compel performance of duties was taken from the 1975 Ethics Act.<sup>109</sup>

10. *Section 410. Special Committee of the Legislature on Ethics.*

Section 410 is similar to section 15.307 of the Michigan Compiled Laws, except that it does not give the committee of the legisla-

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109. See MICH. COMP. LAWS § 169.46 (repealed 1980).

ture authority to issue advisory opinions. Instead, the advisory opinion function remains with the Ethics Board under section 409.

*11. Section 411. Judicial Review.*

As noted in the comments to section 407, the fact that section 411 grants a petitioner the right to seek judicial review and relief does not relieve the petitioner from fulfilling traditional standing requirements.

*12. Section 412. Training and Education.*

Educating officials and the public as to the new ethics laws will be among the most important functions of the Ethics Board. Accordingly, the task will require significant resources.

*13. Section 413. Annual Reports; Review of Ethics Laws.*

The Ethics Board is granted the power and responsibility to revisit the ethics laws and to propose changes as needed to improve their administration.

*14. Section 414. Public Inspection of Records; Public Access to Meetings.*

Any Ethics Board inquiry, including inquiries regarding complaints that later prove meritless, may compromise an official's career. For that reason, the proposed Act permits the Ethics Board to disclose only those records for which disclosure is mandated by the state Freedom of Information Act.<sup>110</sup> Michigan's Freedom of Information Act provides that an agency may deny access to certain records.<sup>111</sup>

Similarly, the proposed Act does not allow an Ethics Board to open its meetings to the public, except as required by the state Open Meetings Act<sup>112</sup> or if requested to do so by the target of an investigation. Michigan's Open Meetings Act provides that a public body may "meet in a closed session" to discuss "the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider periodic personnel evaluation of, a public offic[ial,] employee, staff member, or individual agent, if the named person requests a closed hearing."<sup>113</sup> The proposed Act presumes that the person under investigation desires a closed hearing.

*15. Section 415. Distribution and Posting: Act; Special Reports;*

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110. See, e.g., MICH. COMP. LAWS ANN. §§ 15.231-246 (West 1994 & Supp. 1998).

111. *Id.* § 15.235(a),(c).

112. See, e.g., *id.* § 15.268(a) (Michigan's Open Meetings Act).

113. *Id.*



*Technical Studies.*

Failure to post or distribute the proposed Act does not affect enforcement of the Act nor an official's duty to comply with the proposed Act. The proposed Act allows the Ethics Board to select provisions of the Act for distribution and posting. For example, the Board of Ethics may decide that only Chapter 2's Code of Ethics should be posted, but that Chapters 2 through 3 should be distributed to state and local public officials and employees.

## VI. CONCLUSION

This Article concludes that Michigan's current government ethics laws are inadequate in several key respects. First, the current ethics laws do not elucidate a clearly defined, comprehensive set of conflict-of-interest and revolving-door standards. Second, the current ethics laws fail to require even a minimal transactional disclosure of conflicts. Finally, the current ethics laws do not provide for a strong and independent Ethics Board to administer the law.

The proposed Michigan Government Ethics Act set forth in this Article specifically addresses each of these inadequacies. The proposed Act better defines what is and what is not a conflict of interest and provides procedures for determining whether a conflict exists. Furthermore, the proposed Act prescribes definite and articulate penalties for violations of the Act. In so doing, the proposed Act provides guidance and clear counsel to public officials and employees, and gives assurance to the people of Michigan that its government is run in a manner consistent with high ethical standards.

#### APPENDIX A: SAMPLE ANNUAL DISCLOSURE PROVISIONS

The following provides a proposed annual disclosure provision. This Article, however, does not recommend an annual disclosure requirement because the administrative expense and burden of such a requirement would far outweigh any benefits. Moreover, annual disclosure requirements have a tendency to chill the willingness of good people to serve in state and local government.<sup>114</sup>

#### CHAPTER FIVE: ANNUAL DISCLOSURE.

##### Section 501. Public Officials and Employees Required to File.

(1) The following public officials and employees shall file statements as required by section 501(4) with the Secretary of State:

- (a) an individual holding state elective office;
- (b) a justice or judge;
- (c) a member of a state board or commission provided by the Michigan Constitution of 1973;
- (d) a member of a state board or commission that examines or licenses a business, trade, or profession, or determines rates for or otherwise regulates a business, and a member of a state commission that appoints a director of a principal department of state government;
- (e) an appointed member of a governing board of a state institution of higher education;
- (f) an elected or appointed member of a governing board of a community or junior college;
- (g) a member of a county board of commissioners, and other elected county executives and auditors;
- (h) a chief executive or administrative official of a county;
- (i) a prosecuting attorney;
- (j) a county clerk, county treasurer, county drain commissioner, and register of deeds;
- (k) the state commissioner of public works;
- (l) a state employee of the executive branch, who is ex-

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114. See, e.g., Davies, *supra* note 12, at 95 (opining that "officials strenuously object to disclosing their finances" and that onerous New York state financial disclosure requirements "have already caused the resignation of over 200 officials around the state").

empted or excepted from civil service, and who serves in a non-clerical, policy-making capacity; and

(m) additional individuals as determined from time to time by the Board of Ethics.

(2) The following public officials and employees shall file statements as required by section 501(4) with the clerk of the county in which the individual works:

(a) a mayor of a city, a city manager, a city administrator, and a village president;

(b) a member of a city council, village council, town council, common council, and any other local elected official;

(c) a paid member of a land use planning commission or zoning commission, or land use/zoning authority of a state, region, county, township, village, or city;

(d) an unpaid member of a land use planning commission/authority or zoning commission/authority;

(e) a township trustee and a township supervisor;

(f) a city, village, or township clerk;

(g) a city, village, or township treasurer;

(h) a member of a school board;

(i) a school superintendent;

(j) a member of an economic development authority; and

(k) additional individuals as determined from time to time by the Board of Ethics.

(3) Upon the request of the Ethics Board, the Secretary of State or clerk of the county shall provide to the Board copies of the statements filed pursuant to sections 501(a) and (b).

*Comment on Section 501. Public Officials and Employees Required to File.*

Grossly intrusive financial disclosure requirements have given annual disclosure schemes a bad reputation. The difficulty associated with drafting an annual disclosure provision rests in determining where to draw lines. Several questions arise. For example, which public officials should be required to file? Of those, which should be required to file a complete report, and which should be allowed to file an abridged report? What information should be included in the annual report? All of these difficult questions should be considered carefully.

In the interest of clarity, section 501(a) sets forth job categories in considerable detail, but in the interest of succinctness does not list each individual job title. The following state officials, who currently fall beneath the purview of Michigan's Conflict of Interest Act,<sup>115</sup> would be subject to section 501's disclosure requirements:

[T]he governor; lieutenant governor; secretary of state; state treasurer; attorney general; auditor general; superintendent of public instruction; member of the state board of education; regent of the University of Michigan; trustee of Michigan State University; governor of Wayne State University; member of a board of control of one of the other institutions of higher education named in section 4 of article 8 of the constitution or established by law as therein provided; president of each of the foregoing universities and institutions of higher learning; member of the state board for public community and junior colleges; member of the supreme court; member of the court of appeals; member of the state highway commission; director of the state highway commission; member of the liquor control commission; member of the board of state canvassers; member of the commission on legislative apportionment; member of the civil service commission; state personnel director; or member of the civil rights commission; together with his principal deputy who by law under specified circumstances, may exercise independently some or all of the sovereign powers of his principal whenever the deputy is actually exercising such powers.<sup>116</sup>

Other than those state employees of the executive branch that possess policy-making authority, public employees are not required to file annual reports under section 501.

Because individual circumstances may vary or change from time to time, sections 501(a)(13) through 501(b)(11) give the Board of Ethics the authority to add to or subtract from the list of individuals who must provide annual disclosure statements.

#### **Section 502. Time for Filing.**

An individual specified in section 501(a) and (b) shall file his or her annual disclosure statement as required by section 504 with the Secretary of State or county clerk, respectively:

- (a) Within 60 days after becoming subject to the requirements of section 501;

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115. MICH. COMP. LAWS §§ 15.301-.310 (1979).

116. *Id.* § 15.303(a).

(b) No later than May 1 of each year thereafter, to cover the period during the previous calendar year in which the individual held a position specified in section 501(1).

*Comment on Section 502. Time for Filing.*

The specified date of May 1 should provide adequate time for an official to file.

**Section 503. Notice; Right to Cure.**

(1) Within 30 days after the filing due date specified in section 502, the Secretary of State or county clerk shall give written notice to an individual who has failed to file or has filed a deficient annual disclosure statement that failure to submit an acceptable statement within 30 days will subject the individual to penalties specified in section 506 of this Act.

(2) Within 30 days of receiving from the Secretary of State or the county clerk a transactional disclosure statement or annual disclosure statement that it subsequently determines to be deficient, the Board of Ethics shall give written notice to the individual who filed the deficient statement that failure to submit an acceptable statement within 30 days will subject the individual to penalties specified in section 506 of this Act.

(3) Upon notice from the Secretary of State or county clerk of failure to file an acceptable annual statement, an individual required to file a statement under section 501 shall have a right to submit the required statement within 30 days without penalty.

*Comments on Section 503. Notice; Right to Cure.*

Some individuals fear that an annual disclosure requirement may trap officials who simply forget to file an amendment. Accordingly, section 503 provides a cure period of thirty days for any official who has failed to file an annual disclosure statement. While there is a danger that such an opportunity to cure undermines the effectiveness of the annual disclosure requirement and imposes unnecessary administrative burdens on the Ethics Board, on balance, notions of basic fairness require that officials be afforded a right to cure.

This right to cure comes at a cost, however, in the sense that it places a significant administrative burden on the Secretary of State and county clerks to send letters to all officials who have failed to file by the due date or who have filed deficient statements. This administrative cost could be reduced by simply deleting section 503.

**Section 504. Contents.**

The following interests in sections 504(a), (b), (c) shall be listed by all persons required to file an annual disclosure statement under section 501. For purposes of this section, the interest of a spouse or any other party shall be considered to be the same as the interest of the person making the statement if the interest is *constructively controlled* by the person making the statement:

(a) the description, including the nature, location, and size of all real property in the state; the fair market value of which exceeds \$1,000, in which a financial interest was held during the preceding calendar year; and, if the property was transferred during the year, the name and the address of the person furnishing or receiving consideration in exchange for that real property;

(b) the name, address and nature of any outside employer or business from which income in excess of \$1,000 was derived during the preceding calendar year; and

(c) any information not previously reported under section 210 regarding a matter in which the filer is required to recuse himself or herself under section 209.

The following interests shall also be listed by persons listed in sections 501(a)(1)-(8), (10)-(11), and (13), and sections 501(b)(1)-(3), (5)-(7), (9)-(11):

(a) The name, address, and nature of business or practice of any person from whom anything of value, as defined in section 101 of this Act, was received during the preceding calendar year.

*Comments on Section 504. Contents.*

By requiring financial disclosure of required interests *only* if the interest is constructively controlled by the person making the statement, section 504 addresses the concerns of the Michigan Supreme Court in *Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10)*.<sup>117</sup> The court held that language requiring individuals to file information “for themselves and what they know or have reason to know about members of their immediate families”<sup>118</sup> is unconstitutionally vague. The court explained that:

[A]s the statute imposes criminal penalties for violations, due process requires that the statute provide adequate notice to a person of ordinary intelligence of conduct that is il-

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117. 242 N.W.2d 3 (Mich. 1976).

118. *Id.* at 20.

legal. We believe that the quoted language lacks the specificity required to alert individuals to the responsibility imposed upon them to discover the information required to be disclosed. While we [support the position] . . . that immediate family members were included in the disclosure provisions in order to prevent the individual from circumventing the disclosure provisions by transferring an interest held by that individual to a member of his immediate family, we believe the same result may be accomplished with more precise language.<sup>119</sup>

Section 504 provides such precise language.

As for the required information, section 504 adopts the substance of the requirements contained in the previous 1975 Ethics Act.<sup>120</sup> The Michigan Supreme Court stated that such requirements would survive constitutional scrutiny:

[The information required is] sufficiently narrow and necessary to the accomplishment of the state interest. [They] contain[ ] certain threshold limits. Small amounts of income, debt, real estate and gifts need not be disclosed. Even when the threshold limits are reached the exact numerical amounts or values need not be disclosed to the public . . . . There are also broad exceptions to the required disclosure of creditors. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative within the third degree of consanguinity, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included.<sup>121</sup>

Indeed, section 504 is not as onerous as the similar 1975 Ethics Act provisions. Section 504 does not require disclosure of "the original amount and the amount outstanding, the terms of repayment, and the security given for each debt required to be reported,"<sup>122</sup> nor does it require disclosure of additional information concerning businesses "of which the filer or a member of the filer's immediate family was a partner or held more than a 10% equity interest in that preceding calendar year,"<sup>123</sup> nor does it require information about credi-

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119. *Id.*

120. *See* MICH. COMP. LAWS § 169.54 (1979) (repealed 1980).

121. *Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10)*, 242 N.W.2d at 20.

122. MICH. COMP. LAWS § 169.54.

123. *Id.*

tors.<sup>124</sup> As an additional check, the Board of Ethics may, under section 408, grant waivers from filing or from disclosing certain information on the annual disclosure statement in the rare instances in which such filing or disclosure may prove overly intrusive.

The Michigan Supreme Court also objected to the 1975 Ethics Act's requirement that all listed individuals provide the same degree of annual financial disclosure, regardless of the level of responsibility and discretion possessed by each.<sup>125</sup> The court concluded that the creation of this single class amounted to "an arbitrary, capricious, and unreasonable grouping and, therefore, a violation of the equal protection clause."<sup>126</sup>

The annual disclosure requirements of the proposed Act address the court's concern in four ways. First, section 504 draws its classifications narrowly and requires different levels of disclosure based upon the disclosing party's level of responsibility and discretion. Therefore, not all filers are required to disclose information regarding anything of value that they received during the preceding year; only those filers who may be particularly susceptible to inappropriate gratuities are required to provide such disclosures.

Second, the quantity of information required to be disclosed even by filers who may be "particularly susceptible" is considerably less than that which was required of *all* filers under the 1975 Ethics Act.<sup>127</sup> Third, the only public employees required to file are those employees of the state executive branch who have nonclerical decisionmaking authority. Furthermore, even those such employees are responsible only for the reduced filing. Fourth, the proposed Act provides a "small community exemption" in section 507, whereby officials of a community satisfying specified criteria need not comply with section 501's annual disclosure requirements.

These minimal requirements suffice because many conflicts of interest arise either with respect to an official's real property ("May I vote to make the land adjoining my brother's home a park?"), information that is required under section 504(a), or with respect to the official's non-municipal business or employment information, which

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124. If disclosure regarding information on creditors is desired, it is suggested that the following language be added to section 504:

(d) The name and address of each creditor to whom the value of \$1,000.00 or more was owed by the filer. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from immediate family, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included.

125. See MICH. COMP. LAWS §§ 169.51-105 (repealed 1980).

126. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 242 N.W.2d at 21.

127. See MICH. COMP. LAWS §§ 169.51-105.



is required under section 504(b). Problems created by the minimal reporting requirements are minimized by the fact that the Ethics Board has the authority to subpoena additional information from the filer if necessary.

### **Section 505. Public Inspection.**

The Secretary of State and clerks of the counties shall make the annual statements filed under section 501 available for public inspection during regular office hours. On request of the Ethics Board, the Secretary of State and clerks of the counties shall provide to the Board copies of the statements filed pursuant to this Act .

#### *Comments on Section 505. Public Inspection.*

The public inspection requirement plays an important role by fostering public trust in government and demonstrating that public officials have nothing to hide. Protections against the potential abuse of section 505 may be provided by adding an additional requirement that any person who wishes to view a disclosure statement first complete a form that is forwarded to the filer.<sup>128</sup> The following text is recommended:

Each person examining a statement must first complete a form prepared by the Secretary of State identifying the examiner by name, occupation, address and telephone number, and listing the date of examination and reason for examination. The Secretary of State shall supply such forms to the county clerks annually and replenish such forms upon request. The Secretary of State or county clerk shall promptly notify each person required to file a statement under this Act of each instance of an examination of his or her statement by sending a duplicate original of the identification form completed by the person examining the statement.

### **Section 506. Penalty.**

(1) Any person required to file an annual disclosure statement under section 501 who willfully files a false or incomplete statement or who fails to file a statement within the time prescribed after an opportunity to cure, as provided in section 503(c), shall be guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both; and shall be subject to any additional penalties specified in Chapter 3 of this Act.

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128. Illinois' disclosure statute contains such a requirement. See 5 ILL. COMP. STAT. 42014A-106 (West 1998).

(2) If notice of failure to file a disclosure statement as required in section 503(a) is not given by the Secretary of State or the county clerk, no penalties or forfeiture shall result if a statement is filed within 30 days of actual notice of the failure to file.

*Comments on Section 506. Penalty.*

Section 506(b) provides some level of protection to a person who has failed to timely file a satisfactory statement in the event that the Secretary of State or the county clerk does not send notice of failure to file in a timely fashion. One should also consider imposing appropriate limits on sanctions in the event of noncompliance. The proposed Act opts merely to state that those not filing or filing deficient statements will be subject to the specified penalties and forfeiture. A more aggressive alternative, used by some model acts and states, provides that the Attorney General, or state's attorney for the county for which the filing is required, may institute an action against any person who has filed a deficient statement or who has failed to file within 30 days of the Secretary of State's or county clerk's notice of the failure to file.

**Section 507. Small Community Exemption.**

Section 501 does not apply to an individual listed in section 501(b) of a city, village, or township that does not employ more than two full-time employees and does not maintain a regular office, if the legislative body of the city, village, or township approves this exemption by ordinance or resolution and delivers the ordinance or resolution to the Board of Ethics. "Regular office" means an office open to the public at specified prearranged times for at least 20 hours a week.

*Comments on Section 507. Small Community Exemption.*

Section 507 exempts officials of very small communities from annual disclosure requirements.

**Section 508. Designation of Public Officials and Employees Required to File Annual Disclosure Statements.**

(1) Within 90 days after the effective date of this Act, and by the end of the month of March each year thereafter, the Secretary of State shall:

(a) cause to be filed with the Ethics Board a list of the names and titles of all public officials and employees who are required to file annual disclosure statements pursuant to section 501(a) of this Act; and

(b) notify in writing all such officials and employees of their obligation to file an annual disclosure statement pur-

suant to section 501(a).

(2) Within 90 days after the effective date of this Act, and by the end of the month of March each year thereafter, all county clerks shall:

(a) cause to be filed with the Ethics Board a list of the names and titles of all public officials and employees within the county who are required to file annual disclosure statements pursuant to section 501(b) of this Act; and

(b) notify all such officials and employees of their obligation to file an annual disclosure statement pursuant to section 501(b).

(3) Within 60 days after the effective date of this Act, and by the end of the month of February each year thereafter, all municipal, village, and township clerks shall cause to be filed with the clerk of the county in which the municipality, village, or township is located the names, titles, and addresses of the public officials and employees from the municipality, village, or township who are required to file annual disclosure statements with the county clerk pursuant to section 501(b).

*Comments on Section 508. Designation of Public Officials and Employees Required to File Annual Disclosure Statements.*

It becomes quickly apparent in reviewing the annual disclosure provisions of the proposed Act that administering such a system will require substantial added tasks and the cooperation of many officials at all levels of state and local government. With the decentralization envisioned by these provisions, there will be the inevitable mixed quality of compliance and cooperation. The Ethics Board will not have as much control over the process. Arguably the sanctions provided by the proposed Act for violations and noncompliance, combined with selective direct oversight by the Board from time to time in a certain percentage of counties, will assure reasonable quality. An alternative, which would add substantially to the Ethics Board's own administrative burden (and hence, its expenses), would involve having all persons required to file under section 501 file directly with the Ethics Board, instead of with the Secretary of State and individual county clerks. Ohio adopted such a scheme.<sup>129</sup>

Section 508 requires the state and each local government body to affirmatively identify which public officials and employees are required to file annual disclosure statements under section 501. Section 508 establishes a stepped system, whereby under section 508(3) the municipal, village and township clerks are first required to as-

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129. See OHIO REV. CODE ANN. § 102.02 (Anderson 1998).

semble and forward to the county clerk the names, titles, and addresses of persons within their respective jurisdictions who are required to file annual disclosure statements with the county clerk, by the end of February each year. Thereafter, under section 508(2), the county clerks are required, by the end of March each year, to do two things: (1) assemble and forward to the Ethics Board the names and titles of all persons who are required to file statements with the county clerk pursuant to section 501(b); and (2) notify all such persons of their responsibility to file. Section 508 is the parallel provision for the Secretary of State, whereby, by the end of March each year, the Secretary of State is required to: (1) assemble and forward to the Ethics Board the names and titles of all persons who are required to file statements with the Secretary of State pursuant to section 501(a); and (2) notify all such persons of their responsibility to file.

As noted above, the disadvantage of requiring the county clerks (rather than municipal clerks) to forward names to the Ethics Board and notify individuals, is the considerable administrative burden that such a system would impose on the county clerks in accumulating the names and titles of filers from every political subdivision within the county. Therefore, section 508(3) requires each municipal clerk to provide the county clerk with names and titles of those individuals in that particular municipality who are required to file.

#### **Section 509. Submission and Maintenance of Disclosure Statements.**

(1) The Secretary of State and clerks of the counties shall transmit promptly to the Ethics Board those annual disclosure statements requested by the Board pursuant to section 509(c).






(2) The Secretary of State and clerks of the counties shall index and maintain on file for at least seven years all disclosure statements filed pursuant to section 501.


















































































































































































































#### *Comments on Section 509. Submission and Maintenance of Disclosure Statements.*

The Ethics Board has the authority to request and receive individual statements as needed from the Secretary of State and the individual county clerks, each of whom are responsible for keeping statements on file for a period of seven years.

**APPENDIX B**

**Government Ethics Laws in the United States  
Chart 1**

	5 - Covers all classes of public officials or employees
	4 - Covers all except one class of public officials or employees
	3 - Covers all except two classes of public officials or employees
	2 - Covers all except three or more classes of public officials or employees
	1 - No coverage

STATE	Use of position to obtain personal benefits	Accep. of items to influence official actions	Use of confid. info.	Post-gov't emp.	Rep. of private clients before public entity	Kual conflicts of interest	Political solic. of emp.	Disc. of real prop.	Disc. of outside income	Disc. of gifts, etc.	Disc. of creditors	Ave.
Ala.												4.91
Alaska												4.27
Ariz.												4.64
Ark.												3.73
Cal.												2.82
Colo.												2.91
Conn.												2.27
Del.												2.82
Fla.												4.27
Ga.												2.45
Haw.												4.27
Idaho												2.45
Ill.												3.64
Ind.												2.09
Iowa												3.36
Kan.												2.27
Ky.												3.27
La.												3.27
Me.												1.64

Md.												4.09
Mass.												4.64
Mich.												2.27
Minn.												2.36
Miss.												2.91
Mo.												3.09
Mont.												3.09
Neb.												2.73
Nev.												4.09
N.H.												1.73
N.J.												3.18
N.M.												2.00
N.Y.												2.64
N.C.												1.18
N.D.												3.91
Ohio												3.09
Okla.												3.09
Or.												4.36
Pa.												2.27
R.I.												4.55
S.C.												4.91
S.D.												1.64
Tenn.												1.91
Tex.												4.27
Utah												2.18
Vt.												1.55
Va.												3.64
Wash.												5.00
W. Va.												3.36
Wis.												4.45
Wyo.												1.82
Ave.	3.54	3.50	3.28	2.70	3.00	3.44	2.40	3.14	3.78	3.00	2.84	3.15
Prop. Act												3.91

## APPENDIX B

**Government Ethics Laws in the United States  
Chart 2**

**Legend**

- ✓ All public officers and appointees (see definition sec. 101)
- ✓- All public officers and appointees except judicial
- ✓1 All public officials and appointees except executive
- ✓2 All public officials and appointees except legislative
- ✓2- All public officials and appointees except legislative and judicial
- ✓3 All public officials and appointees except members of state commissions and officers of state agencies
- ✓4 All public officials and appointees except voluntary members of boards or commissions
- 0 None

STATE	Use of position to obtain personal benefits	Acceptance of items to influence official actions	Use of confid. info.	Post-gov't empl.	Rep. of private clients before public entity	K-nal conflicts of interest	Political solicitation of employees	Discl. of real prop.	Discl. of outside income	Discl. of gifts, etc.	Discl. of creditors
Ala.	✓	✓	✓	✓	✓	✓	✓1	✓	✓	✓	✓
Alaska	✓-	✓-	✓-	✓-	✓	✓-	✓-	✓	✓	✓	✓
Ariz.	✓	✓	✓	✓	✓	✓	✓	✓3	✓3	✓3	✓3
Ark.	✓	✓3-	✓	✓	Leg only	✓1-	✓3-	0	✓	✓	✓
Cal.	✓4	✓4	0	✓3,4	✓4	✓4	0	✓	✓	✓	0
Colo.	✓2-	✓2-	✓2-	✓2-	✓2-	✓2-	✓2-	✓1,3,4	✓3,4	✓3,4	✓3,4
Conn.	Officers of State Agencies Only							State Elected Officials Only	✓	State Elected Officials Only	
Del.	✓2-	0	✓2-	✓2-	✓2-	✓2-	✓2-	✓3,4	✓3,4	✓3,4	✓3,4
Fla.	✓	✓	✓	✓	✓	✓	0	✓	✓	0	✓
Ga.	✓	✓	0	0	✓	✓	0	0	0	0	0
Haw.	✓	✓	✓	✓	✓	✓	0	✓	✓	0	✓

Idaho	✓	✓	✓	0	0	✓	0	0	0	0	0
Ill.	✓-	✓-	Leg only	See Book	Leg only	✓1	Ofcrs only	✓	✓	✓	✓
Ind.	✓	✓2-	✓2-	✓1,4-	0	✓2-	0	0	0	0	0
Iowa	✓	✓	✓1-	✓1-	✓1-	✓-	✓-	✓-	✓-	0	0
Kan.	0	✓4	✓2,4	Off. only	✓4	✓4	0	✓4	✓4	Jud only	0
Ky.	✓-	0	Elec Off. & Leg only	✓2-	✓-	✓2-	Leg only	✓	✓	✓	Leg only
La.	✓-	✓-	✓	✓-	✓	✓	✓	Gov-t. & State Officials Only			
Me.	0	✓2-	0	0	0	✓2-	0	0	Leg only	Leg only	Leg only
Md.	✓1,2-	✓-	✓-	✓-	✓	✓	✓2-	✓	✓	✓	✓
Mass.	✓	✓	✓	✓	✓	✓	✓	✓4	✓4	✓4	✓4
Mich.	✓2	✓-	✓2-	Leg only	✓-	✓-	0	0	0	0	0
Minn.	0	✓-	0	0	0	✓-	0	✓-	✓-	✓-	0
Miss.	✓	✓	✓	Leg & State	0	✓	0	0	✓	0	0
Mo.	Officers of State Offices, Agencies or Departments							✓	✓	✓	✓
Mont.	✓-	✓-	✓-	✓-	✓-	✓-	✓-	✓4	0	0	0
Neb.	Officers of State Offices, Agencies or Departments							✓-	✓-	✓-	✓-
Nev.	✓4	✓4	✓4	✓4	✓4	✓4	0	✓	✓	✓	✓
N.H.	0	0	0	0	0	✓3,4-	0	0	✓	-	0
N.J.	✓1-	✓1-	✓1-	✓1-	✓1-	✓1-	Leg only	✓-	✓-	✓-	✓2-
N.M.	Officers of State Offices, Agencies or Departments				0	Officers of State Offices, Agencies or Departments		✓1-	✓-	0	0
N.Y.	✓3,4	✓3,4	✓3,4	Off & Leg	Off & Leg	Leg only	0	✓-	✓-	✓-	✓-
N.C.	0	Off. only	0	0	0	0	Off. only	0	0	0	0
N.D.	✓	✓	✓	0	0	✓	✓	✓3	✓3	✓3	✓3
Ohio	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓	✓	✓	✓
Okla.	✓	0	✓	0	✓	0	✓	0	✓	✓4	0



Or.	✓	✓	✓	0	✓	✓	✓	✓3	✓	✓3	✓3
Pa.	✓2,4	✓2,4	✓2,4	Off. & Elec.	0	✓2,4	0	✓	✓-	0	✓-
R.I.	✓	✓	✓	✓	✓	✓	✓1	✓	✓	✓	✓
S.C.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓-
S.D.	✓2,4	✓2,4	✓2,4	✓2,4	✓2,4	✓2,4	0	0	✓3,4	0	0
Tenn..	Leg. only	✓2-	0	0	0	✓2-	Off & Paid Mem	0	✓	0	0
Tex.	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	0
Utah	✓2,4	✓2,4	✓4	0	0	✓3,4	0	0	✓	✓	0
Vt.	✓2-	✓2-	0	0	0	0	0	0	-	-	0
Va.	✓	✓	✓	Leg & Off	✓	✓	0	✓1,2	✓1,2	✓1,2	✓1,2
Wash.	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
W. Va.	✓	✓	✓	✓2	✓2	0	0	0	✓	0	✓
Wis.	✓	✓	✓	✓	✓3,4	✓	0	✓	✓	✓	✓
Wyo.	✓2-	✓2-	✓2-	0	✓2-	0	✓1,2-	0	0	0	0
Prop. Act	✓	✓	✓	✓	✓	✓	✓	0	0	✓	0